

Liquefied Natural Gas (LNG) Regulation in British Columbia

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This publication is intended as an overview of liquefied natural gas (LNG) regulation in British Columbia. Specific advice should be sought in respect of particular projects.

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The laws, regulations and policies discussed in this overview are stated as of January 31, 2017.

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I. DEFINITIONS

AIA – Archaeological impact assessment

B.C. – British Columbia

BCUC – British Columbia Utilities Commission

CCA – Capital cost allowance

CEA Agency – Canadian Environmental Assessment Agency

CEAA, 2012 – *Canadian Environmental Assessment Act, 2012*

CEPA – *Canadian Environmental Protection Act, 1999*

CO₂e – Carbon dioxide equivalent

COGOA – *Canada Oil and Gas Operations Act*

CPCN – Certificate of Public Convenience and Necessity

CSR – *Contaminated Sites Regulation* (B.C.)

Designating Regulations – *Regulations Designating Physical Activities* (Canada)

DFO – Department of Fisheries and Oceans (Canada)

EA – Environmental assessment

EAA – *Environmental Assessment Act* (B.C.)

EAO – Environmental Assessment Office (B.C.)

EMA – *Environmental Management Act* (B.C.)

FA – *Fisheries Act* (Canada)

FPDA – *Federal Port Development Act* (B.C.)

FID – Final investment decision

GHG – Greenhouse gas

GIC – Governor in Council

HCA – *Heritage Conservation Act* (B.C.)

HRIA – Heritage resources inventory and assessment

IBA – Impact benefit agreement

ICA – *Investment Canada Act*

LGIC – Lieutenant Governor in Council

LNG – Liquefied natural gas

LNG Facility Regulation – *Liquefied Natural Gas Facility Regulation* (B.C.)

MBCA – *Migratory Birds Convention Act* (Canada)

MFLNRO – Ministry of Forests, Lands and Natural Resource Operations (B.C.)

MOE – Ministry of Environment (B.C.)

NPA – *Navigation Protection Act* (Canada)

NEB – National Energy Board

NEBA – *National Energy Board Act* (Canada)

OGAA – *Oil and Gas Activities Act* (B.C.)

OGC – BC Oil and Gas Commission

PNG – Petroleum and natural gas

PNGA – *Petroleum and Natural Gas Act* (B.C.)

PNG Drilling Regulation – *Petroleum and Natural Gas Drilling Licence Regulation* (B.C.)

Projects Regulation – *Reviewable Projects Regulation* (B.C.)

SARA – *Species at Risk Act* (Canada)

TC – Transport Canada

TERMPOL – Technical Review Process of Marine Terminal Systems and Transshipment Sites

UCA – *Utilities Commission Act* (B.C.)

WDR – *Waste Discharge Regulation* (B.C.)

WSA – *Water Sustainability Act* (B.C.)

II. INTRODUCTION

In an increasingly competitive global market for natural gas, the race to export LNG to Asia is on. With continued demand for LNG in Asia, Canada is vying with the United States, Australia, Russia and countries in East Africa and the Middle East to rapidly build the infrastructure required to move LNG to key markets in Japan, Korea, Taiwan, China and India. By positioning the LNG industry in B.C. as a key driver for economic and job growth over the next few years, the B.C. government is sending a clear message: The time to act is now.

Not long ago, declining supplies of conventional natural gas meant that the North American marketplace was focused on LNG imports from other jurisdictions. However, advancements in technologies for recovering shale gas (natural gas produced from the fractures, pore spaces and physical matrix of shales) and for horizontal drilling, as well as an increase in hydraulic fracturing, have shifted the market to LNG exports.

B.C. is particularly well suited to unconventional gas production, with shale being the most commonly occurring sedimentary rock in the northeast part of the Province. In the wake of the commercial success of shale gas in the United States, the nascent LNG industry in B.C. is attracting significant interest from investors as an economically feasible venture.

B.C.'s natural gas industry has been operating safely for over half a century. As early as the 1930s, evidence of the significant benefits that can be derived from natural gas extraction has proliferated. B.C. has many advantages for companies seeking to establish LNG facilities: vast supply, proximity to Asia, a skilled workforce and a stable business environment. B.C. also has the advantage of having a predominately cold weather climate, making LNG projects in B.C. more efficient than, for example, those situated in Australia and Africa.

Unlike projects outside of North America, Canadian LNG projects will likely be able to access the United States debt capital markets to raise some or all of the debt on terms that are competitive with commercial bank financing. As has been seen on some of the United States LNG projects, the commercial bank market also has a very large appetite for LNG projects. While export credit agency financing will likely be needed for the largest projects (and may be attractive on cost terms for all Canadian LNG projects), the ability to finance using the bond or commercial bank markets is a significant advantage to Canadian LNG projects over projects outside of North America.

Because B.C. LNG projects will be starting from scratch, project proponents have an invaluable opportunity to think about government policies and infrastructure-sharing arrangements that could dramatically reduce the project's cost and make them more competitive. B.C. has built on the advantages noted above by creating a competitive policy and fiscal framework for LNG investment. The robust regulatory framework in B.C. demonstrates regulators' strong commitment to fostering a safe, profitable and beneficial LNG industry. In short, B.C. provides a highly favourable business and regulatory environment for investors.

However, as LNG project proponents are discovering, there are many layers of policy and regulation underlying the development of the LNG industry. Project proponents need a legal team with specialists in energy, environmental, taxation, regulatory, commercial, finance, Aboriginal, labour, international trade, intellectual property, and other areas of the law. This publication

examines the principal components of the current policy and regulatory framework for the development of LNG projects in B.C., as well as some of the challenges facing project proponents.

III. CURRENT POLICY SETTING

The cornerstone of B.C.'s LNG policy was released in February 2012 as an accompanying strategy to the provincial government's overall natural gas strategy. The Province's LNG strategy sets out a goal of achieving three LNG facilities by 2020, based on three priorities: (1) keeping B.C. competitive in the global LNG market; (2) maintaining B.C.'s leadership on climate change and clean energy; and (3) keeping energy rates affordable for families, communities and industry. In June 2013, the B.C. government established the new Ministry of Natural Gas Development, tasked with implementing the LNG strategy.

To foster the growth of B.C.'s LNG industry, the provincial government continues to shape the policy landscape by adjusting incentives to grow new markets in Asia, focusing on LNG-related job opportunities and training, promoting the use of natural gas and ensuring efficiency in EA review processes. As of February 2017, there were 20 proposals for LNG projects in B.C. in various stages of feasibility assessment and project planning, with one reaching FID without conditions.

On February 16, 2016, the provincial Ministry of Natural Gas Development released an updated Service Plan for 2016/17 – 2018/19. The plan forms an integral part of the Ministry's mandate, which is to guide responsible development and ensure maximum economic benefits to British Columbians from the Province's natural gas resources, new export markets related to interprovincial pipelines, oil projects and value-added natural gas products, and the Province's next new major industrial sector—the LNG industry.

The first goal of the new Service Plan sends a clear message about the Province's commitment to supporting LNG projects: ensuring a "globally competitive Liquefied Natural Gas export industry in B.C. that supports a prosperous economy and benefits all British Columbians." In order to achieve this goal, the Minister described several key strategies:

- implement a competitive fiscal and policy framework that supports LNG investment in B.C;
- work with project proponents to secure signed Project Development Agreements that will lead to financially secure arrangements for both LNG developers and taxpayers;
- work with the Ministry of Aboriginal Relations and Reconciliation and the federal government to develop specific First Nations negotiation mandates along the pipeline corridors, LNG plant locations and marine traffic routes in order to facilitate rapid investment in LNG facilities;
- work with the MFNLRO to ensure that Crown land disposition processes support LNG investment and the development of linear infrastructure, including pipelines, roads and electricity required for new LNG facilities;

- work closely with the Ministry of Jobs, Tourism and Skills Training, and the federal government, where appropriate, to develop and implement programs that address skills gaps and meet the labour needs of the LNG and natural gas sectors;
- work with BC Hydro to ensure an adequate supply of clean, affordable electricity is available from the grid to support new investments in LNG, and in electrification opportunities to support upstream natural gas and oil exploration and development; and
- build global investor awareness through inbound and outbound international trade missions and LNG in B.C. International Conference.

In addition, the Minister acknowledged the fact that LNG facilities require large amounts of energy. Accordingly, electricity supply and grid interconnection agreements must be in place before FIDs on LNG projects can be made. The Ministry, therefore, has committed itself to increasing the number of power supply agreements reached with LNG project proponents. To that end, BC Hydro has concluded a number of electricity supply and grid interconnection agreements with LNG proponents and anticipates further agreements.

The Province also intends to enter into Project Development Agreements with project proponents in order to provide certainty for LNG development with respect to costs within provincial jurisdiction. These agreements will provide proponents with long-term certainty about the fiscal and policy framework that will apply to their projects once they have reached FID and proceed with construction. The agreements cover a range of matters including B.C.'s LNG tax legislation, B.C.'s corporate income tax and carbon tax, municipal taxes, GHG emission benchmarks, upstream benefits and representations regarding B.C.'s positions on skills and jobs training, engagement with First Nations and federal-provincial issues. One of these agreements has been concluded with a major proponent.

On July 21, 2015, the *Liquefied Natural Gas Project Agreements Act*, which provides the legislative authority for government to enter into LNG Project Agreements and which allows for the ratification of the first LNG Project Agreement, received Royal Assent and came into force.

The Minister also emphasized the importance of ensuring a robust regulatory framework that supports environmentally and socially responsible LNG development in B.C. The Minister cited several strategies aimed at achieving this objective:

- continue to work with the OGC, permitting agencies, local authorities and the EAO to ensure streamlined, integrated and robust regulatory and permitting processes;
- work with the Ministry of Aboriginal Relations and Reconciliation to develop and implement policies that result in First Nations' meaningful engagement specific to the development of an LNG industry;
- in consultation with the Climate Action Secretariat and the federal government, implement world-leading GHG emission benchmarks that ensure B.C. LNG facilities are the cleanest in the world, while providing strong incentives for the use of clean energy from the BC Hydro grid;

- work with the MOE and, in consultation with the federal government, implement air emission standards and interim ambient air quality objectives that protect health, are consistent with leading jurisdictions and encourage clean LNG facilities;
- work with First Nations, communities and the federal government to ensure best practices are in place to guide marine traffic and the safe shipment of LNG to export markets; and
- work with the federal government and the Port of Prince Rupert to ensure that the regulation of LNG facilities and related pipeline projects on federal lands in the Port of Prince Rupert occurs in substantially the same manner as other projects in the Province.

IV. PERMITS AND APPROVALS

The regulatory and permitting process for the development of LNG projects in B.C. is complex and requires the project proponent to interact with federal, provincial and municipal authorities. The following section provides an overview of the regulatory and permitting framework in B.C. for (a) natural gas exploration, development and production; and the construction and operation of (b) pipelines and gas processing facilities and (c) LNG facilities.

A. EXPLORATION, DEVELOPMENT AND PRODUCTION

1. PROVINCIAL

a. Petroleum and Natural Gas Tenure

Most PNG resources in B.C. are owned by the provincial Crown, with small percentages privately owned or held by the federal Crown. The PNGA and its regulations provide the framework for the administration of Crown-owned subsurface PNG rights. PNG tenures provide time-limited rights to hold or occupy land and are intended to facilitate the sustainable and efficient development of PNG resources. Crown-owned PNG rights are granted through three forms of tenure under the PNGA: permits, drilling licences and leases. Permits and drilling licences are exploratory forms of tenure. Leases are the only form of tenure giving a right of production. Because permits are rarely granted, the rest of this discussion will focus on drilling licences and leases.

Drilling Licences

Pursuant to the PNG Drilling Regulation, drilling licences convey the exclusive right to explore for PNG in a defined area. Drilling licences are acquired through a monthly Crown disposition auction process and are convertible to leases in proportion to a licensee's exploratory drilling effort. The auction process is generally initiated by industry when the offering of specific PNG rights is requested, and the decision to dispose of the specific PNG rights is determined at the discretion of the Ministry. Each bid received for a parcel is adjudicated and the tenure typically goes to the highest bidder as long as the bid is acceptable to the Province. A licence grants the exclusive right to apply for exploratory drilling for PNG resources. Drilling licences have terms of three, four or five years, depending upon which part of B.C. the tenure is in.

Drilling licences are intended to stimulate exploration and infrastructure investment through the requirement to drill “earning wells,” which provide credits toward converting the drilling licence to a lease. The drilling licence is the primary form of exploration tenure held in B.C.

Leases

Drilling licences are typically converted into leases, which grant the exclusive right to produce PNG resources. A lease is the only form of tenure that gives a right of production, the issuance of which terminates the underlying licence. Leases are acquired either directly through the Crown disposition auction process or by conversion from permits or drilling licences. Leases convey the exclusive right to explore and produce PNG in the defined area. A lease acquired through a Crown disposition must coincide with the boundaries of the natural gas spacing area grid, but otherwise does not have restrictions on its size or shape.

Drilling licences do not have annual work requirements. However, to convert part or all of a drilling licence to a lease, licensees must drill one or more earning wells on their drilling licence or on a nearby drilling licence to “earn” the area to be converted into a lease. Generally, this requires the drilling of an “earning well” that generates well reports and well data that, in the opinion of the director, sufficiently evaluate a zone in a gas spacing unit. If the Energy and Natural Resources Department believes a lease location is not being developed sufficiently, the Minister may (except during the three years after the date of issue of the lease) require the lessee to submit a plan for the development of the lease location. If the lessee does not comply, or if the Minister believes that a development plan submitted is not adequate for the purposes of developing a lease location, the Minister may give notice to the holder, requiring the lessee to begin the drilling of a well on the lease location.

b. Oil and Gas Activities Act

Pursuant to the OGAA, the OGC is the principal regulator of oil and gas activities in B.C., including the regulation of specified provisions of the EMA, the HCA, the *Land Act*, the *Forest Act* and the WSA. B.C. has a “single window” approach to the regulation of oil and gas activities, meaning that the OGC has broad authority under a wide variety of acts and regulations in order to regulate oil and gas activities.

The OGC’s core roles include reviewing and assessing applications for industry activity, consulting with First Nations, ensuring industry compliance with provincial legislation and cooperating with partner agencies. The public interest is protected through the OGC’s objectives of ensuring public safety, protecting the environment, conserving petroleum resources and ensuring equitable participation in production.

The *Drilling and Production Regulation* under authority of the OGAA addresses well permits along with well spacing, well operations, well abandonment, well data, safety, pollution prevention and production operations. In particular, it includes sections on fracturing operations, hydraulic isolation, fracturing fluids records, produced water and water source wells. The OGC will consider environmental issues when issuing a well permit, particularly if a drilling activity is located in an environmentally sensitive area. Before making a determination on a well permit application, the OGC will perform technical reviews on areas such as archaeology, land and habitat.

c. *Heritage Conservation Act*

An AIA and an HRIA may be required under the HCA. If archaeological or culturally significant resources exist at the project site, the AIA will confirm this and recommend mitigation measures. A permit may also be required under the HCA in respect of investigative work in order to identify any archaeological or historical resources that may be located within project areas. Such permits are also issued by the OGC in respect of oil and gas activities.

d. *Water Use*

The WSA, which was passed by the Legislature in April 2014, came into effect on February 29, 2016. The WSA replaces many parts of the old *Water Act* and creates a new regulatory regime for water management within B.C.

The WSA seeks to make improvements in seven key areas: (1) protecting stream health and aquatic environments; (2) considering water in land use decisions; (3) regulating and protecting groundwater; (4) regulating water use during times of scarcity; (5) improving security, water use efficiency and conservation; (6) measuring and reporting large-scale water use; and (7) providing a range of governance approaches. One of the biggest changes that the WSA makes is to the regulation of groundwater. Under the WSA, all groundwater users (except domestic wells) will require a water licence to divert water from an aquifer (unless the diversion is otherwise authorized under the regulations). Groundwater licence applications can be submitted to the MFLNRO through FrontCounter BC.

The Province is taking a phased approach to the enactment of the WSA. While the majority of the WSA came into effect at the end of February 2016, section 18, which provides for quick licensing procedures, has yet to be brought into force. The next phase of the regulations and policies is expected to include regulations relating to measuring and reporting, livestock watering, water objectives, planning and governance. Along with the WSA, the following regulatory scheme also came into effect on February 29, 2016:

- the *Water Regulation* under the *Water Act* was repealed and the *Water Sustainability Regulation* was enacted under the WSA;
- the *Ground Water Protection Regulation* under the *Water Act* was repealed and a new *Groundwater Protection Regulation* was enacted under the WSA;
- the *British Columbia Dam Safety Regulation* under the *Water Act* was repealed and a new *Dam Safety Regulation* was enacted under the WSA;
- the *Water District Regulation* was enacted under the WSA;
- the *Water Sustainability Fees, Rentals and Charges Tariff Regulation* was enacted under the WSA;
- the *Sensitive Streams Designation and Licencing Regulation* under the *Fish Protection Act* was repealed; and

- the *Violation Ticket Administration and Fines Regulation* under the *Offence Act* was amended to add offences and fines under the WSA.

The WSA governs licensing of surface and sub-surface water use, which may be required for drilling activities. While the MFLNRO is responsible for issuing long-term water licences, the OGC administers water licences for short-term use under the WSA. The WSA and the corresponding *Water Sustainability Regulation* also require approval of “changes in and about a stream”. These approvals are also administered by the OGC in relation to oil and gas activities. The OGC administers authority over subsurface water through water source wells, water injection wells and water disposal wells. Operators must report water withdrawals, injections or disposals into associated wells on a monthly basis. This reporting is done in the same manner in which oil and natural gas production is reported.

e. Contaminated Sites

Contaminated sites in the context of oil and gas activities are managed by the OGC and the MOE under the OGAA and the EMA. The EMA and the corresponding CSR establish what is a contaminated site, who is responsible for remediation and how remediation must occur. The category of persons responsible for remediation of a contaminated site includes current and previous owners or operators of the site and producers and transporters of the contaminating substance. An owner is defined broadly as a person who is in possession of the site, has the right of control of the site, or occupies or controls the use of the site. An owner also includes a person with a legal or equitable interest in the site. An operator is a person who is in control of or responsible for an operation on the site.

Under the EMA, persons responsible for remediation of contaminated sites are absolutely, retroactively and jointly and separately liable for any costs reasonably incurred to remediate the contaminated site. This means that if a project site is contaminated, the owner and any other responsible persons will be responsible for the cleanup of the site. Responsible persons are also liable for contamination that has migrated off-site to neighbouring properties.

The EMA provides for cost recovery actions in civil court, whereby responsible persons may recover investigation and remediation costs associated with a contaminated site from other responsible persons.

f. Reclamation and Remediation

All wells must be restored according to the requirements under the OGAA. When a PNG site is no longer productive, the operator is required to:

- remove hazards and reclaim the site in accordance with the OGAA;
- maintain the surface lease or surface land tenure at the site until a certificate of restoration has been obtained from the OGC;
- conduct an environmental site investigation to identify the presence of any contamination and submit a report detailing how the contamination has been managed and the site remediated; and

- hire a qualified reclamation specialist to verify that the surface reclamation meets all provincial requirements.

g. Waste Discharge

The EMA and the associated WDR are the principal pieces of regulation that govern pollution management in the Province. The administration of the EMA falls primarily to the MOE. The EMA prohibits prescribed industries from introducing waste, such as effluent, litter and refuse, into the environment unless such activities are otherwise authorized by the EMA and any applicable permitting or approval requirements, orders, regulations or waste management plans. Oil and gas activities are generally subject to this prohibition.

As discussed previously, the OGC acts as the single-window regulatory agency for the purposes of oil and gas activities in B.C. This means most of the waste discharge permits for a project will be handled by the OGC. Drilling activities will likely require a waste discharge permit for activities such as wastewater discharge and hazardous waste disposal. Significantly, waste also includes air contaminants such as particulate matter; therefore, air emissions generated by drilling activities may require a permit under the EMA.

A permit under the EMA is the most common form of authorization, and any such permit will set out specific terms and conditions under which discharge may occur. It may set limits on the quantity and quality of waste contaminants, require discharge monitoring and set out reporting requirements.

The *Oil and Gas Waste Regulation*, under authority of the OGAA, authorizes waste discharges to the environment from oil and gas facilities, including air discharges related to drilling operations and for the injection of produced water and returned completion fluids into approved disposal wells.

h. Species at Risk

The provincial *Wildlife Act* protects virtually all vertebrate animals from direct harm, except as allowed by regulation (e.g., hunting or trapping). Legal designation as “endangered” or “threatened” under this Act increases the penalties for harming a species, and also enables the protection of habitat in a Critical Wildlife Management Area. In addition, the *Wildlife Act* regulates the management of wildlife in B.C., other than on federal lands. Although much of it relates to hunting, the *Wildlife Act* was amended in 2004 to allow the Ministry to create an endangered species list, and to provide protections for listed species similar to those under the federal SARA; however, as of the date of this publication, these amendments are not yet in force. A key difference from SARA, however, is that the *Wildlife Act* does not allow for critical habitat designation on private land. It also has specific protections for raptors and their habitats. Activities such as drilling potentially impact species at risk, including caribou and migratory birds.

i. Regulation of Hydraulic Fracturing

The development of shale gas typically uses hydraulic fracturing. Hydraulic fracturing (also called “fracking”) is the process of pumping a fluid or a gas down a well, many hundreds or thousands of metres below ground, to a depth considered appropriate for natural gas production. The

pressure this creates causes the surrounding rock to crack, or fracture. A fluid (usually water with some additives) holding a suspended proppant (usually sand) then flows into the cracks. When the pumping pressure is relieved, the water disperses, leaving a thin layer of the sand to prop open the cracks. This layer acts as a conduit to allow the natural gas to escape from tight (low-permeability) formations and flow to the well so that it can be recovered. The technology is carefully used and managed to minimize any environmental impacts, particularly on groundwater.

The Canadian Association of Petroleum Producers has released Guiding Principles and Operating Practices for Hydraulic Fracturing, which is recommended for observance by operators employing fracturing techniques. These state, among other things, that operators should commit to the following:

- safeguarding the quality and quantity of regional surface and groundwater resources, through sound wellbore construction practices, sourcing fresh water alternatives where appropriate and recycling water for reuse as much as practical;
- measuring and disclosing water use with the goal of continuing to reduce the effect on the environment;
- supporting the development of fracturing fluid additives with the least environmental risks;
- supporting the disclosure of fracturing fluid additives; and
- continuing to advance, collaborate and communicate technologies and best practices that reduce the potential environmental risks of hydraulic fracturing.

While these principles are not legally binding, they have arguably become an industry standard and are generally followed and complied with.

Since January 1, 2012, the OGC has required the disclosure of hydraulic fracturing liquids by extraction companies to reveal the additives used in fracking operations. The OGC's FracFocus Chemical Disclosure Registry, a public website, is now in place with uploaded records of wells located in B.C. and other jurisdictions. The uploaded "fracturing records" include information such as the fracture date, well location, operator name and chemical ingredients.

2. FEDERAL

a. *Fisheries Act*

Under the FA, it is an offence for any person to carry on any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery, without an authorization from the DFO. "Serious harm to fish" means the death of fish or any permanent alteration to, or destruction of, fish habitat. Authorizations permitting such harm are frequently the subject of detailed discussion and review by DFO. It is also an offence for any person to deposit or permit the deposit of a deleterious substance of any type in water frequented by fish. "Deleterious substance" includes any substance that, if added to any water, would degrade or alter the quality of water so that it is rendered deleterious to fish or fish habitat. The FA also requires persons to notify the DFO of an

occurrence of serious harm to fish and deposit of a deleterious substance, or serious and imminent danger of such occurrence.

On June 20, 2016, the Federal Government launched a comprehensive review of the regulatory process under the FA, which began in late 2016.

b. Species at Risk

SARA covers all wildlife species listed as being at risk nationally (and their critical habitats). The protections in SARA apply throughout Canada to all aquatic species and migratory birds (as listed in the federal MBCA) regardless of whether the species are resident on federal, provincial, public or private land. This means that if a species is listed in SARA and is either an aquatic species or a migratory bird, there is a prohibition against harming it or its residence, and penalties for such harm can be substantial.

The MBCA implements an international agreement between Canada and the United States for the protection of migratory birds. Although most of the statute regulates harvesting or hunting, it also contains some environmental protection provisions. Specifically, it prohibits the deposit of oil, oil waste or other substances harmful to migratory birds in any waters or areas frequented by migratory birds, except as authorized by regulation. It also prohibits the disturbance of the nests of migratory birds.

c. Other Permits

Other permits under federal legislation may be required for activities associated with drilling activities, including NPA approvals to construct the various project components that would impact navigation, and permits for the disposal of excavated or dredged material at sea under CEPA.

B. PIPELINES/GAS PROCESSING FACILITIES

1. PROVINCIAL

a. *Oil and Gas Activities Act*

Under the OGAA, a permit is required from the OGC in order to conduct an “oil and gas activity,” which includes the construction and operation of pipelines and gas processing plants. In respect of such permit holders, the OGAA also sets out various obligations and environmental protection and management requirements.

b. BCUC Approvals

Absent an exemption order, public utilities in B.C. are subject to a comprehensive scheme of facility, financial and rate regulation by the BCUC under the UCA. The term “public utility” is defined in the UCA as a person who owns or operates in B.C. equipment or facilities for the production, generation, storage, transmission, sale, delivery or provision of natural gas to or for the public or a corporation for compensation.

Accordingly, the owner or operator of a pipeline or gas processing plant would be a public utility under the UCA if the facility in question is used to provide services to third parties under a tolling or other fee-for-service structure. Public utilities may not construct or operate facilities without first obtaining a CPCN from the BCUC and may only provide services and charge rates that are approved by the BCUC. Applications to the BCUC for these authorizations and approvals are typically considered by the BCUC through public hearing processes.

The BCUC may, on conditions it considers advisable and with the advance approval of the Minister responsible for the administration of the *Hydro and Power Authority Act*, exempt a person, equipment or facilities from requirements under the UCA. The BCUC is typically willing to grant an exemption in situations where the facility owner does not have the ability to exert monopoly powers over B.C. ratepayers because of competitive circumstances. For example, owners of provincially regulated natural gas processing and pipeline facilities in B.C. who provide services to third parties on a fee-for-service basis fall within the definition of “public utility”; however, these facilities have typically been exempt from regulation by the BCUC on the basis that they operate in a competitive market and are not able to exert, either directly or indirectly, monopoly power over B.C. ratepayers.

c. Provincial EA

In B.C., the primary EA legislation is the EAA and the main regulator is the EAO. If the pipeline project meets the thresholds set out in the Projects Regulation, a provincial EA will be triggered, which will focus on the potential environmental, economic, social, heritage and health effects of the development of the project. Under the Projects Regulation, a new pipeline will require an EA if it has (a) a diameter of ≤ 114.3 mm and a length of ≥ 60 km; (b) a diameter of between > 114.3 and ≤ 323.9 mm and a length of ≥ 50 km; or (c) a diameter of ≥ 323.9 mm and a length of ≥ 40 km. An EA is also required for a new natural gas processing facility that (a) has the design capacity to process natural gas at a rate of < 5.634 million m^3/day and will result in sulphur emissions to the atmosphere of ≥ 2 tonnes/day; or (b) has the design capacity to process natural gas at a rate

of ≥ 5.634 million m^3/day . Criteria are also specified for modifications of existing pipelines and facilities.

The provincial process is carried out in three phases: (1) the pre-application phase, where the proponent provides basic information about the project; (2) the application review phase; and (3) the EA certificate decision. Depending on the technical complexity of the project and consultation requirements, the pre-application stage typically takes 12 to 18 months to complete. The application review stage is governed by legislated timelines, so the EAO has six months to review the application once it has been accepted. Following review, the EAO will refer its report and recommendations to the Minister of Environment and the Minister of Natural Gas Development for review, and the Ministers will have 45 days to make a decision as to whether to certify the project (the time limit may be extended by the Ministers if needed).

By their nature, federal and provincial EA regulatory processes overlap. To clarify roles and responsibilities, as well as to avoid duplication of efforts, the federal and provincial governments have entered into the *Canada-British Columbia Agreement on Environmental Assessment Cooperation (2004)*. In addition, the B.C. and federal governments have in place a *Memorandum of Understanding on the Substitution of Environmental Assessments* to help facilitate a single review process where both provincial and federal EAs are required. If a project will be subject to separate federal and provincial EA processes, such processes can be harmonized between the CEA Agency and the EAO.

d. *Heritage Conservation Act*

As part of the provincial EA process, an AIA and a HRIA will be required under the HCA. If archaeological or culturally significant resources exist at the project site, the AIA will confirm this and recommend mitigation measures. A permit may also be required under the HCA in respect of investigative work in order to identify any archaeological or historical resources that may be located within project areas. Such permits are also issued by the OGC in respect of oil and gas activities.

e. *Water Use*

The WSA, which was passed by the Legislature in April 2014, came into effect on February 29, 2016. The WSA replaces many parts of the old *Water Act* and creates a new regulatory regime for water management within B.C.

The WSA seeks to make improvements in seven key areas: (1) protecting stream health and aquatic environments; (2) considering water in land use decisions; (3) regulating and protecting groundwater; (4) regulating water use during times of scarcity; (5) improving security, water use efficiency and conservation; (6) measuring and reporting large-scale water use; and (7) providing a range of governance approaches. One of the biggest changes that the WSA makes is to the regulation of groundwater. Under the WSA, all groundwater users (except domestic wells) will require a water licence to divert water from an aquifer (unless the diversion is otherwise authorized under the regulations). Groundwater licence applications can be submitted to the MFLNRO through FrontCounter BC.

The Province is taking a phased approach to the enactment of the WSA. While the majority of the WSA came into effect at the end of February 2016, section 18, which provides for quick licensing procedures, has yet to be brought into force. The next phase of the regulations and policies is expected to include regulations relating to measuring and reporting, livestock watering, water objectives, planning and governance. Along with the WSA, the following regulatory scheme also came into effect on February 29, 2016:

- the *Water Regulation* under the *Water Act* was repealed and the *Water Sustainability Regulation* was enacted under the WSA;
- the *Ground Water Protection Regulation* under the *Water Act* was repealed and a new *Groundwater Protection Regulation* was enacted under the WSA;
- the *British Columbia Dam Safety Regulation* under the *Water Act* was repealed and a new *Dam Safety Regulation* was enacted under the WSA;
- the *Water District Regulation* was enacted under the WSA;
- the *Water Sustainability Fees, Rentals and Charges Tariff Regulation* was enacted under the WSA;
- the *Sensitive Streams Designation and Licencing Regulation* under the *Fish Protection Act* was repealed; and
- the *Violation Ticket Administration and Fines Regulation* under the *Offence Act* was amended to add offences and fines under the WSA.

The WSA governs licensing of surface and sub-surface water use, which may be required for the construction or operation of the pipeline. While the MFLNRO is responsible for issuing long-term water licences, the OGC administers water licences for short-term use under the WSA. The WSA and corresponding *Water Sustainability Regulation* also require approval of “changes in and about a stream”. These approvals are also administered by the OGC in relation to an oil and gas activity.

f. Contaminated Sites

Contaminated sites in the context of oil and gas activities are managed by the OGC and the MOE under the OGAA and the EMA. The EMA and the corresponding CSR establish what is a contaminated site, who is responsible for remediation and how remediation must occur. The category of persons responsible for remediation of a contaminated site includes current and previous owners or operators of the site and producers and transporters of the contaminating substance. An owner is defined broadly as a person who is in possession of the site, has the right of control of the site, or occupies or controls the use of the site. An owner also includes a person with a legal or equitable interest in the site. An operator is a person who is in control of or responsible for an operation on the site.

Under the EMA, persons responsible for remediation of contaminated sites are absolutely, retroactively and jointly and separately liable for any costs reasonably incurred to remediate the contaminated site. This means that if a project site is contaminated, the owner and any other

responsible persons will be responsible for the cleanup of the site. Responsible persons are also liable for contamination that has migrated off-site to neighbouring properties.

The EMA provides for cost recovery actions in civil court, whereby responsible persons may recover investigation and remediation costs associated with a contaminated site from other responsible persons.

g. Spill Reporting

Under the OGAA, a permit holder and a person carrying out an oil and gas activity, which includes the construction or operation of a pipeline, must prevent spillage and must promptly report to the OGC any damage or malfunction likely to cause spillage that could be a risk to public safety or the environment. Further, if spillage occurs, a permit holder or person carrying out an oil and gas activity must promptly remedy the cause or source of the spillage; contain and eliminate the spillage; remediate any land or body of water affected by the spillage; and, if the spillage is a risk to public safety or the environment, report to the OGC the location and severity of the spillage and any damage or malfunction causing or contributing to the spillage.

h. Waste Discharge

The EMA and the associated WDR are the principal pieces of regulation that govern pollution management in the Province. The administration of the EMA falls primarily to the MOE. The EMA prohibits prescribed industries from introducing waste, such as effluent, litter and refuse, into the environment unless such activities are otherwise authorized by the EMA and any applicable permitting or approval requirements, orders, regulations or waste management plans. Oil and gas activities are generally subject to this prohibition.

As discussed previously, the OGC acts as the single-window regulatory agency for the purposes of oil and gas activities in B.C. This means that most of the waste discharge permits for a pipeline project will be handled by the OGC. Significantly, waste also includes air contaminants such as particulate matter; therefore, air emissions generated by pipeline construction or operation may require a permit under the EMA.

i. Species at Risk

The provincial *Wildlife Act* protects virtually all vertebrate animals from direct harm, except as allowed by regulation (e.g., hunting or trapping). Legal designation as “endangered” or “threatened” under this Act increases the penalties for harming a species, and also enables the protection of habitat in a Critical Wildlife Management Area. In addition, the *Wildlife Act* regulates the management of wildlife in B.C., other than on federal lands. Although much of it relates to hunting, the *Wildlife Act* was amended in 2004 to allow the Ministry to create an endangered species list, and to provide protections for listed species similar to those under the federal SARA; however, as of the date of this publication, these amendments are not yet in force. A key difference from SARA, however, is that the *Wildlife Act* does not allow for critical habitat designation on private land. It also has specific protections for raptors and their habitats.

2. FEDERAL

a. National Energy Board

The federal government has the primary and exclusive jurisdiction over interprovincial pipelines, whereas pipelines located wholly within a province and that do not otherwise form part of an existing federal pipeline system are within the exclusive jurisdiction of the provincial legislature. Accordingly, the construction and operation of interprovincial pipelines is governed by the federal NEBA and administered by the NEB.

As part of its mandate, the NEB has regulatory responsibility over the construction and operation of all interprovincial pipeline facilities. Major facility projects require the issuance of CPCNs. The NEB has the responsibility to make recommendations to the federal Cabinet (i.e., the GIC) on whether the applied-for facilities meet a “public convenience and necessity” threshold. In making its recommendation, the NEB may have regard to (1) the availability of oil, gas or any other commodity to the pipeline; (2) the existence of markets, actual or potential; (3) the economic feasibility of the pipeline; (4) the financial responsibility and financial structure of the applicant; and (5) any public interest that in the NEB’s opinion may be affected by the issuance of the CPCN or dismissal of the application. The decision to issue, or not, a CPCN is one that rests with the GIC. This decision takes the form of an order that is imposed and implemented by the NEB.

In addition, EAs under CEAA, 2012 are consolidated with applications for CPCNs from the NEB. Under the NEBA, if an application relates to a designated project within the meaning of CEAA, 2012, the NEB’s recommendation report respecting the issuance of a CPCN must also set out the EA prepared under CEAA, 2012.

On June 20, 2016, the Federal Government launched a comprehensive review of the regulatory process under the NEB, which began in late 2016 with the government receiving input from stakeholders in December.

b. Pipeline Safety

On June 18, 2015, the *Pipeline Safety Act*, amending the damage prevention provisions in the NEBA and COGOA, received Royal Assent. The amendments, which came into force on June 19, 2016, aim to enhance Canada’s pipeline safety system by increasing the liability of pipeline operators and the control of the NEB. In particular, the Act:

- reinforces the “polluter pays” principle;
- confirms that liability of pipeline companies is unlimited if an unintended or uncontrolled release of oil, gas or any other commodity is a result of fault or negligence;
- establishes the limit of liability, without proof of fault or negligence, at no less than \$1 billion for companies that operate pipelines with capacity to transport at least 250,000 barrels of oil per day and at an amount prescribed by regulation for companies that operate any other pipelines;

- requires that pipeline companies maintain the financial resources necessary to pay the amount of the limit of liability that applies to them;
- authorizes the NEB to order any company that operates a pipeline from which an unintended or uncontrolled release of oil, gas or any other commodity occurs to reimburse government institutions the costs incurred in taking any action in relation to the release;
- requires that pipeline companies remain responsible for their abandoned pipelines;
- authorizes the NEB to order pipeline companies to maintain funds to pay for the abandonment of their pipelines;
- authorizes the NEB to take, in certain circumstances, any action the NEB considers necessary in relation to an unintended or uncontrolled release of oil, gas or any other commodity from a pipeline; and
- allows the GIC to establish, in certain circumstances, a pipeline claims tribunal to examine and adjudicate claims for compensation for damage caused by an unintended or uncontrolled release of oil, gas or any other commodity from a pipeline.

Along with the amendments the NEBA and COGOA, the following regulations also came into force on June 19, 2016:

- *National Energy Board Pipeline Damage Prevention Regulations – Authorizations* replace the *National Energy Board Pipeline Crossing Regulations, Part I*
- *National Energy Board Pipeline Damage Prevention Regulations – Obligations of Pipeline Companies* replace the *National Energy Board Pipeline Crossing Regulations, Part II*
- *Regulations Amending the National Energy Board Onshore Pipeline Regulations*
- *Regulations Amending Administrative Monetary Penalties Regulations (National Energy Board)*

These regulations set out the obligations of pipeline companies and individuals planning construction, ground disturbance activities or crossings in the vicinity of an NEB-regulated pipeline. Under the new regulations:

- Pipeline companies operating a pipeline within a geographical area where a one-call centre exists are required to become members of that centre.
- Individuals are required to contact a one-call centre before engaging in an activity that would cause ground disturbance in the vicinity of a pipeline.
- Pipeline companies are required to have a damage prevention program in place within their management systems. Under a damage prevention program, a pipeline company is required to maintain an ongoing public awareness program, monitor land use and land

ownership changes near a pipeline, and have standards and processes for managing activity requests and locates.

- Individuals and pipeline companies planning to conduct ground disturbance activities within the prescribed area, defined as a strip of land measured 30 metres perpendicularly on each side from the centreline of a pipe, must meet the requirements outlined in the regulations.

c. Federal EA

If a proposed pipeline meets the thresholds under the Designating Regulations, a federal EA may be required. Under the Designating Regulations, an EA under CEAA, 2012 is required for the construction, operation, decommissioning and abandonment of an oil and gas facility or an oil and gas pipeline in a wildlife area or migratory bird sanctuary, or an oil and gas pipeline with a length of 40 km or more. CEAA, 2012 provides the framework for the federal EA process, and the regulator is the NEB for interprovincial pipelines and the CEA Agency for intraprovincial pipelines. The focus of the federal process is on assessing potentially adverse environmental effects that are within federal jurisdiction, including fish and fish habitat, other aquatic species, migratory birds, federal lands, effects that cross provincial or international boundaries and impacts on Aboriginal peoples. A federal EA process can be expected to take from 24 to 36 months to complete from the time a project description is submitted, but delays may occur if the project proponent is required to submit further information or legislated timelines are extended by the Minister to enable interjurisdictional cooperation or because of project-specific circumstances.

On June 20, 2016, the Federal Government launched a comprehensive review of the regulatory process under CEAA, 2012, which began in late 2016 with the government receiving input from stakeholders in December.

d. Fisheries Act

Under the FA, it is an offence for any person to carry on any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery, without an authorization from the DFO. “Serious harm to fish” means the death of fish or any permanent alteration to, or destruction of, fish habitat. Authorizations permitting such harm are frequently the subject of detailed discussion and review by DFO. It is also an offence for any person to deposit or permit the deposit of a deleterious substance of any type in water frequented by fish. “Deleterious substance” includes any substance that, if added to any water, would degrade or alter the quality of water so that it is rendered deleterious to fish or fish habitat. The FA also requires persons to notify the DFO of an occurrence of serious harm to fish and deposit of a deleterious substance, or serious and imminent danger of such occurrence.

On June 20, 2016, the Federal Government launched a comprehensive review of the regulatory process under the FA, which began in late 2016.

e. Species at Risk

SARA covers all wildlife species listed as being at risk nationally (and their critical habitats). The protections in SARA apply throughout Canada to all aquatic species and migratory birds (as listed in the federal MBCA) regardless of whether the species are resident on federal, provincial, public or private land. This means that if a species is listed in SARA and is either an aquatic species or a migratory bird, there is a prohibition against harming it or its residence, and penalties for such harm can be substantial.

The MBCA implements an international agreement between Canada and the United States for the protection of migratory birds. Although most of the statute regulates harvesting or hunting, it also contains some environmental protection provisions. Specifically, it prohibits the deposit of oil, oil waste or other substances harmful to migratory birds in any waters or areas frequented by migratory birds, except as authorized by regulation. It also prohibits the disturbance of the nests of migratory birds.

f. Other Permits

Other permits under federal legislation may be required for activities associated with the pipeline, including NPA approvals to construct the various project components that would impact navigation, and permits for the disposal of excavated or dredged material at sea under CEPA.

C. LNG FACILITIES

1. PROVINCIAL

a. *Oil and Gas Activities Act*

The OGC regulates oil and gas activities in B.C. under authority of the OGAA. “Oil and gas activities” include the processing and storage of oil and gas. B.C. has a “single window” approach to the regulation of oil and gas activities, meaning that the OGC has broad authority to regulate oil and gas activities under a wide variety of legislation including the EMA, the HCA, the *Land Act*, the *Forest Act* and the WSA.

Under the OGAA, a person must not carry out an oil and gas activity unless the person holds a valid permit. Applications for LNG facility permits are governed by the LNG Facility Regulation. The LNG Facility Regulation also includes provisions related to construction, engineering design and LNG siting requirements; site restoration after construction; pre-operation testing; hazard analysis and risk assessment; safety and loss management programs; emergency planning and response; flaring and venting limits; and noise and light control.

b. BCUC Approvals

Absent an exemption order, public utilities in B.C. are subject to a comprehensive scheme of facility, financial and rate regulation by the BCUC under the UCA. The term “public utility” is defined in the UCA as a person who owns or operates in B.C. equipment or facilities for the production, generation, storage, transmission, sale, delivery or provision of natural gas to or for the public or a corporation for compensation.

Accordingly, the owner or operator of an LNG export facility would be a public utility under the UCA if the facility in question is used to provide services to third parties under a tolling or other fee-for-service structure. Public utilities may not construct or operate facilities without first obtaining a CPCN from the BCUC and may only provide services and charge rates that are approved by the BCUC. Applications to the BCUC for these authorizations and approvals are typically considered by the BCUC through public hearing processes.

The BCUC may, on conditions it considers advisable and with the advance approval of the Minister responsible for the administration of the *Hydro and Power Authority Act*, exempt a person, equipment or facilities from requirements under the UCA. The BCUC is typically willing to grant an exemption in situations where the facility owner does not have the ability to exert monopoly powers over B.C. ratepayers because of competitive circumstances. In the case of an LNG export facility built to serve foreign markets, there would presumably be no ability or reason for gas distribution utilities or end-use consumers in B.C. to rely on or use the facility, either directly or indirectly, and therefore no reason for the BCUC to be interested in regulating the facility and not grant an exemption order.

c. Provincial EA

In B.C., the primary EA legislation is the EAA and the main regulator is the EAO. If a project meets the thresholds set out in the Projects Regulation, a provincial EA will be triggered, which will focus

on the potential environmental, economic, social, heritage and health effects of the development of the project. Under the Projects Regulation, an EA is required for a new natural gas processing plant facility that (a) has the design capacity to process natural gas at a rate of < 5.634 million m^3/day and will result in sulphur emissions to the atmosphere of ≥ 2 tonnes/day; or (b) has the design capacity to process natural gas at a rate of ≥ 5.634 million m^3/day . Criteria are also specified for modifications of existing facilities.

The provincial process is carried out in three phases: (1) the pre-application phase, where the proponent provides basic information about the project; (2) the application review phase; and (3) the EA certificate decision. Depending on the technical complexity of the project and consultation requirements, the pre-application stage typically takes 12 to 18 months to complete. The application review stage is governed by legislated timelines, so the EAO has six months to review the application once it has been accepted. Following review, the EAO will refer its report and recommendations to the Minister of Environment and the Minister of Natural Gas Development for review, and the Ministers will have 45 days to make a decision as to whether to certify the project (the time limit may be extended by the Ministers if needed).

By their nature, federal and provincial EA regulatory processes overlap. To clarify roles and responsibilities, as well as to avoid duplication of efforts, the federal and provincial governments have entered into the *Canada-British Columbia Agreement on Environmental Assessment Cooperation (2004)*. In addition, the B.C. and federal governments have in place a *Memorandum of Understanding on the Substitution of Environmental Assessments* to help facilitate a single review process where both provincial and federal EAs are required. If a project will be subject to separate federal and provincial EA processes, such processes can be harmonized between the CEA Agency and the EAO.

d. Heritage Conservation Act

As part of the provincial EA process, an AIA and an HRIA will be required under the HCA. If archaeological or culturally significant resources exist at the project site, the AIA will confirm this and recommend mitigation measures. A permit may also be required under the HCA in respect of investigative work in order to identify any archaeological or historical resources that may be located within project areas. Such permits are also issued by the OGC in respect of oil and gas activities.

e. Water Use

The WSA, which was passed by the Legislature in April 2014, came into effect on February 29, 2016. The WSA replaces many parts of the old *Water Act* and creates a new regulatory regime for water management within B.C.

The WSA seeks to make improvements in seven key areas: (1) protecting stream health and aquatic environments; (2) considering water in land use decisions; (3) regulating and protecting groundwater; (4) regulating water use during times of scarcity; (5) improving security, water use efficiency and conservation; (6) measuring and reporting large-scale water use; and (7) providing a range of governance approaches. One of the biggest changes that the WSA makes is to the regulation of groundwater. Under the WSA, all groundwater users (except domestic wells) will require a water licence to divert water from an aquifer (unless the diversion is otherwise authorized

under the regulations). Groundwater licence applications can be submitted to the MFLNRO through FrontCounter BC.

The Province is taking a phased approach to the enactment of the WSA. While the majority of the WSA came into effect at the end of February 2016, section 18, which provides for quick licensing procedures, has yet to be brought into force. The next phase of the regulations and policies is expected to include regulations relating to measuring and reporting, livestock watering, water objectives, planning and governance. Along with the WSA, the following regulatory scheme also came into effect on February 29, 2016:

- the *Water Regulation* under the *Water Act* was repealed and the *Water Sustainability Regulation* was enacted under the WSA;
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- the *British Columbia Dam Safety Regulation* under the *Water Act* was repealed and a new *Dam Safety Regulation* was enacted under the WSA;
- the *Water District Regulation* was enacted under the WSA;
- the *Water Sustainability Fees, Rentals and Charges Tariff Regulation* was enacted under the WSA;
- the *Sensitive Streams Designation and Licencing Regulation* under the *Fish Protection Act* was repealed; and
- the *Violation Ticket Administration and Fines Regulation* under the *Offence Act* was amended to add offences and fines under the WSA.

The WSA governs licensing of surface and sub-surface water use, which may be required for the LNG facility to address the additional need for water for cooling purposes. While the MFLNRO is responsible for issuing long-term water licences, the OGC administers water licences for short-term use under the WSA. The WSA and the corresponding *Water Sustainability Regulation* also require approval of “changes in and about a stream”. These approvals are also administered by the OGC in relation to oil and gas activities.

f. Contaminated Sites

In B.C., contaminated sites are regulated by the EMA and the corresponding CSR. This legal framework establishes what is a contaminated site, who is responsible for remediation and how remediation must occur. The category of persons responsible for remediation of a contaminated site includes current and previous owners or operators of the site and producers and transporters of the contaminating substance. An owner is defined broadly as a person who is in possession of the site, has the right of control of the site, or occupies or controls the use of the site. An owner also includes a person with a legal or equitable interest in the site. An operator is a person who is in control of or responsible for an operation on the site.

Under the EMA, persons responsible for remediation of contaminated sites are absolutely, retroactively and jointly and separately liable for any costs reasonably incurred to remediate the contaminated site. This means that if a project site is contaminated, the owner and any other responsible persons will be responsible for the cleanup of the site. Responsible persons are also liable for contamination that has migrated off-site to neighbouring properties.

The EMA provides for cost recovery actions in civil court, whereby responsible persons may recover investigation and remediation costs associated with a contaminated site from other responsible persons.

Persons responsible for remediation of a contaminated site may limit liability through a variety of means, including a voluntary remediation agreement or a Certificate of Compliance. This certificate may be issued when remediation has occurred to the satisfaction of the MOE, either on a numerical standards basis or on a risk assessment basis.

g. Waste Discharge

The EMA and the associated WDR are the principal pieces of regulation that govern pollution management in the Province. The administration of the EMA falls primarily to the MOE. The EMA prohibits prescribed industries from introducing waste, such as effluent, refuse and litter, into the environment unless such activities are otherwise authorized by the EMA and any applicable permitting or approval requirements, orders, regulations or waste management plans. Oil and gas activities are generally subject to this prohibition.

As discussed previously, the OGC acts as the single-window regulatory agency for the purposes of oil and gas activities in B.C. This means that most of the waste discharge permits for a project will be handled by the OGC. LNG facilities will likely require a waste discharge permit for activities such as dredge disposal, wastewater discharge and hazardous waste disposal. Significantly, waste also includes air contaminants such as particulate matter; therefore, air emissions generated by an LNG facility may require a permit under the EMA.

h. Species at Risk

The provincial *Wildlife Act* protects virtually all vertebrate animals from direct harm, except as allowed by regulation (e.g., hunting or trapping). Legal designation as “endangered” or “threatened” under this Act increases the penalties for harming a species, and also enables the protection of habitat in a Critical Wildlife Management Area. In addition, the *Wildlife Act* regulates the management of wildlife in B.C., other than on federal lands. Although much of it relates to hunting, the *Wildlife Act* was amended in 2004 to allow the Ministry to create an endangered species list, and to provide protections for listed species similar to those under the federal SARA; however, as of the date of this publication, these amendments are not yet in force. A key difference from SARA, however, is that the *Wildlife Act* does not allow for critical habitat designation on private land. It also has specific protections for raptors and their habitats.

i. LNG Tax

On November 27, 2014, the B.C. government enacted Bill 6, the *Liquefied Natural Gas Income Tax Act*, which will govern the tax rules for the LNG industry in B.C. The Act, which has not yet

come into force, will come into effect by regulation of the LGIC. Key highlights of the proposed tax regime are as follows:

- beginning January 1, 2017, a two-tiered tax will apply to the net income earned from liquefaction activities in respect of LNG facilities located in B.C.;
- the first tier is a 1.5% tax which will apply to net income during the period when net operating losses and eligible capital expenditure are being deducted (taxes paid in this period will be creditable against the future LNG tax payable when the 3.5% or 5% tax rate is in effect);
- the second tier is a 3.5% tax (increasing to 5% for periods beginning on or after January 1, 2037) which will apply to net income after net operating losses and amounts in respect of eligible capital expenditures have been fully deducted; and
- beginning January 1, 2017, a new corporate income tax credit will be available to any person subject to the LNG income tax with a permanent establishment in B.C.; the credit is calculated based on the corporation's eligible cost of natural gas acquired for an LNG facility.

As compared with the original announcement made by the B.C. government in February 2014, the most significant changes announced in October 2014 concern a reduction in the upper end of the range of the proposed tax rate (as originally announced, it was up to 7%). The additional corporate income tax credit based on natural gas acquired for an LNG facility is also a new proposal. These changes have been justified on the basis of declines in world market LNG pricing levels, anticipated competition for LNG supply and higher than expected construction costs for B.C. LNG developments. Industry reaction to the LNG tax remains unclear but will no doubt be seen in the timing of FIDs.

The B.C. government's LNG tax will be additive to existing gas royalty taxes and pipeline tariffs under the NEBA.

Since the enactment of the LNG tax legislation, the Province has been in the process of drafting associated regulations and amendments. The first of these, the *Liquefied Natural Gas Income Tax Amendment Act, 2015*, received Royal Assent and came into force on May 15, 2015, meaning that the practical effect of these amendments will be felt once the *Liquefied Natural Gas Income Tax Act* itself enters into force. The amendments contain a number of changes to the LNG tax legislation, including many relating to the Province's prior commitment to set out enforcement and administration mechanisms for the Act, as well as a change to the new Natural Gas Tax Credit.

The Province initially contemplated that the Natural Gas Tax Credit would be equal to 0.5% of the corporation's eligible cost of natural gas for the taxation year, as determined under the Act. In an effort to enable greater flexibility and responsiveness in the face of global LNG pricing fluctuations, and to ensure the long-term competitiveness of the Province's LNG tax regime, the amendments will allow the Province to increase this 0.5% rate by regulation. It should be noted, however, that the credits may still only be used insofar as they reduce the taxpayer's B.C. corporate income tax to an amount equivalent to the amount that would be payable if the B.C. general corporate income tax rate were 8%. As the current general corporate income tax rate is 11%, the credits therefore

allow for a maximum effective reduction of 3%, and the recent amendments do not currently contemplate an adjustment to this cap.

In addition to the above-noted changes to the Natural Gas Tax Credit, the recent amendments contain a number of other technical and substantive changes to the Act, including:

- a number of clarifications to the key defined terms used in the LNG tax legislation;
- administrative and enforcement provisions relating to registration and security, returns and assessments, penalties, offences, appeals and anti-avoidance rules;
- provisions regarding debt forgiveness, bankruptcy, the treatment of trusts with exempt beneficiaries and transitional rules for partnerships during the first taxation years; and
- clarifications to the transfer pricing rules.

On June 5, 2015, and effective January 1, 2017, a new *Liquefied Natural Gas Income Tax Regulation* was made.

j. Greenhouse Gas Emissions

On October 20, 2014, the B.C. government introduced legislation for the management of GHG emissions from the LNG industry. This legislation, the *Greenhouse Gas Industrial Reporting and Control Act*, received Royal Assent November 20, 2014 and with the exception of some sections, is in force effective January 1, 2016.

The Act seeks to establish a GHG emissions intensity benchmark of 0.16 CO₂e tonnes per tonne of LNG produced. A number of details of the new GHG regime for the LNG industry have yet to be determined in regulations, but the legislation is aimed at keeping B.C.'s GHG emissions in check as the Province strives to achieve its legislated GHG emission reduction target of 33% below 2007 levels by 2020. The B.C. government estimates that five LNG plants in B.C. will generate 13 million tonnes of GHG emissions, on top of the Province's annual GHG emissions of 62 million tonnes (as measured in 2010).

The 0.16 benchmark will cover all facility GHG emissions (including combustion, electricity generation, venting and fugitives) from the point when gas enters a facility to when it is loaded onto a ship or railcar to go to market. Under Bill 2, a "facility" is defined as including all buildings, structures, stationary items and equipment that (1) are located or used primarily on a single site, contiguous sites or adjacent sites; (2) are controlled by the same person; and (3) function as a single integrated site. This means that gas-fired generation owned by another party and supplied to an LNG plant would not fall within the definition of a "facility," nor would the regime capture emissions from upstream activities.

In terms of compliance, LNG proponents will have flexibility to meet the benchmark through the following mechanisms:

- improvements in energy efficiency or increased use of clean electricity as part of the facility design;

- purchase of emission offsets from B.C.-based emission reduction projects at market prices; or
- contribution to a technology fund at a rate of \$25 per tonne of CO₂e.

These compliance costs will need to be incorporated into project plans along with the LNG tax, the carbon tax, the royalty regime and corporate and other taxes. The Province has indicated that investments from both the emission offsets and the technology fund will be used to reduce GHG emissions in the natural gas and other sectors in B.C. While no details have been made available yet, it is expected that the offsets and the technology fund will drive investments in strategies and technologies to reduce carbon emissions throughout the life cycle of LNG production, including low- or no-venting equipment, electrification, cogeneration and waste heat recovery, natural gas vehicles and potential opportunities for carbon capture and storage or reuse.

To implement the Act, three supporting GHG regulations also came into effect on January 1, 2016:

- *Greenhouse Gas Emission Reporting Regulation*, which replaces the existing *Reporting Regulation* and adds compliance reporting requirements, including specific requirements for LNG operations.
- *Greenhouse Gas Emission Administrative Penalties and Appeals Regulation*, which establishes the administrative penalties for non-compliance with the Act or regulations.
- *Greenhouse Gas Emission Control Regulation*, which establishes the BC Carbon Registry and sets criteria for developing emission offsets issued by the provincial government. The regulation also establishes the price (\$25) for funded units issued under the Act that will be put towards a technology fund to support the development of clean technologies. Regulated operations, such as LNG operations, will need to purchase offsets from the market or funded units from government to meet emission limits.

k. LNG Environmental Incentive Program

To encourage the incorporation of lower-emitting technology into LNG facilities, the B.C. government has established the LNG Environmental Incentive Program, which will reward facilities that invest in cleaner technology with an escalating incentive, based on their compliance costs, for performance of between 0.23 and 0.16 tonnes of CO₂e per tonne of LNG produced. In particular, facilities that have achieved annual performance below 0.23 tonnes of CO₂e per tonne of LNG produced will be eligible to participate in the program:

- performance below 0.23 and above 0.16 tonnes will receive a pro-rated incentive based on their actual compliance costs; and
- performance below 0.16 tonnes will earn the facility a performance credit that can be sold to other LNG facilities.

I. LNG Pipeline Conversion Prohibition

On January 5, 2015, the Province issued a direction to the OGC prohibiting the OGC from issuing permits to convert LNG facility pipelines into pipelines for transporting oil or diluted bitumen. While the Province has stated that other pipeline projects may be added to the list in the future, currently “LNG Facility pipeline”, as defined in the direction, includes the following pipeline projects:

- Pacific Trail Pipelines Project (for Kitimat LNG)
- Coastal GasLink Pipeline Project (for LNG Canada)
- Eagle Mountain-Woodfibre Gas Project (for Woodfibre LNG)
- Pacific Northern Gas Looping Project (for Douglas Channel LNG)
- Prince Rupert Gas Transmission Project (for Pacific Northwest LNG)
- Westcoast Connector Gas Transmission Project (for Prince Rupert LNG)

The direction was issued in response to concerns raised by First Nations about long-term pipeline use and, in particular, the potential adverse effects of transporting oil or diluted bitumen by pipelines, such as spills.

m. Port Regulation

On February 16, 2015, the provincial government tabled Bill 12, the FPDA. The FPDA received Royal Assent on March 25, 2015 and was brought into force on December 6, 2016. The FPDA authorizes the Province to enter into agreements with the federal government and a federal port to administer and enforce provincial law on port lands. Specifically, the FPDA authorizes a provincial official or body to exercise a power or perform a duty under a federal regulation where:

- the federal regulation incorporates by reference an enactment of B.C.; and
- the government has entered into an agreement, providing for administration and enforcement of the federal regulation by the provincial official or body.

The FPDA is part of the Province’s strategy to provide regulatory certainty to LNG development. The FPDA will ensure LNG facilities are regulated in a streamlined manner such that LNG proponents can move forward with investments knowing the provincial oversight is clear. Agreements under the FPDA would extend the role of the OGC in regulating the construction, operation and permitting of LNG facilities to federal port lands. The FPDA will not affect marine traffic and LNG shipping operations.

According to the Province, LNG facilities proposed for the Port of Prince Rupert are expected to be the first to benefit from this initiative.

n. Other Permits

Other provincial approvals or permits may be required for activities associated with LNG facilities. For example, the Ministry of Transportation has jurisdiction over access roads and the transport of dangerous goods. Requirements regarding health and safety will also be important, and project proponents will have to abide by other statutes and regulations such as, for example, the *Workers Compensation Act*, the *Employment Standards Act*, the *Safety Standards Act*, and the *Occupational Health and Safety Regulation*.

2. FEDERAL

a. Federal EA

If a proposed LNG facility meets the thresholds under the Designating Regulations, a federal EA may be required. Under the Designating Regulations, an EA under CEAA, 2012 is required for the construction, operation, decommissioning and abandonment of a new facility for the liquefaction, storage or regasification of LNG, with a processing capacity of 3,000 tonnes/day or more or a storage capacity of 55,000 tonnes or more. A federal EA is also required for the expansion of an existing LNG facility that would result in an increase in the processing or storage capacity of 50% or more and a total processing capacity of 3,000 tonnes/day or a total storage capacity of 55,000 tonnes or more. CEAA, 2012 provides the framework for the federal EA process, and the main regulator is the CEA Agency. The focus of the federal process is on assessing potentially adverse environmental effects that are within federal jurisdiction, including fish and fish habitat, other aquatic species, migratory birds, federal lands, effects that cross provincial or international boundaries and impacts on Aboriginal peoples. A federal EA process can be expected to take from 24 to 36 months to complete from the time a project description is submitted, but delays may occur if the project proponent is required to submit further information or legislated timelines are extended by the Minister to enable interjurisdictional cooperation or because of project-specific circumstances.

On June 20, 2016, the Federal Government launched a comprehensive review of the regulatory process under CEAA, 2012 which began in late 2016 with the government receiving input from stakeholders in December.

b. NEB Export Licence

If a proponent plans to export LNG from Canada, a licence from the NEB under the NEBA authorizing the export will be required. In order to grant an export licence, the NEB must be satisfied that the quantity of gas to be exported does not exceed the surplus remaining after due allowance has been made for the reasonably foreseeable requirements for use in Canada.

The *Economic Action Plan 2015 Act*, which received Royal Assent on June 23, 2015, amended the NEBA to extend the maximum term for which natural gas export licences can be issued, from 25 to 40 years.

c. Marine and Shipping

TC is the federal regulatory agency that is responsible for overseeing marine infrastructure in Canada and ensuring safe and efficient marine transportation. In addition, TC regulates the safe transportation of dangerous goods by water and implements measures to protect the marine environment. Marine traffic and shipping in waterways inside (including the Fraser River) and surrounding Canada are subject to regulation by TC.

On September 30, 2016, the *Port of Prince Rupert Liquefied Natural Gas Facilities Regulations* were enacted with respect to LNG facilities to be built at Prince Rupert, B.C. The Regulations are issued under federal authority by virtue of the *Canada Marine Act*, which regulates Canadian ports. At present, there are four proposals for LNG facilities to be located at Prince Rupert, two are to be located wholly on federal port lands and two are to be located largely on provincial lands, with small portions on federal port lands. The regulations implement a regulatory regime for the design, construction, operation, and maintenance of LNG projects proposed on federal lands, and in particular at the Port of Prince Rupert.

d. TERMPOL

Where a project includes a marine terminal, it may be subject to completion of TERMPOL. TERMPOL is a voluntary review process that may be requested by proponents involved in building and operating a marine terminal system for bulk handling of oil, chemicals and liquefied gases. The process focuses on the marine transportation components of a project and examines the safety of tankers entering Canadian waters, navigating through channels, approaching berthing at a marine terminal and loading or unloading oil or gas. The review is led by TC and may involve other federal departments and other stakeholder representatives as needed. The review can consider any safety measures above and beyond existing regulations to address any site-specific circumstances. TERMPOL report recommendations are not binding, although the proponent can choose to adopt them. In addition, the findings of a TERMPOL review may be used by the federal Minister of Transport to inform decisions on shipping routes under the *Canada Shipping Act, 2001*. Within the context of LNG projects, TERMPOL applies to (1) the specialized equipment and procedures necessary at proposed LNG terminals; (2) proposed transshipment facilities for these substances; and (3) any proposed changes to existing terminals or designated transshipment sites or facilities.

e. Exclusion Zones

While there is no provision in the NPA that specifically provides for LNG facility exclusion zones, it is possible for the Minister of Transport to designate an exclusion zone in respect of a specific LNG project.

The *Vessel Traffic Services Zones Regulations* under the *Canada Shipping Act, 2001* regulates the manoeuvring of vessels 20 metres in length or more, and therefore would likely apply to LNG tankers. The regulations stipulate traffic systems and “no-go” areas in relation to large shipping vessels. There are also provisions under the *Canada Oil and Gas Drilling and Production Regulations* under the *Canada Oil and Gas Operations Act* regulating vessel traffic around offshore installations.

f. Fisheries Act

Under the FA, it is an offence for any person to carry on any work, undertaking or activity that results in serious harm to fish that are part of a commercial, recreational or Aboriginal fishery, or to fish that support such a fishery, without an authorization from the DFO. “Serious harm to fish” means the death of fish or any permanent alteration to, or destruction of, fish habitat. Authorizations permitting such harm are frequently the subject of detailed discussion and review by DFO. It is also an offence for any person to deposit or permit the deposit of a deleterious substance of any type in water frequented by fish. “Deleterious substance” includes any substance that, if added to any water, would degrade or alter the quality of water so that it is rendered deleterious to fish or fish habitat. The FA also requires persons to notify the DFO of an occurrence of serious harm to fish and deposit of a deleterious substance, or serious and imminent danger of such occurrence.

On June 20, 2016, the Federal Government launched a comprehensive review of the regulatory process under the FA, which began in late 2016.

g. Species at Risk

SARA covers all wildlife species listed as being at risk nationally (and their critical habitats). The protections in SARA apply throughout Canada to all aquatic species and migratory birds (as listed in the federal MBCA) regardless of whether the species are resident on federal, provincial, public or private land. This means that if a species is listed in SARA and is either an aquatic species or a migratory bird, there is a prohibition against harming it or its residence, and penalties for such harm can be substantial.

The MBCA implements an international agreement between Canada and the United States for the protection of migratory birds. Although most of the statute regulates harvesting or hunting, it also contains some environmental protection provisions. Specifically, it prohibits the deposit of oil, oil waste or other substances harmful to migratory birds in any waters or areas frequented by migratory birds, except as authorized by regulation. It also prohibits the disturbance of the nests of migratory birds.

h. Investment Canada Requirements

While any foreign investment in Canada over certain thresholds must meet ICA requirements and approvals, it is clear that unlike Canada’s oil sands and potash industries, the LNG industry is open for foreign investment and lack of ICA approval is a very remote risk. Accordingly, there has been a reform of the process for deciding whether or not investments in Canada are of net benefit to Canada. Under the ICA, investments are reviewed, but this process recognizes that it is generally a net benefit to Canada for LNG investment to take place.

i. Federal Tax Incentive

The federal government announced on February 19, 2015 that accelerated CCA treatment would apply to certain property used in liquefaction facilities for the domestic and export LNG markets and for LNG storage. The new measure signals the federal government’s support for Canada’s emerging LNG industry.

LNG capital assets are generally included in Class 47, with a CCA rate of 8%. Under the new measures, an additional deduction will result in a CCA rate of 30% for qualifying assets related to natural gas liquefaction that were acquired after February 19, 2015 and before 2025. Non-residential buildings that are part of a facility for liquefaction of natural gas, and that are acquired between these dates, will enjoy a 10% CCA rate instead of the current 6% CCA rate.

LNG project participants will now enjoy increased deductions for many kinds of equipment used in connection with liquefaction of natural gas, including controls, cooling equipment, compressors, pumps, storage tanks and pipelines used exclusively to transport natural gas within a liquefaction facility or to move LNG (as opposed to pipelines used to move natural gas from the gas extraction sites to LNG facilities). However, the additional deductions will not apply to: (i) equipment used exclusively for regasification; (ii) property acquired to produce oxygen or nitrogen; (iii) a breakwater, dock, jetty, wharf or similar structure; (iv) electrical generating equipment; or (v) the acquisition of used equipment or buildings.

The additional allowances for a liquefaction facility can be claimed only against income attributable to liquefaction of natural gas at that facility.

These new measures will allow companies that invest in new LNG facilities to recover their investment more quickly.

j. Other Permits

Other permits under federal legislation may be required for activities associated with LNG facilities and marine terminals, including NPA approvals to construct the various project components that would impact navigation, and permits for the disposal of excavated or dredged material at sea under CEPA.

3. MUNICIPAL

a. Building and Development Permits

In B.C., building permits are typically required for the construction of new buildings or structures, as well as alterations, additions or repairs to existing buildings and structures. Building permits are usually issued by the municipality where the proposed building or structure is located. Project proponents will be required to comply with the requirements of the *British Columbia Building Code*, which includes standards for the construction of buildings (including specifications for green buildings), as well as upgrades for buildings to remove unacceptable hazards. Each municipality has an application process in place for building permits, and project proponents are advised to consult with the municipality in which the proposed project will be located.

With respect to development permits, the *Local Government Act* enables municipalities to designate Development Permit Areas in their Official Community Plans for the protection of the natural environment, protection of development from hazardous conditions, protection of farming, revitalization of commercial areas and the establishment of objectives for the form and character of intensive residential, commercial, industrial and multi-family development. To determine whether a project area is subject to municipal development permit requirements, project proponents should review any applicable Official Community Plans or development permit

requirements of the municipality in which the project is located. Project proponents are also advised to check local zoning bylaws to ensure that the property is properly zoned for the proposed use.

b. Zoning

Land within a municipality is divided into legal zoning classifications that specify the types of buildings that may be constructed and the uses or activities that can take place on a property. In B.C., the vast majority of a local government's powers pertaining to land use control are contained in Part 26 of the *Local Government Act* (Planning and Land Use Management). In particular, the *Local Government Act* allows municipal governments to make rules on land use, zoning bylaws and subdivision bylaws.

Zoning bylaws are typically prepared by municipalities and regional districts. Provisions regarding parking, drainage, signs, screening and flood plains may be incorporated in a zoning bylaw or could be in one or more separate bylaws. Project proponents who intend to develop land are required to obtain approvals from the municipal government for zoning, subdivision, development and building. To the extent that the development of land includes a change in use, an application to change the zoning of the land to another category may be required, which the municipality can approve at its discretion.

V. FIRST NATIONS MATTERS

A. CONSULTATION WITH ABORIGINAL PEOPLES

1. THE CROWN'S DUTY TO CONSULT

Consultation with stakeholders, including Aboriginal groups, is legally required for the development of major resource projects in B.C. and across Canada. Subsection 35(1) of Canada's *Constitution Act, 1982* provides constitutional recognition and protection of Aboriginal and treaty rights. It states: "The existing aboriginal and treaty rights of the aboriginal peoples of Canada are hereby recognized and affirmed." In the Constitution, "aboriginal peoples of Canada" include the Indian, Inuit and Métis peoples of Canada, while "treaty rights" include existing and future treaty rights acquired by way of land claims agreements.

Since the landmark Supreme Court of Canada decisions in *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, and *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, 2004 SCC 74, the doctrine of the Crown's "duty to consult" Aboriginal peoples has emerged as a key means of protecting and affirming these constitutionally protected section 35 rights, which governments, proponents and Aboriginal peoples must navigate in the context of resource development.

Every Crown decision that has or may have an impact on Aboriginal rights and interests requires some level of consultation. The Crown's duty to consult is triggered whenever the Crown has knowledge (real or constructive) of the *potential* existence of an Aboriginal or treaty right and contemplates conduct that *might* adversely affect such rights.

While the duty to consult is easily triggered, the substance and scope of Crown consultation is influenced by a variety of factors and depends on the circumstances of each case. The appropriate level of consultation will depend on the strength of an Aboriginal group's claim supporting the existence of a particular right or title, as well as the seriousness of the potentially adverse effects upon the right or title claimed. As a result, the scope of the duty to consult exists along a spectrum and must be assessed on a case-by-case basis.

2. ROLE OF THE PROPONENT IN CONSULTATION

For the purposes of the Crown's duty to consult, the "Crown" includes provincial and federal government decision makers. While the duty to consult rests with the Crown, many procedural aspects of this constitutional obligation are often delegated (expressly or implicitly) to project proponents by the Crown. Proponents often participate extensively in the discharge of the duty to consult because they have the greatest familiarity with the project at issue and can engage fully with, and discuss concerns raised by, Aboriginal peoples.

Within the context of major resource projects, the Crown's duty to consult will usually be triggered at the start of the regulatory review process, because the issuance of permits and approvals constitutes "conduct" by the Crown. For many major resource projects, this means that the Crown's duty to consult will be triggered at the start of the EA review process. However, many proponents choose to engage with Aboriginal groups from the very early stages of project

planning. As discussed further below, proponents must be proactive in engaging with potentially impacted Aboriginal groups and discussing their concerns in a meaningful way.

3. ACCOMMODATION

The duty to consult does not impose on the Crown or proponents any duty to obtain consent or reach agreement with Aboriginal groups; rather, the commitment is to a meaningful process of consultation carried out in good faith (with a reciprocal obligation of good faith by Aboriginal groups). There is no stand-alone duty of the Crown to accommodate Aboriginal peoples in respect of its decisions and project approvals. However, good faith consultation may sometimes reveal a duty of the Crown to accommodate Aboriginal rights or interests.

Where accommodation is required in making decisions that may adversely affect as yet unproven Aboriginal rights and title claims, the Crown must reasonably balance Aboriginal concerns about the potential impact of the decision on the asserted right or title with other societal interests. At law, accommodation can include mitigating, minimizing or avoiding adverse effects of actions or decisions on Aboriginal interests.

4. DUTY TO CONSULT WITHIN THE EA PROCESS

As noted above, the start of the EA review process will usually trigger the Crown's duty to consult. The EA process requires LNG project proponents to first identify, with the assistance of governmental authorities such as the EAO (and Aboriginal Affairs and Northern Development Canada if a federal EA review is required), potentially affected First Nations within the vicinity of the project area.

Once potentially affected Aboriginal groups are identified, the EAO will list them in an order issued pursuant to section 11 of the EAA, which sets out the scope for the project's EA review along with required consultation activities and time frames. In a section 11 order, the EAO will clearly indicate its expectations of proponents in relation to Aboriginal consultation, which may include directing proponents to:

- involve Aboriginal groups in relevant studies;
- incorporate community and traditional knowledge into baseline studies;
- identify Aboriginal interests that may be affected by a proposed project; and
- identify and develop measures to prevent, avoid or mitigate any potentially significant adverse effects on Aboriginal interests.

The Crown retains overall responsibility for the duty to consult, and the EAO must ultimately determine whether the consultations undertaken by the EAO and the proponent satisfy that duty.

The EAO's *Guide to Involving Proponents When Consulting First Nations in the Environmental Assessment Process* (2013) is a useful reference for proponents, as it clarifies the roles and responsibilities of proponents and the Crown in consultation throughout the EA process. It sets

out the EAO's principles and objectives in consultation and its expectations of proponents from the early stages of the EA process.

B. AGREEMENTS WITH ABORIGINAL GROUPS

1. CAPACITY FUNDING AGREEMENTS

There is no express legal requirement in B.C. for private third parties to provide funding for Aboriginal participation in consultation. Nevertheless, most Aboriginal groups will request some type of process and/or capacity funding from the proponent to engage in consultation or regulatory processes. Ultimately, whether a proponent chooses to provide capacity funding and the amount of such funding depend on the business case that has been made for engaging in consultation with a particular Aboriginal group. Process or capacity funding agreements can take many forms, including protocols, memorandums of understanding, capacity funding agreements or other framework agreements.

In connection with the EA review process, while the EAO provides a limited amount of funding to assist Aboriginal groups to participate in the EA review process, it encourages proponents to provide Aboriginal groups with additional capacity funding to participate in other aspects of the EA, such as engagement with the proponent during studies and information gathering.

2. IMPACT BENEFIT AGREEMENTS

There is currently no requirement at law for the Crown or proponents to enter into business or benefits arrangements with Aboriginal groups in order to fulfill the duty to consult or, where appropriate, to accommodate Aboriginal peoples, and there is no requirement at law for accommodation to include economic compensation to Aboriginal peoples.

However, apart from fulfilling the Crown's legal obligations of consultation and accommodation, a relatively common business practice that has evolved in various industries across Canada, including LNG, is the negotiation of IBAs between project proponents and Aboriginal groups closely associated with a particular project. In return, companies receive regulatory certainty for the development and operation of their projects, as well as a tool for managing Aboriginal and related governmental risk.

The scope and content of IBAs vary widely and generally arise out of a business imperative rather than a legal obligation. The proponent's business case for entering into IBAs may include considerations such as corporate social responsibility and social licence; the establishment of engagement protocols and long-term relationships; and the desire to provide benefits to local communities and to mitigate legal uncertainties and Aboriginal-related risks. Typically, IBAs may include commitments by the proponent to provide employment and contracting/procurement opportunities, education and training, and economic benefits to Aboriginal groups and their members through a variety of financial models. IBAs may also formalize engagement processes and include environmental monitoring and protection commitments.

In exchange for these benefits, the proponent generally seeks support and sign-off from the Aboriginal group in respect of its project. Provisions to this effect typically include (1) agreement that the Aboriginal group will support the project (including providing letters of project support to

government agencies and regulatory decision makers); (2) an acknowledgement that the duty to consult has been met; and (3) negative covenants that the Aboriginal group will not take any action against the project or support any member of the Aboriginal group who takes such actions.

In connection with the EA review process, the EAO encourages proponents to explore IBAs with Aboriginal groups where the parties consider such agreements to be in their mutual interest. The EAO will consider any information it receives regarding such agreements when assessing the social and economic impacts of a proposed project; however, IBAs are not considered preconditions to completion of the EA review process or a decision by the responsible ministers.

C. BEST PRACTICES FOR LNG PROPONENTS

B.C. presents unique challenges to the development and operation of LNG projects, as it boasts a diverse landscape of Aboriginal rights and interests. Pipeline routes may traverse the traditional territories of many Aboriginal communities in northern B.C., including historic Treaty 8 lands, lands subject to modern-day treaties (such as those covered by the Nisga'a Final Agreement), lands that are the subject of modern treaty negotiations or unresolved land claims, reserve lands, sacred areas and traditional hunting grounds. Certain areas may also be subject to claims or assertions of Aboriginal title, as well as overlapping claims and competing Aboriginal interests.

LNG proponents may need to consult with a large number of Aboriginal groups that vary in terms of their capacity for engaging in consultation, their internal policies and their views of particular projects. Other challenges may include determining who is the proper rights holder and representative of an Aboriginal group for the purposes of consultation and accommodation. These can raise complex issues that governments and proponents need to carefully consider in fulfilling the duty to consult and in planning projects. Generally, the Crown and proponents should err on the side of caution and be inclusive in their consultation efforts, although this can become challenging.

Most proponents active in the resource sector, both in Canada and internationally, intuitively understand the need to build strong relationships and community support in order to build successful projects. Practically, the value of achieving and maintaining positive relationships with potentially affected Aboriginal groups cannot be overstated. Effective consultation and engagement with Aboriginal groups has become one of the most critical factors to affect the viability and ultimate success of a project and must therefore be taken seriously and treated as an integral part of project planning and development.

LNG proponents should develop a proactive consultation plan and strategy as early in the life of a project as possible. Proponents should be actively involved in engaging with Aboriginal groups and the Crown to (1) ensure that the Crown is meeting its consultation obligations; (2) develop strong working relationships with Aboriginal communities; and (3) garner support from Aboriginal communities for their project, if reasonably possible. Proponents should also develop flexible consultation procedures that can adapt to the unique circumstances and expectations of each Aboriginal group. Further, consultation should not be viewed as simply one step in the application and approval process with a definitive start and end date. Rather, consultation is an ongoing process that occurs throughout the lifetime of a project.

Effective processes for documenting the proponent's consultation processes are also essential. Proponents are often required to generate reports for government agencies and regulatory authorities, including disclosure of either the whole or a summary of the consultation record. If litigation ensues, the consultation record will become evidence of whether the Crown has met the duty to consult. Consequently, proponents should identify a process early on for how information is to be collected and documented.

A proponent should also develop an effective business plan and conduct its own internal risk assessment and risk mitigation strategy. These steps may include a consideration of the utility of potential business or benefits arrangements with Aboriginal groups. Whether a project involves mining, LNG, a pipeline or shale gas development, as noted above, if the project has the potential to infringe on Aboriginal rights or title, governments and proponents will be motivated to reach agreements with potentially impacted Aboriginal groups in order to secure regulatory and project certainty.

The information in this publication is necessarily general in nature, and dealings with Aboriginal peoples must always be approached on a case-by-case basis.

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