

**Proposal to Aboriginal Community, Mining Industry  
and Governments**

**Canadian Aboriginal Minerals Association  
Indigenous Environmental Leadership and Partnership**

**“Indigenous Community Driven  
Environmental Assessments”**

## **Proposal to Aboriginal Community, Mining Industry and Governments**

### **Canadian Aboriginal Minerals Association**

#### **Indigenous Environmental Leadership and Partnership**

##### **What is being Proposed?**

Generate support for Indigenous community driven environmental impact assessments for designated mineral exploration and mining projects. To achieve this, provincial and federal Governments and the Mining Industry would need to support the role, of interested Indigenous communities to taking a lead role in the preparation of certain portions or potentially for all of the Environmental/Impact assessment process for a given mining project.

Link the need for the proponent's need to prepare their Environmental Impact Statement and the federal and provincial government's need to prepare a final Environmental/Impact Assessment Report for mining projects (under CEEA 2012 , Bill C-69 and Provincial EA) and the need for Indigenous Community Consultation through supporting Indigenous community authored project descriptions, environmental screenings, and reports as a means to:

- a) fulfill the needs of the environmental review and permitting processes,
- b) fulfill industry and Crown consultation,
- c) Satisfy the Indigenous community that their aspects, concerns and recommendations have been fully included and addressed in the environmental review of the mine project.
- d) Satisfy all parties that Indigenous rights, titles and interests have been recognized, and included in the EA process and that impact mitigation of these is derived and accepted by the affected Indigenous communities. Build and support Indigenous community capacity and decision making (UNDRIP). Recognize that there are Indigenous peoples and groups that have substantial knowledge and skills both in scientific and Aboriginal traditional knowledge that could be great assets to all parties involved in these review and approval processes.

##### **Why is it necessary?**

##### **EA Reports - Issues for Proponents and Indigenous Communities:**

1. Mining Projects have and may experience development delays by having incomplete or inadequate project descriptions, screenings and environment/impact assessment reports for these reasons:
  - a) Mining companies have been challenged for either having no information or not having accurate, factual, current and meaningful Indigenous community information in the required reports (under the *Canadian Environmental Assessment Act, 2012* (and provincial equivalents)).

- b) Indigenous communities have extensive temporal and spatial knowledge but are often reluctant to share with mine proponents and governments in the Assessment process out of a lack of trust, respect and use of data, particularly where that data may be accessible by the public.
  - c) Indigenous Rights and interests while identified in most communities, is not communicated to the fullest extent, thus deriving mitigating impact measures may be problematic.
  - d) Indigenous groups may often argue that the Crown (and Mine Proponent) has not consulted them or that consultation was inadequate (or no Consent).
  - e) Mitigation measures described in Assessment reports often fail to take into account Indigenous Traditional and community knowledge, input and recommendations.
2. Indigenous communities affected by mining projects do not have complete, sufficient or adequate information to help inform their communities. Indigenous communities:
- a) may lack extensive knowledge in western sciences and aspects of engineering.
  - b) seek third party advisers (lawyers, accountants, consultants, etc) to help them understand the data and reports at a financial cost to either the community, proponent and government.
  - c) View debates on the merits of technical data among governments and mine proponents and their consultants as relegating the community's knowledge as insignificant.
  - d) have and will continue to have a connection, use and occupation of their lands
  - e) have an interest in deciding matters which affect these lands.
  - f) Require the ongoing sharing of meaningful and complete information from both the government and mining proponents
  - g) should be positioned to decide whether to continue involvement, support the project or propose alternatives
  - h) Should have the opportunity to be a partner in the collection of information and in the preparation of materials for review processes.

### **What would be the Benefit?**

#### **Objective:**

To encourage and support an Indigenous community driven environment/impact assessment processes for Mining Projects. The mining project proponents will continue to be responsible for the final sign off of all documents submitted as part of the EA process. The Indigenous group will develop the appropriate documents, based on their experience and/or access to appropriate expertise, in partnership with the proponent while seeking advice from jointly selected advisers and consultants and Indigenous community members.

### **Anticipated Outcome:**

An Indigenous community driven environmental assessment process will yield the following:

- a) Certainty of investment by both the community and industry for proposed projects;
- b) Promotes community and industry partnership at early stages in the EA process;
- c) Educate community and industry and promote understanding among parties;
- d) Provide a better understanding of potential impacts to asserted or established Aboriginal or Treaty rights and other community concerns;
- e) Identify appropriate measures to avoid or mitigate potential effects to the environment and impacts on Indigenous peoples including unique opportunities to affect some potential aspects of project design that may provide more certainty with respect to likelihood of approval;
- f) Build capacity in the community in the areas of western sciences and engineering knowledge;
- g) Build an understanding of community needs to plan for the future to have a nearby workforce and identify learning and training requirements early on in the planning of projects; and
- h) Promote community-industry-government consultation and community consent (agreements)
- i) Cost savings with avoidance of duplicating consultants and advisers.

### **Opportunities:**

Indigenous communities, particularly communities located in areas of long term development may be able to utilize their experience and the experience of other Indigenous communities to:

- a) Assist neighboring communities with their knowledge or expertise;
- b) Build their capacity related to project reviews and eventually partner with project proponents;
- c) Eventually have a 'go-to' body that has expertise they trust and can utilize as they see fit; and
- d) Build a community of expertise for project reviews.

### **Background**

Mining Companies are faced with the uncertainty of project approval in the federal environmental assessment process. Challenges occur throughout the process, including, such as, in determining the scope of the project, conducting the scientific, technical and socio-economic research, obtaining strong and adequate evidence for the project and in meeting the requirements of the affected Aboriginal communities. The demands on the proponent can frustrate the process without a guarantee for approval. (see Appendix A: Mining company Obligations under CEAA and Bill C-69).

Aboriginal communities are also faced with uncertainty regarding the environmental risks to the community if a mining project is allowed to proceed. This uncertainty comes about when the western science is in doubt in the Environmental Assessment process or there is a lack of trust with the proponent and the government. While Aboriginal knowledge is “considered”, often it is not applied to project planning and mitigation methods or does it embrace the needs and plans of the community. There is also confusion as to the role of the EA process in Aboriginal consultation and whether communities are being consulted and if so how adequate is the consultation. Aboriginal groups often argue that they were not consulted. In most cases, this has resulted in costly litigation and Court challenges.

The governments are also faced with the tasks of determining whether a Project Description is complete or whether the scope of the project is sufficient. Add to this the government must verify that affected Aboriginal groups were “consulted” by the mine proponent to the satisfaction of the Crown. The governments too must balance their Constitutional obligations to ensure that a project will not only benefit Aboriginal groups (accommodate) but also the Public interest (environment and economic in Bill C-69). (see Appendix B and C Government Obligations Environmental Assessment). Many Aboriginal groups do not believe that the current EA process (CEAA 2012) fulfills the government’s duty to consult and accommodate and does not meet the state obligations set out in UNDRIP (Bill C-69).

### **How can Environmental Assessment Process Maximize Aboriginal Involvement?**

There are several key activities where the Proponent must engage with Aboriginal communities to satisfy the needs of CEAA 2012 (and Bill C-69) and Crown consultation. These include preparation in:

- Project Description
- Screening
- Environmental Impact Statement
- Comprehensive Report
- Environmental Assessment Impact Report

The Proponent may choose from at least three methods to accomplish the undertaking or completion of these activities. Regardless of how a proponent proceed, they must engage with Aboriginal communities throughout all stages. There are pros and cons to each method related to which may maximize meaningful Aboriginal engagement to the benefit of the community, proponent and governments. These research and study methods can be conducted in the following manner: (1) Proponent with lead consultant and sub consultants (current practice); or (2) Aboriginal community as lead consultant alone or with sub-consultants; or (3) Proponent to Designate to Aboriginal-industry or Aboriginal organization as Consultants (specialty in EA).

## 1) Proponent Prepared Studies and Assessment

Throughout the environmental assessment process, from project description, through comprehensive to final submission of the Environmental Assessment report to the government, the proponent has a choice to conduct all, some or none of the research, analysis, in house utilizing their own staff. Very few proponents have this in house capacity and rely on outside or outsourced services.

The proponent of a designated project must provide the Agency (CEAA) with the information or studies that are set out in the notice of the commencement of the impact assessment of the designated project within three years after the day on which a copy of that notice is posted on the Internet site.

Proponents often retain third parties, or qualified environment, engineering, other technical expertise (consultants) to prepare submissions to government. Under a terms of reference, the consultant, or consulting team is guided to include regulatory requirements to meet the statutory requirements (CEAA 2012 and pending Bill C-69) to gain project approval. The consultant participates in all phases of the environmental review and may appear to present evidence in the case where the project is reviewed by an environmental review panel.

### Pros:

- Proponent control over scope and selection of consultant, outcome of studies and final EA
- Can appoint or retain one lead consultant to coordinate entire EA process and reporting
- Option to change EA team or expand to meet government requirements
- Limited time to allocate in-house resources to the studies
- Certified third party reviews credible, defensible.

### Cons:

- Costs to retain outside expertise
- Limited knowledge and expertise of consultants in multidisciplinary such as social vs technical, culture vs. engineering
- Issues of confidentiality of community knowledge
- Linear thinking with a focus on project completion time lines not the EA process quality, quantity and time lines.
- Conclusions and findings Studies and reports open to scrutiny by others from community, governments, scientists and non-government groups
- Lack of trust of proponent methodology, advisers and evidence
- Lack of trust in government to ensure Aboriginal issues are addressed

- Lack of trust that the Environmental Review process fulfills Aboriginal consultation and accommodation.
- if the Agency is of the opinion that there is not sufficient information available to it on Aboriginal aspects and impacts for the purpose of conducting the impact assessment or preparing the report with respect to the impact assessment, it may require the collection of any information or the undertaking of any study that, in the Agency's opinion, is necessary for that purpose, including requiring the proponent to collect that information or undertake that study.

## 2) Aboriginal Community Prepared Studies and Assessment

Aboriginal community involvement in environmental studies and assessments has been growing as both governments and mine proponents are recognizing their obligations to protect, maintain and compensate Aboriginal communities for proponent use, occupation of Aboriginal lands and resources. Aboriginal communities can provide the full spectrum of participation in the environmental process, from working within their community and their advisers, to preparing documents, studies and recommendations to complete the environmental assessment for proponents. Community scientific, technical and relevant socio-economic information is managed by the community and proponent. Often the community lead on the EA is guided by a formal mutual agreement describing the scope of engagement, scope of work and how the proponent will rely on the community for the collection, analysis, use in impact determination and in the final dissemination of findings.

In a Standard EA process, under Bill C-69, there is an allowance for a delegation to another party to conduct the EA. Where this allows for a Proponent to delegate to delegate the EA process, with the authority of the government, to an Aboriginal entity or community remains unknown. Bill C-69 also allows for Substitution to an Indigenous process.

Cooperation and communication with Aboriginal peoples with respect to environmental assessment is a key component of CEAA 2012 (Bill C-69). The definition of "environmental effects" includes provisions that explicitly relate to Aboriginal peoples and environmental effects that cause changes to their:

- health and socio-economic conditions;
- physical and cultural heritage;
- current use of land and resources for traditional purposes; or
- structures, sites or things that are of historical, archaeological, paleontological or architectural significance.
- any change occurring in Canada to the health, social or economic conditions of the Indigenous peoples of Canada; or
- any change to a health, social or economic matter within the legislative authority of Parliament

- considerations related to Indigenous cultures raised with respect to the designated project;
- community knowledge provided with respect to the designated project;

Government final approval and determination regarding whether the carrying out of the project is likely to cause significant adverse environmental effects must include a consideration of the following factors:

- any adverse impact that the project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*;
- traditional knowledge of the Indigenous peoples of Canada provided with respect to the project;
- Aboriginal community knowledge provided with respect to the project;
- comments received from the public; and
- the mitigation measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project. (Bill C-69 s.84 Factors)

**Pros:**

- The Agency may delegate to any person, body or jurisdiction the carrying out of any part of the impact assessment of the designated project and the preparation of the report with respect to the impact assessment of the designated project (s.29 Bill C-69), with condition the process to be substituted will include consultations with any Indigenous group that may be affected by the carrying out of the designated project (s.33. d.)
- Control of confidential community information, cultural and health information (concern with Bill C-69 “**119 (b)** the disclosure is necessary for the purposes of procedural fairness and natural justice or for use in legal proceedings”
- Proponent engages community to conduct and participate all or portions of the environmental processes to meet statutory “consultation” requirements
- Creates a relationship/partnership for the life of the project “cradle to cradle”
- Specific Funding envelopes specific available to Aboriginal communities
- Mineral Exploration Depletion Allowance available as tax benefits for expenditures on environment and Aboriginal community consultation.
- Knowledge, both western and traditional is gained and balanced at all stages
- Aboriginal communities are rights based, whereas outside parties may be interest based in their input and review of the environments...Aboriginal ownership of the process and outcome.
- Community socio-economic, cultural, traditional and spiritual knowledge is gained to allow community to recommend mitigation and/or accommodation measures.
- Helps mitigate disputes and protests by non-government groups

- More assurance of project approval if Aboriginal community is satisfied with their full inclusion in the review process.
- From community perspective, completeness of the reports and requirements of consultation and accommodation and mitigation measures are met.
- Meets the obligations set out in portions of the United Declaration on the Rights of Indigenous Peoples (UNDRIP)
- Asserts the potential or established Aboriginal or Treaty rights for an area or territory without court recognition.
- Promotes the spirit and intent of Treaties in “sharing”, joint management and sharing of risks, benefits and rewards

**Cons:**

- Challenge to identify who from an *Indigenous governing body*, whether a council, government or other entity that is authorized to act on behalf of an Indigenous group, community or people that holds rights recognized and affirmed by section 35 of the *Constitution Act, 1982 can take a research lead in the EA process.*
- Additional costs with community wide consultation, depends on size and location of communities
- Fear that an Aboriginal involvement be construed as abrogating or derogating from the protection provided for the rights of the Indigenous peoples of Canada by the recognition and affirmation of those rights in section 35 of the *Constitution Act, 1982.*
- Minimum control of sub-contractors by proponent
- Risks of changing scope as community becomes more or involved aware of project
- Challenge to ensure balanced team of western vs. traditional practitioners.
- Obligation to enter into an impact benefits or participation agreement with affected communities.
- Perception of liability for the EA report findings, recommendations should there be errors, omissions in the report.
- Potential risks to Aboriginal research team for prescribed engineering or related mitigation structures (mitigation methods can be an unknown untested science).
- Uncertain as to whether “Public Interest determination” may override Aboriginal-Proponent decisions’ determining whether a project is in the public interest. Such as factors to be considered in the assessment (Bill C-69 s.63), following:

*The extent to which the project contributes to sustainability*

*The extent to which effects on areas of federal responsibility are adverse*

*The implementation of mitigation measures (defined to include compensation)*

*Impacts on Indigenous Communities and Indigenous Rights*

*Impacts on Canada’s environmental obligations and climate commitments*

### 3) Joint Industry and Aboriginal Environmental Group Prepared Assessments

Many Aboriginal communities are affiliated with Aboriginal lead environmental groups comprised of teams mandated to address environmental concerns. These groups serve tribal councils, communities, regional Aboriginal groups and designated Aboriginal organizations. Industry also has utilized unique groups, perhaps related to Universities, or are members of the International Council for Metals and the Environment (ICME) who specialize in the environment whose team are certified environmental scientists and geoscientists. With proponents continuing to outsource much of their environmental assessment work, coordinating the work through a stand alone joint expertise group may help the proponent balance the western scientific, engineering and technical merits of the project and the land and community based knowledge of the Aboriginal community.

#### Pros:

- Gives Proponent more assurance that industry standards are met to complete the environmental assessment
- Proponent can facilitate the team an apportion work according to expertise, geography and skills
- Obligations of “consultation” and inclusion of Aboriginal knowledge is assured
- Universities may provide “in kind” services

#### Cons:

- Additional costs for consultants, coordination and consultation
- Coordination may be challenging unless structured with team leaders
- Challenging to coordinate unless a team leader
- Possible disputes among the team regarding strength of scientific data, significance and application to mitigation.
- In Bill C-69 beyond the proponent’s responsibility to provide information under section 19, and a general responsibility for federal authorities with expertise to assist, do not delineate the allocation of responsibility for the gathering of the information needed, particularly in light of the much broader scope of the assessment.
- ensuring adequate information is before the Agency (or Panel) on issues such as alternatives, impacts on Indigenous communities and rights, and social, economic and health impacts of proposed projects, and how this information will be gathered within the time frames permitted.

## Appendix A

### Mining Company Obligations Environmental Assessment

The mining industry as a proponent in resource development projects has several obligations to the Government of Canada, specifically with respect to the environment. CEEA 2012 and the new proposed Bill C-69 make it clear that mining companies must:

1. The proponent of a designated project must provide the Agency with an initial description of the project that includes the information prescribed by regulations
2. Undertake extensive baseline, technical, socio-economic studies as part of their project description, and environmental impact assessment,
3. Support the Crown in its duty to conduct Consultation with Aboriginal communities affected by the proponent's project.

Proponents are required to conduct an environmental assessment to determine the following potential adverse environmental effects:

- effects that impact on Aboriginal peoples, such as their use of lands and resources for traditional purposes;
- health and socio-economic conditions;
- physical and cultural heritage;
- current use of land and resources for traditional purposes; or
- structures, sites or things that are of historical, archaeological, paleontological or architectural significance.
- impacts on Indigenous communities, impacts on Indigenous rights

Proponents are required to submit a description of the designated project to the Canadian Environmental Assessment Agency (the Agency) to inform a decision on whether an environmental assessment of the designated project is required.

The designated project description (project description) must include the prescribed information including information about the possible adverse environmental effects of the project.

Proponents must provide to the Agency a description of their proposed project if it is captured by regulations outlining projects likely to require federal environmental assessment.

## Appendix B

### **An Aboriginal Community driven Environmental Assessment Process assists in Government (Crown) Obligations to Aboriginal Peoples**

The Crown's obligations are established by the Constitution Act s. 35, CEAA 2012 and the proposed Impact Assessment Act Bill C-69. Under CEAA 2012, the Canadian Environmental Assessment Agency (the Agency) acts as the Crown Consultation Coordinator to integrate the Government of Canada's Aboriginal consultation activities into the EA process to the greatest extent possible. This applies to all EAs for which the Agency is the responsible authority, including review panels.

The Agency coordinates federal Aboriginal consultation activities and provides Aboriginal groups with an **opportunity** to comment on:

- Potential environmental effects of the project and how they should be included in the environmental assessment;
- The potential impacts of a project on potential or established Aboriginal or Treaty rights;
- Mitigation measures;
- any adverse impact that the designated project may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*; and
- Follow-up programs.

#### **Regarding Aboriginal consultation, the Agency:**

- Identifies Aboriginal groups whose potential or established Aboriginal or Treaty rights may be adversely affected by the proposed project;
- Invites identified Aboriginal groups to provide comments in relation to the EA;
- Provides Aboriginal groups with information about the proposed project and the EA process;
- Provides funding to assist eligible Aboriginal groups in preparing for and participating in consultation activities through the Agency's Participant Funding Programs.
- Crown considers the feedback provided by Aboriginal groups during the consultation process, including any concerns or issues raised, prior to any decisions being final; and
- Identifies mitigation and accommodation measures that may be required to address issues raised during the consultation process.

The nature and level of consultation activities undertaken by the Agency will vary on a project-by-project basis and are dependent on the nature of the potential or established Aboriginal or Treaty rights, and the extent and severity of the potential adverse impacts of the proposed project on those rights.

The Agency reports that, "Cooperation and communication" with Aboriginal peoples with respect to environmental assessment is a key component of CEAA 2012. It adds that "environmental effects" includes provisions that explicitly relate to Aboriginal peoples and environmental effects that cause changes to their:

- health and socio-economic conditions;
- physical and cultural heritage;
- current use of land and resources for traditional purposes; or
- structures, sites or things that are of historical, archaeological, paleontological or architectural significance.

Based on the Project Description, in the early parts of a project and the process, the government will decide whether to discharge its legal duty to consult and, if appropriate, accommodate Aboriginal peoples when the Crown contemplates conduct (associated with designated projects) that might adversely impact established or potential Aboriginal and treaty rights.

The proposed new Bill C-69 *Impact Assessment Acts* continues to require Aboriginal engagement by the Crown by

- mandates a new early planning phase that seeks Indigenous and public input on the proponent's project description and the upcoming impact assessment;
- broadens the scope of the impact assessment by requiring the process to evaluate the need for, and alternatives to, the proposed project, and to assess potential changes in indigenous health, social, and economic conditions, rather than just environmental effects;
- sets out statutory criteria for decision-making under the Act, including whether the project makes a "contribution to sustainability" of indigenous communities

## Appendix C

### Obligations of the Government to Support the UN Declaration on the Rights of Indigenous Peoples

The Environmental Review process, if structured to maximize Aboriginal involvement could help the CROWN meet the obligations set out in portions of the United Declaration on the Rights of Indigenous Peoples (UNDRIP), specifically :

#### *Article 18*

*Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions.*

#### *Article 24*

*1. Indigenous peoples have the right to their traditional medicines and to maintain their health practices, including the conservation of their vital medicinal plants, animals and minerals. Indigenous individuals also have the right to access, without any discrimination, to all social and health services.*

*1. Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and oral traditions, literature, designs, sports and traditional games, including visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.*

#### *Article 32*

*1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.*

*2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.*

*3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.*