

**INTERIM CONSULTATION  
PROCEDURE WITH TREATY 8  
FIRST NATIONS**

**September | 2011**

**Version 1.1**

**Contents**

**1 PREFACE .....3**

BACKGROUND .....3

**2 INTRODUCTION.....4**

OVERVIEW .....4

**3 OVERVIEW OF COMMISSION CONSULTATION .....5**

PHASE 1 – INITIAL PREPARATION .....5

IDENTIFICATION OF WHO TO CONSULT ..... 5

PROPONENT’S ROLE IN APPLICAITON SUBMISSION AND CONSULTATION ..... 6

RECEIPT OF APPLICATION FROM PROPONENT ..... 6

PHASE 2 – ENGAGEMENT .....7

PHASE 3 – INTERIM CONSULTATION PROCEDURE DISCUSSION.....9

PHASE 4 – ICP DECISION PHASE AND FOLLOW UP .....11

**APPENDIX.....12**

APPENDIX A .....12

APPENDIX B.....14

APPENDIX C.....15

APPENDIX D .....20

## **Background**

The BC Oil and Gas Commission (Commission) is the province's independent regulator of oil and gas activities and is responsible for permitting and overseeing petroleum and natural gas operations in British Columbia. The Commission has responsibility and authority to ensure the Crown's legal obligations to consult and accommodate, if appropriate, are fulfilled with respect to decision making on oil and gas activities where activities have the potential to adversely impact treaty rights.

The Commission presently has a series of signed Consultation Process Agreements (CPA) with Treaty 8 First Nations that expire on Mar. 31, 2011. Halfway River First Nation, Sauteau First Nation, West Moberly First Nation, Prophet River First Nation, Doig River First Nation and Fort Nelson First Nation have declined the provincial government's offer to extend these agreements.

The Interim Consultation Procedures (ICP) will be used to guide the conduct of consultation by Commission staff in situations where consultation obligations arise and there is no signed CPA in effect with a Treaty 8 First Nation.

The ICP also draws on experience and information learned from the conduct of the agreed upon consultation processes that were developed collaboratively with First Nations.

## 2 Introduction

### Overview

- Consultation with Treaty 8 First Nations about any potential adverse impacts on their treaty rights by oil and gas sector related activity is the responsibility of the Crown.
- The Commission, as an agent of the Crown, will fulfill the Crown's obligation to consult with Treaty 8 First Nations prior to the authorization of activities under the Oil and Gas Activities Act and related specified enactments for which the Commission is the responsible decision maker ("oil and gas activity").
- The Commission and First Nations are obligated to consult in good faith.
- The Commission will apply these consultation process guidelines in its consultation with the Treaty 8 First Nations that are not party to an agreed upon process under a CPA or other agreement. The following First Nations are party to an agreement with the provincial government which addresses consultation on oil and gas activity:
  - Blueberry River First Nation – Long Term Oil and Gas Agreement.
  - Dene Tha First Nation – Consultation Agreement.
  - McLeod Lake Indian Band – CPA.
- The ICP, and specifically the Consultation Categorization Worksheet, provide a guide for the assessment of the level of consultation and the anticipated time frames for initial response. Consultations under these guidelines shall be approached with flexibility and adjusted appropriately according to the potential impact of the proposed oil and gas activity on the treaty right(s).

## 3 Overview of Commission Consultation Procedure

Depending on the circumstances, consulting with Treaty 8 First Nations involves some or all of the following steps. It is recognized that the process of consultation may involve going back and forth between the various steps.

### Phase 1 – Initial Preparation

#### 1. Identification of who to consult:

- a. First Nations Liaison Officers (FNLO) within the Commission will lead consultation on applications.
- b. First Nations' rights under Treaty 8 have been acknowledged as having a traditional territorial scope. The concept of a traditional territory refers to the geographic area within which a First Nation historically exercised treaty and aboriginal rights and continues to do so today. Based on the historic and continued exercise of treaty rights, there may be overlapping traditional territories.
- c. Where there are issues of shared use, or where First Nations' areas of rights exercised overlap, the duty to consult is triggered with all of the First Nations involved and the initial level of consultation will be based on information reasonably available to the Crown, including consideration of information gathered during previous consultation on oil and gas activities.
- d. Officially, consultations must be held with the Chief and council of the First Nation. However, as a practical matter, some First Nations may choose to delegate the day to day consultation responsibility to a staff member working for the First Nation (for example, a land use manager), and where this is confirmed by Chief and Council, Commission staff will communicate with the staff member identified.

- e. Contact with individual members of a First Nation who are not authorized representatives for consultation of the First Nation will not be viewed as constituting consultation.

## **2. Proponent's Role in Application Submission and Consultation**

- a. Proponents are encouraged to engage First Nations as early as possible when planning for oil and gas activities.
- b. While the Commission is ultimately responsible for ensuring consultation, and as indicated accommodation, is appropriate to each situation and that it is adequately and reasonably carried out, proponents can play an important role.
- c. The engagement of proponents with a potentially affected First Nation can facilitate effective and timely information exchange, and can assist to identify modifications to plans in order to mitigate and avoid impacts to the First Nation's treaty rights.
- d. Submission of First Nations consultation packages as part of the application requirement which includes an initial assessment of the Consultation Categorization level based on the ICP Consultation Categorization Worksheet guidance.
- e. Guidance on the proponent's role is found in Appendix A.

## **3. Receipt of application from Proponent:**

- a. Initial Level of Consultation – Categorization. With a view to revising or confirming the initial categorization of the application as submitted by the Proponent, Commission staff will review the level of consultation as suggested by the ICP Consultation Categorization Worksheet, found in Appendix C. The levels are:
  - i. ICP Information only – minimal or no potential for impact on treaty rights.
  - ii. ICP Notification with comment – low potential for impact on treaty rights; notification of an activity with an opportunity for comment.
  - iii. ICP Normal – moderate potential for impact on treaty rights.
  - iv. ICP Deep – high potential for impact on treaty rights.
- b. Timeline for Response. The standard timeline for an initial response and comment to an application, set by reference to the categorization of the application, is as follows:

- i. ICP Notification with comment – 10 to 15 calendar days.
  - ii. ICP Normal – 20 to 30 calendar days.
  - iii. ICP Deep – determined through a project specific assessment.
- c. Flexibility may be required based on individual circumstances and all reasonable requests for extensions should be granted, generally up to seven (7) calendar days. Provision of a response identifying First Nation concerns will initiate the Discussion Phase, which will proceed under a timeline appropriate in the circumstance.

## Phase 2 – Engagement

1. Commission staff will distribute application consultation packages to the First Nation(s). A cover letter for each application consultation package will be sent to the First Nation(s), including:
  - a. Details of the application. The First Nation must be provided with enough information about the activity to be able to understand the significance of any potential adverse impacts on treaty rights.
  - b. Information should be provided to First Nations in a manageable and understandable format, along with adequate time for review.
  - c. Request for comments as to the potential for impact to treaty rights and any options to avoid or mitigate potential adverse impacts.
  - d. Opportunity for discussions related to the proposed activity.
  - e. Expected timeline for initial response.
2. Consultation packages will be distributed by a variety of methods:
  - a. Hand delivery to the community representative.
  - b. Via commercial transport (bus, courier).
  - c. Regular mail or express post.
  - d. Electronically (email).
3. Follow up to delivery. A follow up visit, phone call and/or email will be made and documented by Commission staff to First Nation(s), and will include:
  - a. Request to confirm that consultation package was received.
  - b. An opportunity to clarify application details and/or answer any questions.
  - c. Request to First Nation(s) to provide response back on potential impact to treaty rights, and any options to avoid or mitigate potential impacts.
  - d. The Commission will seek to work within the timelines identified under the ICP Consultation Categorization Worksheet. Flexibility

may be required based on circumstances and all reasonable requests for extensions of the initial response timeline should be granted, generally up to seven (7) calendar days.

4. First Nation response:

- a. If no response is received within the applicable timeline, Commission staff will provide written notice that the application may, after the date specified, be forwarded for a decision:
  - i. If a First Nation fails to respond or provide comment with respect to any potential adverse impacts from an activity on their treaty rights, follow up efforts will be made to encourage the First Nation to participate in consultations. These efforts may include phone calls, faxes, other correspondence, and/or a personal visit by a Commission staff member. These efforts will be documented.
  - ii. If, despite these follow-up efforts, the First Nation still does not respond, the Commission will send a notice letter to the First Nation setting out the information which has been provided to the First Nation with respect to the proposed oil and gas activity; the Commission's understanding of any treaty rights of the First Nation potentially impacted by the proposed oil and gas activity as based on any information which has been provided by the First Nation, in this or any past consultation, or through engagement by the Proponent, or indicating that no information has been provided; and advising that, depending on the information the Commission has reasonably available to it, the Commission staff will be making a recommendation that the application proceed to decision after the date specified.
- b. Assessment of Consultation and Accommodation. If no response to the notice letter is received, prior to proceeding to the Decision Phase:
  - i. Assess consultation and need to accommodate in relation to the scope and nature of any treaty rights potentially adversely impacted by the proposed oil and gas activity. Commission conducts a file summary review, including:
    - Identifying known areas of treaty rights exercised in proximity of proposed activity location.
    - A review of other projects in the area and any First Nation consultation responses received on them and any other mitigations or accommodations that have been employed.
    - Reviewing proponent's engagement logs (when applicable).
    - Review of any other sources of information reasonably available.



- ii. Determine if accommodation is appropriate:
  - Identify accommodation options (including amendments, timeframes, additional conditions) based on an understating of the treaty rights potentially adversely impacted and the degree of impact.
  - Provide recommendations as to the completeness of consultation and any appropriate accommodation options to the decision maker.

## Phase 3 ICP Discussion Phase

1. First Nation Responds
  - a. Receipt of a written or verbal response may trigger the Discussion Phase. Methods of consultation may include:
    - i. Correspondence and exchanges of information related to proposed activities (for example, phone, fax, electronic, face to face).
    - ii. Meetings and field site visits.
    - iii. Adequate opportunity for consultation must be provided.
    - iv. The proponent may be requested to participate in the discussion phase.
2. Preliminary Assessment of Consultation Level and Accommodation
  - a. As to process, review initial assessment of consultation level and need to accommodate based on discussions and advise First Nation of preliminary assessment. Review includes a file summary updated to include discussions with First Nations and any other new information from other sources regarding:
    - i. Treaty rights exercised in proximity of proposed activity.
    - ii. A review of other projects in the area and feedback received on them.
    - iii. Review of the proponent's engagement logs (when applicable).
  - b. Accommodation. Based on preliminary assessment, as further informed by discussions:
    - i. Accommodation primarily means avoiding or mitigating impacts on treaty rights, but can also include measures aimed at promoting the broader interests of First Nations groups. It involves attempting to seek a compromise while trying to harmonize conflicting interests. Accommodation(s) can be fixed in the terms of a decision or set out in an agreement.

- c. Discussion of accommodation options. If it appears there is likely an infringement of a treaty right, identify accommodation options (amendments, timeframes, additional conditions) and:
  - i. Communicate with First Nation identifying proposed accommodation options, including a description of the information considered in assessing the need for and level of accommodation and reasons supporting the appropriateness of the proposed measure and provide a reasonable opportunity for the First Nation to respond to options proposed or to identify other options. Discuss any options proposed by the First Nation.
  - ii. Attempt to reach agreement (may involve the proponent).
  - iii. Practical accommodation measures include:
    - Mitigation.
    - Avoidance.
    - Proposal modification.
    - Commitments to take other action.
    - Impact monitoring.
- d. Agreement Reached. If agreement is reached, document the agreement, including how accommodation measures are linked to concerns over potential impacts, and provide feedback to First Nation with recommended action/conditions to be forwarded to the Decision Maker.
- e. No Agreement Reached. If agreement is not reached, and there are outstanding issues relating to treaty rights identified, review and document the sufficiency of consultation both as to scope and depth, attempts to reach agreement, and willingness to undertake proposed accommodation measures. The sufficiency of consultation and accommodation involves consideration of whether reasonable efforts have been made in the circumstances, both procedurally and substantively, and the extent of the level of consultation and potential obligation applicable:
  - i. If consultation and proposed accommodation are considered to be sufficient, FNLO will provide a written notice of decision letter to First Nation(s), which provides a reasonable opportunity to provide further input and summarizes the assessment of the sufficiency of consultation and accommodation proposed, attempts to reach agreement, and willingness to undertake proposed accommodation measures.
  - ii. If consultation and proposed accommodation are not considered to be sufficient, FNLO will re-engage to continue consultation, and/or accommodation efforts.
- f. If agreement is not reached, consider engaging in an issue resolution process. For example, if requested by First Nation, the

Chief may request a meeting with the Deputy Commissioner/Commissioner prior to the decision being made.

## Phase 4 – ICP Decision Phase and Follow Up

1. Decision Maker conducts an analysis of the consultation and accommodation record.
2. If analysis of the consultation and accommodation record suggests that further consultation or accommodation may be appropriate and/or more information is forthcoming from First Nation(s), continue consultation and/or accommodation discussions.
3. If consultation and accommodation is assessed as sufficient and, in circumstances where agreement has not been reached, the reasonable opportunity to provide further input has elapsed with nothing further having been received, the Decision Maker may proceed with making a decision and if appropriate, provide rationale to First Nation.
  - a. Ensure copy of decision and rationale is forwarded to First Nation(s).
  - b. Ensure implementation of accommodation(s) and or permit conditions.

## Role of the Proponent

- Consultations between the Commission and First Nations do not preclude companies or industry representatives from undertaking discussions with First Nations prior to or during the Commission's formal consultations. Companies are encouraged to establish and maintain ongoing communications with First Nations as the foundation for strong, open business relationships.
- Industry can play an important role. The engagement of proponents with potentially affected First Nations can facilitate effective and timely information exchange, modify plans to mitigate and avoid impacts to Aboriginal interests, and can also contribute to some of the Province's and Commission's broader objectives, including partnerships and relationship building with First Nations.
- When Commission staff engages in consultations with First Nations, company representatives may be included in consultations where appropriate to provide specific information on applications under discussion. Companies should also be encouraged to provide understandable information about their projects.

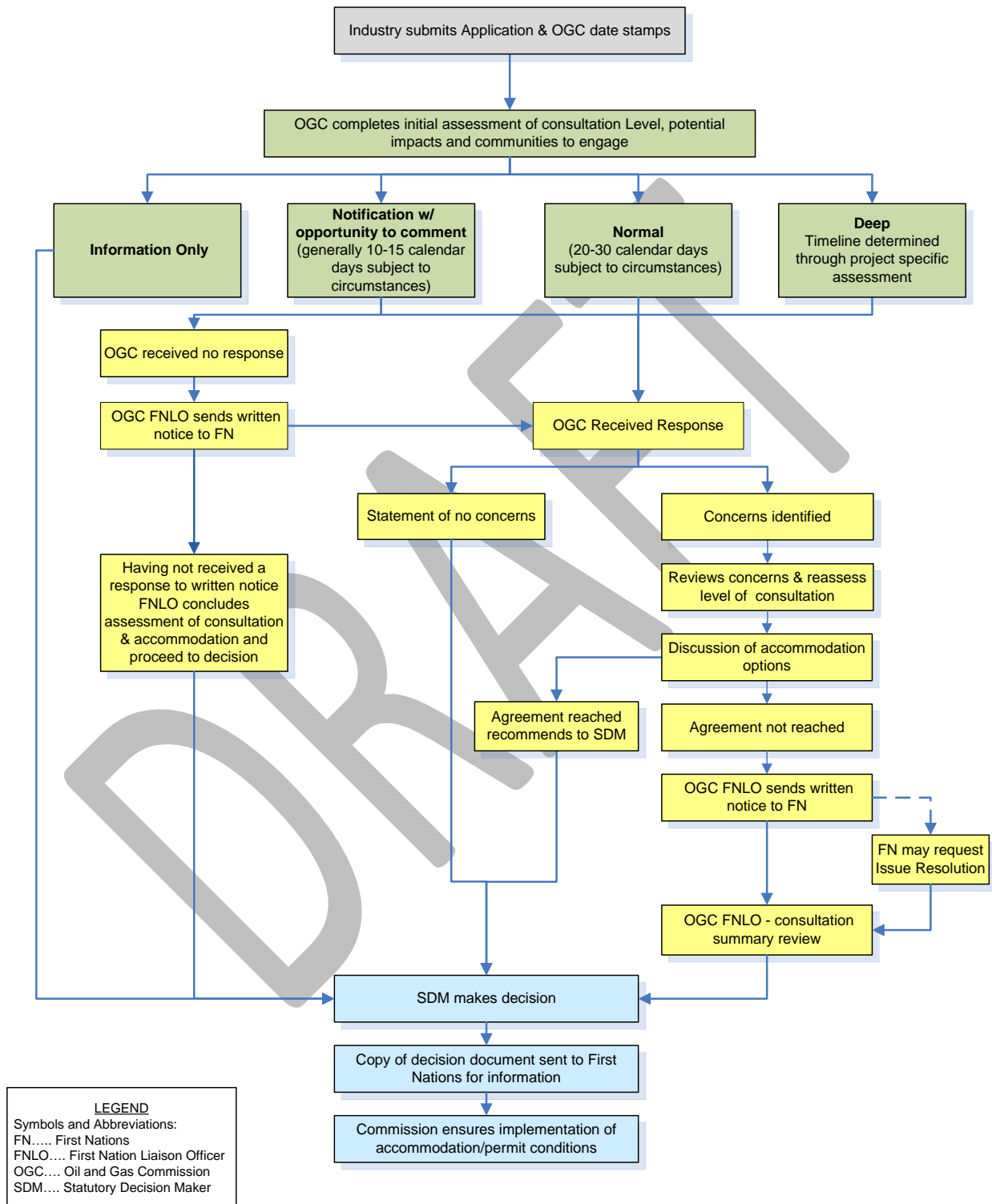
### **PROPONENTS ARE ENCOURAGED TO TAKE THE FOLLOWING STEPS:**

1. Engagement with First Nation(s):
  - a. ICP applies to oil and gas activities on Crown land.
  - b. Based on the Crown's identification of the First Nation(s).
  - c. Contact the Commission First Nations Liaison Officer.
2. Review readily available information:
  - a. Obtain any non-confidential information that the Crown has readily available about potentially affected First Nations.
3. Pre-Application Engagement with the First Nation:
  - a. Proponents are encouraged to engage early and maintain meaningful relationships.
  - b. Provide meaningful and understandable information about their proposed application.
  - c. Modify plans to avoid or mitigate any concerns if possible.

- d. Proponent should document all engagement (an engagement log can greatly benefit the flow of the process where the First Nation has been advised that the proponent's engagement activities will be shared with the Commission). The engagement log may be considered in the decision making process.
4. Application Submission and Engagement in Commission's consultation with a First Nation. The Proponent:
- a. Submits First Nations consultation packages as part of the application requirement as identified by Commission staff.
  - b. Categorizes the proponent's application based on the ICP Consultation Categorization Worksheet (Commission will determine what level of consultation is ultimately required by the Crown regarding the proposed oil and gas activity).
  - c. Include the engagement log, which includes details of what pre-application communication has occurred with a First Nation.
  - d. During the Commission's consultation process, proponent may be asked to :
    - i. Attend meetings, conference calls or field trips.
    - ii. Provide technical information on the project.
    - iii. Provide options to address concerns related to potential impacts to treaty rights.

Appendix B

Interim Consultation Procedure (ICP) Flow Diagram



## ICP Consultation Categorization Worksheet

### Purpose

This Interim Consultation Procedure (ICP) Consultation Categorization Worksheet is a tool to ensure a consistent approach in the initial categorizing of oil and gas activity applications submitted to the BC Oil and Gas Commission for the purpose of the Commission's assessment of the appropriate level of consultation. It provides:

- A consistent approach for Commission, industry and First Nation staff to categorize an application, amendment and revision to application submissions.
- Documents the rationale for the appropriate categorization.

### General Approach

- Revisions and amendments to an application and new applications with minimal or no potential of adverse impacts to treaty rights are streamed as Information Only.
- Revisions and amendments to an application and new applications with a low potential adverse impacts to Treaty Rights are streamed as Notification with an opportunity for Comment.
- New applications with a moderate potential of adverse impacts to treaty rights are streamed as Normal consultation.
- New applications with a high potential of adverse impacts to Treaty Rights such as applications requiring an environmental assessment are streamed as Deep consultation.
- Pre-application submission engagement with First Nations by industry is encouraged.

### General Guidance

The ICP categories are established as referenced below:

- a. ICP Information Only.
- b. ICP Notification with Comment.
- c. ICP Normal.
- d. ICP Deep.

The standard timeframe for an initial response shall generally be determined as;

- a. ICP Information Only – notification of activity only.
- b. ICP Notification with opportunity to comment – 10 to 15 calendar days.

- c. ICP Normal – 20 to 30 calendar days.
- d. ICP Deep – determined through a project specific assessment.

Flexibility may be required based on individual circumstances and all reasonable requests for extensions should be granted, generally up to seven (7) calendar days.

**Information Only Criteria**

New Applications, amendments or revisions are categorized as Information Only if the submission information indicates one or more of the below I1 to I4 Criteria applies.

Please note: Applications submitted for Information Only status must be submitted with a complete rationale detailing why the company believes the application should be classified as Information Only. If applicable, this rationale should include the relevant Commission numbers related to the project, when the related projects were consulted on, the project area, the archaeology status, or what the health and safety or environmental benefit to the site will be. Failure to submit a complete application may result in the status being changed to either “Notification with Comment” or “Normal” and the application will be delivered to First Nations for consultation.

- I1. *An application, a revision or an amendment to an application which is for improved health and safety or provides an overall environmental benefit at the site, including site remediation and restoration.*

Provide text rationale if the revision is a minor project change for improved safety or overall environmental benefit at the site:

\_\_\_\_\_

- I2. *A revision or amendment to an application which accommodates a First Nation interest identified during consultation.*

Describe the concern or issue and how the concern was mitigated (make reference to written correspondence):

\_\_\_\_\_

Rationale prepared by \_\_\_\_\_ agency or company \_\_\_\_\_

- I3. *A minor revision or an amendment to an oil and gas activity that is within a Review Corridor that was previously consulted upon with no outstanding issues.*

OGC File# \_\_\_\_\_

- I4. *An Application, a revision or an amendment to an Application which is:*

- *Immediately off an established access route.*



- *Requires less than one (1) ha of clearing.*
- *There are no outstanding concerns for archaeological resources (attach a completed Archaeological Assessment Information Form).*
- *Is in an area that has been through the consultation process within the last two years on a related project with First Nations where no site specific concerns were identified.*

I4 applies if all the I4 sub- criteria are true.

Provide a complete rationale and file #(s) of related projects:

\_\_\_\_\_

15. *An Application, a revision or an amendment to an Application which is:*

*A subsequent well on an existing well pad in which no new land is required. An additional pipeline within an existing right of way in which no new land is required.*

16. *An Application, a revision or an amendment to an Application which is;*

*A Water Act, section 8, "short term use of water" permit which:*

- *has only diversion points that are geographically located within northeast BC (i.e. Fort Nelson and Peace Forest Districts);*
- *does not include any diversion point within areas established by Order under the Oil and Gas Activities Act Environmental Protection and Management Regulation;*
- *specifies the withdrawal rate is less than 500m<sup>3</sup>/day **and** 100,000m<sup>3</sup> total **or** the source is a water source dugout and/or other manmade structure;*
- *does not include any diversion point located on an identified sensitive waterbody or area of known First Nations significance*

I6 applies only if all the I6 sub- criteria are true. Refer to Appendix D for a table outlining the complete categorization criteria of short term use of water applications.

### **Notification with Opportunity to Comment (NOC) Criteria**

New Applications, revisions or amendments are categorized as Notification with Comment if the following criteria are met:

*NOC1 Does not meet the Information Only Criteria.*

*NOC2. Does not meet the Normal or Deep Criteria.*

- NOC3. Consultation level determined through assessment of historic data.
- NOC4. New Applications, revisions or amendments for;

*Water Act, section 8, "short term use of water" permits which:*

- *includes any diversion point geographically located outside northeast BC (i.e. Fort Nelson and Peace Forest Districts);*
- *includes any diversion point within areas established by Order under the Oil and Gas Activities Act Environmental Protection and Management Regulation;*
- *specifies any withdrawal rate of equal to or greater than 500m<sup>3</sup>/day **or** 100,000m<sup>3</sup> total **and** the source is not a water source dugout and/or other manmade structure; or*
- *includes any diversion point located on an identified sensitive waterbody or area of known First Nations significance*

NOC4 applies only if any of the NOC4 sub- criteria are true. Refer to Appendix D for a table outlining the complete categorization criteria of short term use of water applications.

### **Normal Criteria**

New Applications are categorized as Normal if the submission information indicates any of the below Criteria applies

- N1. *The Application is located in an area, documented, mapped and accepted by the parties, as a First Nation area of special interest.*
- N2. *The Application is located in a Special Management Zone, a Major River Corridor or a Protected Area identified and mapped in approved Land and Resource Management Plans.*
- N3. *An Application for geophysical activity that requires a new cut of greater than 200 ha or covers an area of greater than 70 sq. Km.*
- N4. *An Application for a pipeline that has an overall length greater than 15 km long or has a segment greater than 10.0 km Long.*
- N5. *The Application is for a low-grade or high-grade access road (not a winter access road) greater than five km long.*
- N6. *The Application is for a plant site greater than 2.0 ha.*
- N7. *The Application is for a new well site pad for which multiple wells may be drilled.*

**Deep Criteria**

- D1. As determined through a project specific assessment. For example, an application that requires an Environmental Assessment under the Environmental Assessment Act.*

DRAFT

**WATER USE CLASSIFICATION TABLE**

| <p>If <u>all</u> of the below criteria are met, the application will be deemed:</p> <p><b>“Information Only”</b></p>  | <p>If <u>any</u> of the below criteria are met, the application will be deemed:</p> <p><b>“Notification with Opportunity to Comment”</b></p>   |
|---|--|
| <p>The diversion point is geographically located within northeast BC (i.e. Fort Nelson and Peace Forest Districts).</p>   | <p>The diversion point is geographically located outside north-eastern BC.</p>   |
| <p>The diversion point is not identified within areas established by Order under the <i>Oil and Gas Activities Act</i> Environmental Protection and Management Regulation.</p>    | <p>The diversion point is identified within areas established by Order under the <i>Oil and Gas Activities Act</i> Environmental Protection and Management Regulation.</p>                     |
| <p>The withdrawal rate is less than 500m<sup>3</sup>/day <b>and</b> 100,000m<sup>3</sup> total, <b>or</b> the source is a water source dugout and/or other manmade structure.</p> | <p>The withdrawal rate is equal to or greater than 500m<sup>3</sup>/day <b>or</b> 100,000m<sup>3</sup>, <b>and</b> the source is not a water source dugout and/or other manmade structure.</p> |
| <p>Diversion point is not located on an identified sensitive waterbody or area of known significance.</p>   | <p>Diversion point is located on an identified sensitive waterbody or area of known significance.</p>  |