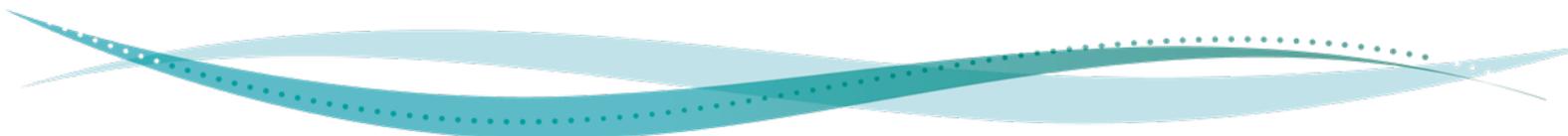


# Land and Water Boards of the Mackenzie Valley



## Engagement and Consultation Policy

January 2023



## Revision History Table

YEAR	SECTION	REVISION
January 27, 2023	General	<ul style="list-style-type: none"> <li>• Updated and revised terminology and definitions</li> <li>• Updated and clarified references to legislation and to new or updated LWB guidance documents</li> <li>• Corrected typographical and administrative errors</li> <li>• Removed previous appendices as all content is now located on LWB websites or in other sections of the Policy</li> </ul>
	1.0 – Introduction (including subsections 1.1-1.5)	<ul style="list-style-type: none"> <li>• Updated to further explain the collaborative system of land and water management in the Mackenzie Valley, and the roles that all parties play in it, as well as the goal of furthering reconciliation</li> <li>• Updated to use the term “early engagement” rather than “pre-submission engagement”</li> <li>• References to influential and important documents added to Section 1.3</li> <li>• One guiding principle renamed, two guiding principles added</li> <li>• Figure 1 replaced</li> <li>• Table 1 added to emphasize the benefits of early engagement and collaboration</li> </ul>
	2.0 – LWBs’ Approach (including subsections 2.1-2.3)	<ul style="list-style-type: none"> <li>• Updated to emphasize the importance of early engagement and collaboration</li> <li>• Updated to include considerations about Traditional Knowledge</li> <li>• Clarified expectations for municipal undertakings and municipal public works activities</li> <li>• Added information about ongoing engagement (post-issuance)</li> <li>• Addition of Figure 2 to illustrate engagement in relation to a project lifecycle</li> <li>• Additional clarity on the assessment of Crown consultation</li> <li>• Addition of Table 2 to explain the differences between engagement, LWB consultation, and Crown consultation</li> <li>• Figure 3 added to illustrate when engagement and consultation occurs in relation to the regulatory process</li> </ul>
2018		Updated with minor editorial revisions based on a legal review of case law (related to consultation) to date and to account for Devolution
2013		Initial approval and distribution

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# The Mackenzie Valley



## Definitions and Acronyms

TERMS	DEFINITIONS
Aboriginal and Treaty Rights <sup>1</sup>	<p>Aboriginal rights are practices, traditions, and customs integral to the distinctive culture of the Aboriginal group claiming a right that existed prior to contact with Europeans (for Métis prior to effective European control).</p> <p>Treaty Rights are 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.</p>
affected party	A party that is affected (or predicted to be affected) by a proposed or existing project, including an Indigenous government, an individual occupying land for traditional purposes, a private landowner, or a lease or interest holder (e.g., for a lodge).
applicant	A person who has filed an application with the LWB. <sup>1F<sup>2</sup></sup>
application	Any application for or in relation to a land use permit or water licence submitted in accordance with the <i>Mackenzie Valley Resource Management Act</i> (MVRMA), the <i>Waters Act</i> , or their regulations, and the LWBs <a href="#">Rules of Procedure</a> , including a request for a Board ruling, a plan approval, or any step required to advance a Board proceeding.
Board (LWB)	<p>Land and Water Boards of the Mackenzie Valley, as established by the MVRMA.</p> <p>Part 3 of the MVRMA establishes regional land and water boards with the power to regulate the use of land and water, and the deposit of waste, including the issuance of land use permits and water licences, so as to provide for the conservation, development, and utilization of land and water resources in a manner that will ensure the optimum benefit to the residents of the management area and of the Mackenzie Valley and to all Canadians.</p> <p>Part 4 of the MVRMA establishes the Mackenzie Valley Land and Water Board (MVLWB).</p> <p>Regional Land and Water Boards have been established in the Gwich'in, Sahtú, and Wek'èzhìi management areas and now form Regional Panels of the MVLWB.</p>
	Wherever in the MVRMA reference is made, in relation to any matter, to a power or duty to consult, that power or duty shall be exercised, as set out in

<sup>1</sup> Aboriginal and Treaty Rights are recognized and affirmed under s35 of the *Constitution Act*, 1982. The term “Aboriginal” is used in this document only when citing specific legal references; the term “Indigenous” has commonly replaced it as the more recognized term in line with the [United Nations Declaration on the Rights of Indigenous Peoples](#).

<sup>2</sup> Note that a licensee or permittee may also be an applicant.

TERMS	DEFINITIONS
Board (LWB) Statutory Consultation	<p>section 3 of the MVRMA:</p> <p>(a) By providing, to the party to be consulted:</p> <p>(i) notice of the matter, in sufficient form and detail to allow the party to prepare its views on the matter;</p> <p>(ii) a reasonable period for the party to prepare these views;</p> <p>(iii) an opportunity to present those views to the party having the power or duty to consult;</p> <p>(b) By considering, fully and impartially, any views so presented.</p>
Crown Consultation	<p>The Crown’s common law duty to consult and accommodate regarding adverse impacts to established or asserted Aboriginal and Treaty Rights protected by section 35 of the <i>Constitution Act, 1982</i>.</p>
engagement	<p>The communication and outreach activities an applicant undertakes with an affected party prior to and during the operation of a project.</p>
Engagement Plan	<p>A forward-looking document, developed collaboratively between the applicant and each affected party, that details timing and approaches to engagement throughout the life of the project.</p>
Engagement Record	<p>A summary and log which details the engagement processes and outcomes between an applicant and an affected party.</p>
GLWB	<p>Gwich’in Land and Water Board</p>
Indigenous government	<p>A government representing the rights and interests of a First Nation (as defined in section 2 of the MVRMA), Métis or Inuit organization, the Tłı̨cho First Nation, the Tłı̨cho Government, or the Délı̨ne Got’ı̨ne Government.</p>
licensee	<p>A person who holds a water licence issued by a LWB.</p>
Mackenzie Valley	<p>That part of the Northwest Territories bounded on the south by the 60th parallel of latitude, on the west by the Yukon Territory, on the north by the Inuvialuit Settlement Region as defined in the Agreement given effect by the <i>Western Arctic (Inuvialuit) Claims Settlement Act</i>, and on the east by the Nunavut Settlement Area as defined in the <i>Nunavut Land Claims Agreement Act</i>, but not including Wood Buffalo National Park.</p>
MVLWB	<p>Mackenzie Valley Land and Water Board</p>
MVRMA	<p><i>Mackenzie Valley Resource Management Act</i></p>

TERMS	DEFINITIONS
NWT	Northwest Territories
permittee	A person who holds a land use permit issued by a LWB.
project	Any undertaking <sup>3</sup> or activity that requires a water licence and/or a land use permit.
SLWB	Sahtú Land and Water Board
WLWB	Wek'èezhìi Land and Water Board

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<sup>3</sup> “undertaking” is defined, in section 1 of the [Waters Regulations](#) and section 2 of the [Mackenzie Valley Federal Areas Regulations](#), as: an undertaking in respect of which water is to be used or waste is to be deposited, of a type set out in Schedule B, or Schedule II, respectively.

## 1.0 Introduction

The Mackenzie Valley of the Northwest Territories (NWT) is home to an integrated and coordinated system of land and water co-management resulting from land claim agreements and provided for by the *Mackenzie Valley Resource Management Act* (MVRMA).<sup>4</sup> Under the authority of the MVRMA, the Land and Water Boards of the Mackenzie Valley (the LWBs) regulate the use of land and water, and the deposit of waste, through the issuance and management of land use permits (permits) and water licences (licences). There are four LWBs in the Mackenzie Valley that perform these functions, each in different management areas.<sup>5</sup>

The objective of the LWBs is to provide for the conservation, development, and utilization of land and water resources in a manner that will provide the optimum benefit generally for all Canadians and in particular for residents of the Mackenzie Valley.<sup>6</sup> In exercising their authorities, the LWBs must consider “The importance of conservation to the well-being and way of life of the Aboriginal peoples of Canada to whom section 35 of the *Constitution Act*, 1982 applies and who use an area of the Mackenzie Valley” and “any traditional knowledge and scientific information that is made available.”<sup>7</sup> In addition, the LWBs must ensure that the concerns of Aboriginal people and the general public have been taken into account.<sup>8</sup>

To meet these objectives, the LWBs work with applicants, affected parties (including Indigenous governments), and other parties (e.g., other Boards and government agencies that issue associated authorizations) to ensure that potential impacts of proposed projects are understood and carefully considered before decisions are made with respect to the issuance of permits and licences. Before issuing a water licence or land use permit, a Board must ensure that the potential impacts of proposed uses of land and water are evaluated and appropriate mitigation and water compensation measures are in place when required. Important responsibilities, which often intersect, include:

- the role of the applicant to carry out engagement with potentially affected parties (referred to in the Policy as “applicant engagement”);
- the role of the Board to carry out statutory consultation under the MVRMA (referred to in the Policy as “LWB consultation”); and,
- the role of the Crown to ensure that if the duty to consult has been triggered, adequate Crown consultation and accommodation has taken place with potentially impacted Indigenous governments (referred to in the Policy as “Crown consultation”).<sup>9,10</sup> In the Mackenzie Valley, the Government of Canada and the Government of the Northwest Territories (GNWT) have indicated

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<sup>4</sup> Please refer to any of the LWB websites ([www.glwb.com](http://www.glwb.com)/[www.mvlwb.com](http://www.mvlwb.com)/[www.slwb.com](http://www.slwb.com)/[www.wlwb.ca](http://www.wlwb.ca)) resources pages for links to reference documents such as land claim agreements, acts, and regulations.

<sup>5</sup> For more information, please refer to the NWT Board Forum website at [www.nwtboardforum.com](http://www.nwtboardforum.com).

<sup>6</sup> See section 101.1 of the [MVRMA](#).

<sup>7</sup> See section 60.1 of the [MVRMA](#).

<sup>8</sup> See paragraph 114(c) of the [MVRMA](#).

<sup>9</sup> See the Department of Justice Canada’s *Principles: Respecting the Government of Canada’s Relationship with Indigenous Peoples* at <https://www.justice.gc.ca/eng/csj-sjc/principles.pdf> and information about Government of Canada’s duty to consult at <https://www.rcaanc-cirnac.gc.ca/eng/1331832510888/1609421255810>

<sup>10</sup> See the Government of Northwest Territories’ Department of Executive and Indigenous Affairs’ document titled: *The Government of Northwest Territories’ approach to consultation with Aboriginal Governments and organizations* at [https://www.eia.gov.nt.ca/sites/eia/files/aboriginal\\_consultation\\_approach.pdf](https://www.eia.gov.nt.ca/sites/eia/files/aboriginal_consultation_approach.pdf)

that they rely on the LWBs' processes to contribute to fulfilling these duties,<sup>11</sup> therefore, the LWBs may need to assess and rule on the adequacy of Crown consultation in the case where the LWB is the final decision-maker.

Given the collaborative system of land and water management in the Mackenzie Valley, and the roles that all parties play in it, as well as the goal of furthering reconciliation,<sup>12</sup> coordinated processes are essential to achieving meaningful involvement of affected parties. The LWBs have developed the *Engagement and Consultation Policy* (the Policy) to reflect this coordinated system and ensure that their responsibilities for meaningful consultation with all affected parties, including Indigenous peoples in the Mackenzie Valley, are clearly articulated and met (Figure 1).

Because what is considered meaningful can be subjective and differ among people, it is essential that all parties involved in LWB processes truly listen and do their best. The LWBs highly recommend all applicants become familiar with the NWT context, with the specific area in which a project is proposed, and who the affected parties may be as the general understanding is that more effective relationships will lead to greater social, environmental, and economic well-being for all.<sup>13</sup>

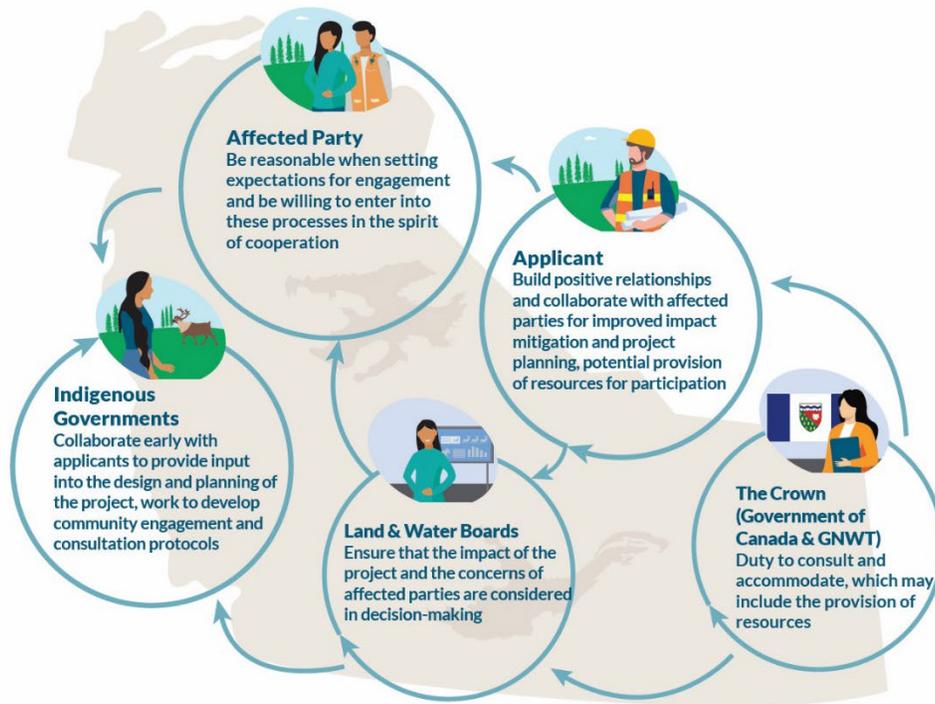
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<sup>11</sup> The federal and territorial governments prepared a statement that notifies parties that the Crown is relying on the LWBs' process relating to the Crown's constitutional duty to consult for every item that goes out for review via the LWBs' Online Review System (e.g., any application, policy, guidance document, etc.). For more information, please see:

<https://mvlwb.com/sites/default/files/2020-11/LWB%20Communique%20-%20ORS%20Language%20-%20Crown%20Consultation%20Nov%205%2020%200.pdf>; <https://wlwb.ca/sites/default/files/2022-10/MVLWB%20and%20Crown%20Consultation%20Obligations.pdf>

<sup>12</sup> In *Honouring the Truth, Reconciling for the Future: Summary of the Final Report of the Truth and Reconciliation Commission of Canada*, reconciliation is "about establishing and maintaining a mutually respectful relationship between Aboriginal and Non-Aboriginal peoples in this country" and "in order for that to happen, there has to be awareness of the past, acknowledgement of the harm that has been inflicted, atonement for the causes, and action to change behaviour" (The Truth and Reconciliation Commission of Canada, 2015, p. 6). The LWBs are developing their approach for advancing reconciliation in their Outreach Strategy and recommend that all parties keep reconciliation in mind.

<sup>13</sup> The LWBs highly recommend all readers of this Policy become more familiar with the NWT context. An example of a resource that is widely available is the GNWT *Living Well Together* resource at <https://www.fin.gov.nt.ca/en/services/diversity-and-inclusion/living-well-together>.



*Figure 1: Shared responsibility for meaningful involvement of affected parties. In addition to each entities' responsibility, there is a need for interagency cooperation, information-sharing, transparency, and accountability between the various organizations.*

## 1.1 Purpose and Objectives

The Policy describes the:

- Submission requirements for applicants, permittees, and licensees pertaining to early (well in advance of application submission) and ongoing (throughout the life of the project) engagement with affected parties; and
- LWB consultation procedures during regulatory proceedings.

This Policy is supported, in part, by the LWBs' [Engagement Guidelines for Applicants and Holders of Water Licences and Land Use Permits](#) (the Guidelines) that include specific requirements and suggested best practices for early engagement and engagement planning with affected parties for the life of the project. The Policy is also supported by the LWBs' [Rules of Procedure](#) and other LWB policies and guidelines.<sup>14</sup>

<sup>14</sup> The LWBs' guidance documents can be found on the Policies and Guidelines webpage, and the Rules of Procedure webpage, on any of the LWB websites ([www.glwb.com](http://www.glwb.com)/[www.mvlwb.com](http://www.mvlwb.com)/[www.slwb.com](http://www.slwb.com)/[www.wlwb.ca](http://www.wlwb.ca)). New resources are added to the websites as they become available. Applicants, licensees, permittees, and all parties should ensure that they are using the most recent version of all guidance documents.

## 1.2 Authority

The LWBs' authorities set out under the [MVRMA](#) and the [Waters Act](#) and their regulations. The LWBs' authority to develop and implement this Policy is granted under sections 65, 102, and 106 of the MVRMA. Additionally, the Boards may not issue a licence, permit, or authorization for the carrying out of a proposed development unless the requirements of Part 5 of the MVRMA have been met.<sup>15</sup> As preliminary screeners, the Boards must ensure that "the concerns of [A]boriginal people and the general public are taken into account", and that their decisions have regard to "the protection of the social, cultural, and economic well-being of residents and communities in the Mackenzie Valley".<sup>16</sup> In exercising their powers, the Boards shall also consider "the importance of conservation to the well-being and way of life of the aboriginal peoples of Canada to whom section 35 of the *Constitution Act*, 1982 applies and who use an area of the Mackenzie Valley".<sup>17</sup>

## 1.3 Policy Development

The Policy was originally developed by the Engagement and Consultation Working Group, and influenced by the work of the Mackenzie Valley Land and Water Board (MVLWB) and the Mackenzie Valley Environmental Impact Review Board Joint Steering Committee on Consultation, formed in 2010. It is also based on legal and policy research, including regulatory, community-based, and industry engagement best practices, as well as careful consideration of public comments received by the LWBs after the release of draft documents in February and October 2012. The Policy underwent an administrative update in 2018 and a full update (including public review) in 2022.<sup>18</sup>

This updated Policy is based on the original *Engagement and Consultation Policy*, input from engaged parties, LWB staff, public review comments, and other LWB policies, standards, and guidelines, and consideration of past and present practice of the LWBs. This Policy has been influenced by the [United Nations Declaration on the Rights of Indigenous Peoples](#) (the Declaration), the [United Nations Declaration on the Rights of Indigenous Peoples Act](#) (UNDRIPA), [Truth and Reconciliation Commission of Canada: Calls to Action](#), and [Reclaiming Power and Plan: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls](#). The LWBs recommend that all readers of this Policy become familiar with these important documents.<sup>19</sup>

The Policy will be reviewed periodically to determine whether revisions are necessary. Information gathered through the application of the Policy during regulatory proceedings will guide the frequency and

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<sup>15</sup> Part 5 describes the objectives and general process of preliminary screening, environmental assessment, and environmental impact review. The Boards are the primary screeners under the MVRMA.

<sup>16</sup> See paragraphs 114(c) and 115(b) and (c) of the [MVRMA](#).

<sup>17</sup> See section 60.1 of the [MVRMA](#).

<sup>18</sup> The draft Policy Item for Review (2022) may be accessed on the LWB Online Review System at <https://new.onlinereviewsystem.ca/review/EA1640FE-C8EC-EC11-B47A-DC9840823A5F>. Other documents relevant to this Policy update may be accessed on the LWB General Outreach page: <https://wlwb.ca/outreach/general-outreach-0>

<sup>19</sup> These documents may be accessed on the United Nations ([www.un.org](http://www.un.org)), the Government of Canada Justice Laws ([www.laws-lois.justice.gc.ca](http://www.laws-lois.justice.gc.ca)), the National Centre for Truth and Reconciliation ([www.nctr.ca/records/reports](http://www.nctr.ca/records/reports)), and the National Inquiry into Missing and Murdered Indigenous Women and Girls (<https://www.mmiwg-ffada.ca/final-report/>) websites, respectively.

nature of revisions to the Policy. The LWBs will seek input on proposed revisions through public reviews and, in some cases, may establish working groups; however, the LWBs may also make administrative updates to the Policy from time to time as necessary.

#### 1.4 Application

This Policy will be applied by all the LWBs operating under the MVRMA including the:

- Mackenzie Valley Land and Water Board
- Gwich'in Land and Water Board
- Sahtú Land and Water Board
- Wek'èezhì Land and Water Board

The Policy applies to all applications and submissions made to a LWB by any applicant, permittee, or licensee.<sup>20</sup>

#### 1.5 Guiding Principles

The following principles guide the LWBs' decisions on any matter related to engagement and consultation with affected parties occurring prior to and throughout their regulatory proceedings. The principles are not listed in order of priority, and they carry equal weight:

- **Relationships:** Positive and reciprocal relationships are pillars to meaningful engagement and consultation and are beneficial overall (see Table 1). A strong commitment to fostering dialogue, mutual understanding, and collaboration is required. Building positive relationships involves mutual trust and respect, openness, transparency, and a willingness to adapt to what is heard. Relationships should be established before a project is planned and continue throughout the entire life of a project.
- **Shared responsibility:** Coordinated processes, which reflect the responsibilities of the applicant, the Government of Canada, the Government of the NWT (GNWT), Indigenous governments, and the LWBs to enable meaningful involvement of affected parties, are essential in the co-management system (see Figure 1).
- **Accessibility:** All information relevant to an application or submission is made available in a timely and understandable manner and considers the particular culture(s), language(s), and traditions of the affected parties.<sup>21</sup> The LWBs will make best efforts to ensure that the LWBs' proceedings are designed so that parties can participate in a meaningful way and in a way that addresses their individual needs.
- **Inclusiveness:** Those potentially affected, including youth, Elders, and women, should be given the opportunity to be heard and involved. It is important to understand the local context and recognize that capacity challenges may exist. All parties should endeavour to ensure that space is created specifically so that marginalized groups of people can participate and be heard in a meaningful way.
- **Reasonableness:** Applicants, affected parties, the LWBs, and the Crown must be reasonable when setting expectations for engagement and consultation processes and be willing to enter into these processes in the spirit of respect and cooperation. This includes the provision of reasonable resources

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<sup>20</sup> Submissions made to the LWB include documents such as management plans, reports, etc.

<sup>21</sup> This does not pertain to information that is protected by law, commercially confidential, or proprietary.

(e.g. financial and human resources), where appropriate, for carrying out and participating in applicant engagement and LWB consultation processes (see Figure 2);<sup>22</sup> and consideration of other factors which may affect capacity (e.g. other ongoing initiatives, community events, traditional harvesting activities, global pandemics, etc.).

- **Reflection:** Engagement should inform the assessment of impacts, project planning, and adaptive management. Parties should work together to determine whether and how recommendations from affected parties can be incorporated. Applicants, licensees, and permittees should explain how engagement has been reflected in applications and submissions.

The LWBs believe that the benefits of good engagement and consultation are extensive. Those benefits include having the social licence to operate, increasing the likelihood of access to local and Indigenous knowledge that may be incorporated into project planning, and, most likely, better and more efficient regulatory process outcomes (see Table 1).

*Table 1: Potential Benefits of Early Engagement and Collaboration*

	APPLICANT	AFFECTED PARTY	LAND & WATER BOARD
<b>Potential Benefits of Early Engagement and Collaboration</b>	<ul style="list-style-type: none"> <li>• Positive relationships</li> <li>• Greater chance of avoiding impacts</li> <li>• Lower cost of project changes</li> <li>• Social licence to operate</li> <li>• Increasing the likelihood of access to local and Indigenous knowledge that may be incorporated into project planning</li> <li>• Most likely, better and more efficient regulatory process outcomes</li> </ul>	<ul style="list-style-type: none"> <li>• Positive relationships</li> <li>• Greater chance of avoiding impacts</li> <li>• Involvement during project design</li> <li>• Better understanding of the project</li> </ul>	<ul style="list-style-type: none"> <li>• Concerns identified before regulatory process</li> <li>• Better information coming into the regulatory process</li> <li>• Greater likelihood of traditional knowledge being incorporated into evidence being provided to the Board</li> <li>• Better-informed decisions</li> </ul>

<sup>22</sup> All organizations must address capacity for consultation issues within the space of their available human and financial resources. Under the current statutory framework, there is no funding for public participation in regulatory proceedings. It is therefore important for the Government of Canada and the GNWT to ensure that Indigenous governments have capacity at the community level to respond to applicant engagement. In specific cases, an applicant may also choose to assist with capacity in addition to the cost of engagement.

## 2.0 LWBs' Approach

The LWBs' approach to engagement and consultation is:

1. To require applicants to initiate dialogue and engagement planning **early** with affected parties, particularly affected Indigenous governments, in the early planning stages and well in advance of an application with the goal of:
  - identifying and establishing relationships;
  - sharing information;
  - identifying and understanding concerns, potential impacts (including any potential for impacts to Aboriginal and treaty rights), and interests;
  - addressing concerns raised to the extent possible early in the pre-planning stage and/or planning when to address certain concerns over the life of a project;
  - collaborating on project planning including planning for closure and reclamation (e.g. closure goals and objectives), monitoring, and mitigation design;
  - identifying and tracking commitments; and
  - ensuring appropriate levels and types of engagement are collaboratively planned for the life of the project;
2. To apply consultative approaches throughout LWB proceedings, which assists affected parties to contribute meaningfully towards the assessment of impacts on the environment, problem solving, and the establishment of appropriate mitigations; informs the LWBs' decisions in relation to licences and permits; and meets the LWBs' statutory responsibilities pursuant to the MVRMA and the *Waters Act* and their regulations. This may include assessing and ruling on the adequacy of Crown consultation, in cases where the LWB is the final decision-maker; and
3. To assess, if necessary, the adequacy of consultation by the Crown before making a final decision, taking into account information gathered during applicant engagement and through its consultative processes.

The following sections outline this approach with regard to engagement requirements (section 2.1) and LWB consultation (section 2.2) throughout regulatory proceedings, and LWB process if the Crown's duty to consult and accommodate has not been met and the LWB is responsible for a final decision on a permit or licence (section 2.3).

## 2.1 Applicant Engagement

It is the LWBs' expectation that every applicant initiates dialogue early and prior to the project planning stages, and well in advance of making an application to a LWB. The intent is to seek and understand the full nature of concerns expressed by affected parties, to consider opportunities to mitigate potential impacts from the project, and to strive toward collaborative project planning and effective consensus-building. The LWBs encourage applicants to follow locally-developed protocols and to mutually develop agreed-upon engagement approaches with affected Indigenous governments in the early stages of project planning.

Initiating engagement activities well in advance of project planning also allows for Traditional Knowledge (TK) to be incorporated early into a project. Where possible, applicants should follow local TK policies, protocols, and guidelines, including entering into TK agreements and following agreed-upon procedures for the use and protection of TK. Where TK policies or guidelines do not exist, applicants should consult with communities, Indigenous governments, and TK-holders to determine acceptable standards for working with TK-holders and handling the TK being shared. Gathering TK should be founded on a solid relationship among applicants and affected parties. In addition to following local protocols, policies, and guidelines for gathering TK, the LWBs highlight the importance of using and considering this knowledge in a way that respects the communities, Indigenous governments, and the individual TK-holders that provided it.<sup>23</sup>

An applicant, prior to submitting an application and throughout the life of the project, is expected to respond to concerns where it can do so and work with affected parties to jointly resolve such concerns. The Policy is further based on the expectation that the applicant and the affected parties will make best efforts to consider and to agree upon future engagement efforts that are reasonable in consideration of the scope, scale, and context of the project.

The LWBs' requirements for engagement are outlined below and more detailed guidance for applicants is provided in the Guidelines.

### 2.1.1 Submission Requirements

An **Engagement Record** and an **Engagement Plan** must be submitted with a new application (see section 2.1.3 for ongoing engagement expectations).<sup>24,25</sup>

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<sup>23</sup> The LWBs have [adopted](#) the Mackenzie Valley Environmental Impact Review Board's [Guidelines for Incorporating Traditional Knowledge in Environmental Impact Assessment](#) on an interim basis.

<sup>24</sup> This applies to new applications where there is not already an approved Engagement Plan in place, or where the most-recently approved Plan requires revision. Certain applications made during the life of the project (e.g. storage authorizations, permit extensions, and certain permit amendments depending on the nature) would not require a new Engagement Plan given that the most-recently approved Engagement Plan under the existing authorization will usually still apply. Applicants should consider these triggers in their initial Engagement Plan.

<sup>25</sup> Engagement Records and Engagement Plans will generally not be expected for municipal undertakings and municipal public works activities, unless otherwise determined by the LWB.

## Engagement Record

The **Engagement Record** includes an **Engagement Summary** and **Engagement Log** for each affected party. The Engagement Summary is a results-based report of engagement with **each** affected party. It is important that this summary details the outcomes of engagement and documents any unresolved concerns. The Engagement Log is a detailed account of all engagement occurrences. The resulting Engagement Record must be comprehensive and provide the LWB with evidence of what and when engagement activities took place prior to an application, a summary of key concerns, resulting changes to the proposed project based on what was heard, and which concerns remain unresolved. The Engagement Record must demonstrate that early engagement was done in good faith and that all reasonable measures have been taken to consider and reflect the views of any affected parties in the application/submission. For example, a mass email distribution to multiple affected parties notifying them of the contents of a complete application made shortly before the time of application would not, in most cases, be considered reasonable or meaningful engagement.

The LWBs acknowledge that difficulties may arise with regard to engagement. Such situations are considered by the Board on a case-by-case basis as described in section 2.1.2.

## Engagement Plan

The Engagement Plan is a forward-looking document that details timing and approaches to engagement with each affected party throughout the life of the project. It should reflect the scope, scale, and context of the project. Projects with more potential for impacts will typically require more engagement than other less-impactful ones. Elements of the Engagement Plan may need to be specific for each affected party (e.g. some parties may wish to have more/less engagement and at different stages). It is important that the Engagement Plan be developed in collaboration with each affected party as much as possible. Applicants and affected parties should discuss and come to mutual agreement upon the planned goals, methods, frequency, and process for engagement throughout the life of the project.

Applicants should refer to the Guidelines for more details regarding engagement submission requirements and recommended engagement best practices. The Guidelines also provide suggested approaches to support the submission of engagement documents, including:

- Step-by-step guidance for identifying affected parties;
- Initiation of dialogue and engagement planning; and
- Recommended engagement activities and templates/guides for engagement documentation and planning.

The Guidelines provide suggestions on the **minimum** expected levels of engagement and engagement planning based on the type and circumstances of a proposed project. (See Appendix B of the Guidelines.) Examples are provided to guide applicants working on smaller scale projects that likely require just one permit and which will likely have low or negligible impacts, versus larger projects that will require permits and licences over a longer period of time and could have the potential for higher level impacts.

### 2.1.2 Assessment of Applicant Engagement

Upon receipt of an application or submission, the LWBs will assess the Engagement Record and the Engagement Plan (if applicable) to determine whether they are complete. The LWBs recommend that both the Engagement Record and the Engagement Plan are reviewed and signed by the appropriate affected party/parties for verification prior to submission. Signed submissions will normally be considered complete and increase the likelihood of a more straightforward process. If Engagement Record and Engagement Plan submissions are not signed, the LWB will conduct a review against the guiding principles (see section 1.5) to assess:

1. Whether all potentially affected parties were engaged; and
2. Whether the timing of the engagement activities provided sufficient time for the affected parties to fully consider the application and provide their views to the applicant.

At the final decision stage, in addition to considering the two criteria above, the LWB will also assess:

3. The outcomes of applicant engagement: any concerns that were raised and how those were addressed or if they remain unresolved and why. If there are unresolved concerns at the time of submission, the Engagement Plan and Engagement Record must detail how and when these concerns can be addressed during the life of the project.

All parties will have the opportunity to provide input regarding the contents of the application, including the Engagement Record and the Engagement Plan, during the LWBs' proceeding. At the final decision stage, the LWBs will consider all evidence, including submissions made during the proceeding. The LWBs have the discretion to consider circumstances where engagement attempts have been unsuccessful. Such decisions are made on a case-by-case basis and are based on the evidence on the record. In these situations, the LWBs will assess the evidential record against the Guiding Principles. The LWBs maintain discretion to address applicant engagement with affected parties throughout the life of the project (for example, by placing conditions in permits or licences that address ongoing engagement).

### 2.1.3 Ongoing Engagement Post-Issuance of Permits and Licences

Ongoing engagement processes throughout the life of a project are iterative and allow for continued collaboration and evolving relationships. During the life of the project, permittees/licensees must implement the approved Engagement Plan, collaborate on any required changes to it over time, and conduct early engagement for all additional applications or submissions to the LWB.<sup>26</sup> Figure 2 illustrates applicant engagement requirements before an application is made and during the life of the project.

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<sup>26</sup> Some submissions may not require engagement. Applicants should conduct engagement for submissions in accordance with the approved Engagement Plan and/or the Guidelines.



*Figure 2: Applicant engagement during early stages of project planning and well before an application is made. Engagement continues throughout the life of the project.*

## 2.2 LWB Consultation

The LWBs have statutory consultation obligations under the MVRMA. The following procedural elements form part of the LWBs' consultation approach:

- Distributing applications for review and comment;
- Conducting preliminary screenings;
- Conducting public hearings;
- Distributing drafts of water licence and land use permit conditions for public review;
- Issuing and making available written reasons for its decisions;
- Managing permits and licences after they have been issued (including public reviews of reports and management plan updates); and
- Developing guidelines and policies.

The LWBs rely on their policies and guidelines to carry out their proceedings. In particular, the LWBs' [Rules of Procedure](#) set out expectations for proceedings and for parties' conduct. The LWBs will provide opportunities for meaningful consultation throughout LWB proceedings and will work with individual

parties and communities to ensure the proceedings are accessible and meet their individual needs.

The LWB must also consider any TK and scientific information that is made available to it in its decision-making process. TK is invaluable, and must be gathered, used, and considered appropriately. The LWBs value the contribution of TK as evidence in proceedings and emphasize the importance of gathering it in an appropriate way.<sup>27</sup>

### 2.3 Ruling on Adequacy of Crown Consultation

In the LWBs' view, the LWBs' responsibility to consult is separate from the Crown's constitutional duty to consult. Although the Government of Canada and the GNWT have indicated that they rely on the LWBs' proceedings to discharge their duty, the LWBs do not have a constitutional duty to consult. Their proceedings and decision-making can, however, satisfy the Crown's duty in many cases.<sup>28</sup> In addition, and where set out in the MVRMA, the LWBs do have an obligation to conduct statutory consultation, for the purposes of fulfilling their statutory mandates. Table 2 describes the differences between applicant engagement, LWB consultation, and Crown Consultation, and Figure 3 subsequently demonstrates how all three relate to regulatory process steps. Meaningful engagement and consultation is best practice and is essential to advancing reconciliation, however, the formal obligations are listed here.

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<sup>27</sup> See the LWBs' [Rules of Procedure](#) for information about requests to submit information under confidential cover.

<sup>28</sup> The Supreme Court confirmed in *Clyde River (Hamlet) v Petroleum Geo-Services Inc.* [2017 SCC 40] that although the Crown "may rely on steps undertaken by a regulatory agency to fulfil its duty to consult, the Crown always holds ultimate responsibility for ensuring consultation is adequate" (para 22). The Federal Court of Appeal in *Tseil-Waututh Nation v Canada (Attorney General)* [2018 FCA 153] further explained that "while Parliament may delegate procedural aspects of the duty to consult to a tribunal", (para 490) "when the Crown relies on a regulatory or environmental assessment process to fulfil the duty to consult, such reliance is not delegation of the Crown's ultimate responsibility to ensure consultation is adequate. Rather, it is a means by which the Crown can be satisfied that Indigenous concerns have been heard and, where appropriate, accommodated..." (para 493) and "What changes is that the Board's process serves the additional purpose of contributing to the extent possible to the constitutional imperative not to approve a project if the duty to consult was not satisfied" (para 526).

*Table 2: Differences between Applicant Engagement, LWB Consultation, and Crown Consultation*

	<b>APPLICANT</b>	<b>LWB</b>	<b>CROWN</b>
<b>Type of Obligation</b>	Engagement as per LWB Policy	Statutory (MVRMA) consultation	Common law and constitutional duty to consult
<b>Who is Engaged/Consulted</b>	Anyone potentially affected by the proposed activities	General public and Indigenous governments	Indigenous governments and Indigenous rights holders
<b>Focus of Discussions</b>	Concerns and potential impacts	Concerns and potential impacts including, but not limited to, Aboriginal and/or Treaty rights	Aboriginal and/or Treaty rights
<b>Goal</b>	Collaborative project planning to minimize concerns and potential impacts and to advance reconciliation	Ensure that concerns and potential impacts are considered in decision-making and to advance reconciliation	Fulfil legal duty to consult and accommodate Indigenous peoples of Canada by ensuring concerns and potential impacts are considered in decision-making and to advance reconciliation



*Figure 3: Engagement and consultation in relation to the regulatory process.*

In the case that the LWBs act as a final decision-maker (i.e., where Ministerial approval is not required), the LWB may need to, if necessary, assess the adequacy of consultation by the Crown before making a final decision, taking into account information gathered during applicant engagement and through its consultative processes. Where the LWB is a final decision-maker, the LWB cannot approve a licence or permit if it is not satisfied that the Crown's duty to consult and accommodate has been met. In cases where there are questions about the adequacy of Crown consultation, or any other issue that arises during the course of a LWB proceeding, the LWBs will refer to the LWBs' [Rules of Procedure](#).<sup>29</sup> For example, if significant unresolved concerns about adequacy of consultation are raised and not resolved, the LWB may need to address these concerns both procedurally and by securing additional evidence before it can complete a proceeding.

<sup>29</sup> Additional guidance regarding the assessment of adequacy of Crown consultation may be developed at a later date, if needed.