



Comité consultatif pour l'environnement de la Baie James
James Bay Advisory Committee on the Environment
ᑲ ᐃᑎᐱᐱᐱᐱᐱᐱ ᑲ ᐃᑲᐱᐱ ᐱᐱᐱᐱᐱ ᐱᐱᐱᐱ ᐱᐱ

Review of federal environmental assessment processes:

Recommendations relating to the *Canadian Environmental Assessment Act - 2012*

Presented by the James Bay Advisory Committee on the Environment to the
Expert Panel on the Review of Environmental Assessment Processes

February 6th 2017

Introduction

The [James Bay and Northern Quebec Agreement](#) (JBNQA) – Canada’s first modern treaty with Aboriginal peoples – was signed in 1975, and is protected by Section 35 of the *Constitution Act* of 1982. Pursuant to the signing of the JBNQA, the James Bay Advisory Committee on the Environment (JBACE) was established to “...review and oversee the administration and management of the environmental and social protection regime established by and in accordance with [Section 22]” (Par. 22.3.1). The JBACE is composed of representatives of the three signatory governments – the Government of Canada, the Gouvernement du Québec and the Cree Nation Government – and, most notably, operates with the following mandate to:

- Advise these governments, in its capacity as the preferential and official consultative forum for them, on the adoption of policies, laws and regulations or measures having environmental or social consequences on the James Bay Territory (Par. 22.3.24);
- Be consulted by these governments and advise them on issues related to the implementation of the environmental and social protection regime and land use measures on the Territory (Par. 22.3.28);
- Examine and make pertinent recommendations regarding the environmental and social impact assessment and review procedure for the Territory (Par. 22.3.27).

In accordance with its afore-mentioned responsibilities, this JBACE brief serves to provide recommendations regarding potential amendments of the *Canadian Environmental Assessment Act - 2012* (*CEA Act - 2012*), in the context of the Expert Panel’s review of federal assessment processes.

Here, we believe that the current revision exercise offers an important opportunity to facilitate the application of the *CEA Act - 2012* in the James Bay Territory, in concert with the assessment and review procedure set out in Section 22 of the JBNQA. This brief thus elaborates on our opinion that a ‘one-project, one assessment’ approach is most desirable and outlines our suggestions to achieve it. Beyond this, this text underscores the importance of sensitizing federal authorities to the Territory’s unique contexts, and the need to revise the timelines currently prescribed in the *CEA Act - 2012*.

Motivations underlying this document and future JBACE intentions

The JBACE’s motivations underlying this brief are the need to protect the Territory and its inhabitants as well as the rights and representative processes of the Cree people as stipulated under Section 22 and 24 of the JBNQA. In accordance with the JBACE mandate, this brief also aims to improve environmental and social impact assessment and review procedures, and to reduce duplication.

For now, little concrete information is available regarding any potential amendments to the *CEA Act - 2012*.

This text thus illustrates in detail the uniquely-adapted and comprehensive environmental and social impact assessment procedure applicable in the James Bay Territory as was formally established by the JBNQA’s Cree, provincial, and federal signatory parties. The text then outlines the JBACE’s understanding of the various options currently available for coordination, and also hashes out potential ameliorative avenues for addressing the above-mentioned motivations.

The JBACE fully intends to exercise its mandate and to provide more in-depth recommendations and insights once a draft Bill has been tabled with proposed amendments to the Act.

The Section 22 environmental and social impact assessment and review procedure: unique, adapted, and flexible

True to its mandate and since the signature of the JBNQA four decades ago by the Cree, provincial and federal parties, the JBACE has overseen the Section 22 environmental and social protection regime – including its prescribed environmental and social impact assessment and review procedure. The JBACE is thus intimately familiar with this uniquely-adapted and flexible procedure for assessing and reviewing development projects in the James Bay Territory (see [Appendix I](#) for a map).

Given that the concerns and recommendations expressed in this brief stem from this corpus of experience, a detailed overview of the Section 22 procedure is warranted; one that highlights these unique, adapted, and flexible aspects.

Core principles

Section 22 outlines an environmental and social protection regime that provides for a two-tiered environmental and social impact assessment and review procedure designed to minimize the environmental and social impact of development projects on the Cree and the Territory.

The regime also provides for a special status of involvement for the Cree people “...*over and above that provided for in procedures involving the general public*” (Par. 22.2.2c), through consultation or representative mechanisms. This represents a fundamental principle of the JBNQA, and affords Cree participation and representation on all of the committees and at each stage of the Section 22 environmental and social impact assessment and review procedure for development projects.

The table in [Appendix II](#) offers an overview of Cree participation and representation in the Section 22 environmental and social impact assessment and review procedure.

- ⇒ Environmental assessments conducted per the *CEA Act - 2012* are not required to ensure this. Instead, when environmental assessments are required per the Act in the James Bay Territory, the inclusion of Cree representatives on the bodies tasked with these assessments and arrangements for the exchange of information are made following an informal approach agreed upon by the Cree and the Canadian Environmental Assessment Agency (CEA Agency). There is no formal agreement for such arrangements.

The Section 22 environmental and social protection regime is also subject to a unique set of nine guiding principles (Par. 22.2.4):

- a) The protection of the hunting, fishing and trapping rights of Native people in the Territory [...] with respect to developmental activity affecting the Territory;
- b) The environmental and social protection regime with respect to minimizing the impacts on Native people by developmental activity affecting the Territory;
- c) The protection of Native people, societies, communities, economies, with respect to developmental activity affecting the Territory;
- d) The protection of wildlife resources, physical and biotic environment, and ecological systems in the Territory with respect to developmental activity affecting the Territory;

- e) The rights and guarantees of the Native people within Category II established by and in accordance with Section 24 until such land is developed (more on this below);
- f) The involvement of the Cree people in the application of this regime;
- g) The rights and interests of non-Native people, whatever they may be;
- h) The right to develop by persons acting lawfully in the Territory;
- i) The minimizing of the negative environmental and social impacts of development on Native people and on Native communities by reasonable means with special reference to those measures proposed or recommended by the impact assessment and review procedure.

These guiding principles focus on the protection of Cree communities, of the specific hunting, fishing and trapping regime set out Section 24, and on the safeguarding of the Territory's wildlife resources.

Indeed, Section 22 of the JBNQA, in accordance with its guiding principles, recognizes that wildlife harvesting is squarely at the center of Cree culture and is explicitly designed to protect and to ensure that the Cree may fully exercise the harvesting rights and guarantees provided for in accordance with the hunting, fishing and trapping regime of Section 24 (see paragraphs 22.2.2d, 22.2.4a, and 24.11.1 of the JBNQA).

The table in [Appendix III](#) offers an overview of Cree wildlife harvesting rights as expressed in Section 24 of the JBNQA.

It is crucial for the JBACE to highlight these rights and guarantees, given their consequential consideration in Section 22's environmental and social impact assessment and review procedure.

- ⇒ Here again, the *CEA Act - 2012* was not enacted with these specific issues at heart and so does not explicitly address these rights and guarantees which are, in contrast, fundamental considerations at the core of Section 22's assessment and review procedure.

Mechanics of the Section 22 assessment and review procedure

The two-tiered Section 22 assessment and review procedure is built around the following elements:

- Administrators with decision-making authority over the procedure. Depending on the jurisdiction, this decision-making responsibility falls to the Provincial Administrator, the Federal Administrator or the Cree Regional Administrator.¹ These Administrators issue the directives or 'terms of reference' for the preparation of environmental and social impact statements by proponents. They also issue decisions regarding the exemption of 'grey zone' projects following assessments (more on this below), and decide on the approval for projects following reviews. In light of the project's nature and of its location, one or more Administrators may have the said decision-making responsibilities.

¹ The provincial Administrator is the Deputy Minister of the Ministère du Développement durable, de l'Environnement et de la Lutte contre les changements climatiques (MDDELCC), the federal Administrator is the President of the Canadian Environmental Assessment Agency (CEA Agency), and the Cree Regional Administrator is the Director of the Department of the Environment and Remedial Works of the Cree Nation Government.

- Three committees that make recommendations to the pertinent Administrators:
 - 1) A six-member tripartite Evaluating Committee (COMEV) composed of two representatives appointed by each of the three parties;
 - 2) A five-member Provincial Review Committee (COMEX) composed of three representatives appointed by the Gouvernement du Québec and two from the Cree Nation Government; and,
 - 3) A five-member Federal Review Panel (COFEX-South) composed of three representatives appointed by the Government of Canada and two from the Cree Nation Government.
- Two lists of development projects:
 - 1) Schedule 1, the ‘inclusion list,’ which identifies projects automatically subject to assessment and review and requiring the preparation of an environmental and social impact statement;
 - 2) Schedule 2, the ‘exclusion list,’ which identifies projects that are exempt from impact assessment or review, and do not require the preparation of an impact statement.
- A description of the contents of an impact statement that proponents prepare for the purposes of Section 22 reviews (Schedule 3). It confirms that proponents may include a section therein on information and questions submitted by the communities potentially-affected by the project. On the basis of Schedule 3, COMEV may recommend more elaborate and project-specific directives to the concerned Administrator, who formally issues the final directives to proponents for the purposes of Section 22 reviews.

Section 22 assessments conducted by COMEV for ‘grey zone’ projects²

Projects not listed in either Schedule 1 or 2, so-called ‘grey zone’ projects, are submitted to COMEV which recommends whether or not an impact statement should be prepared by the proponent for review in relation to the nature and scope of the project. COMEV may recommend the delivery of either an ‘Attestation of Exemption’ from an environmental and social impact review, or may recommend to the Administrator that the project be subject to a review. If need be, COMEV may also recommend specific conditions regarding the scope of the review and the content of a proponent’s impact statement which may be included in the Administrator’s directive for the said review.

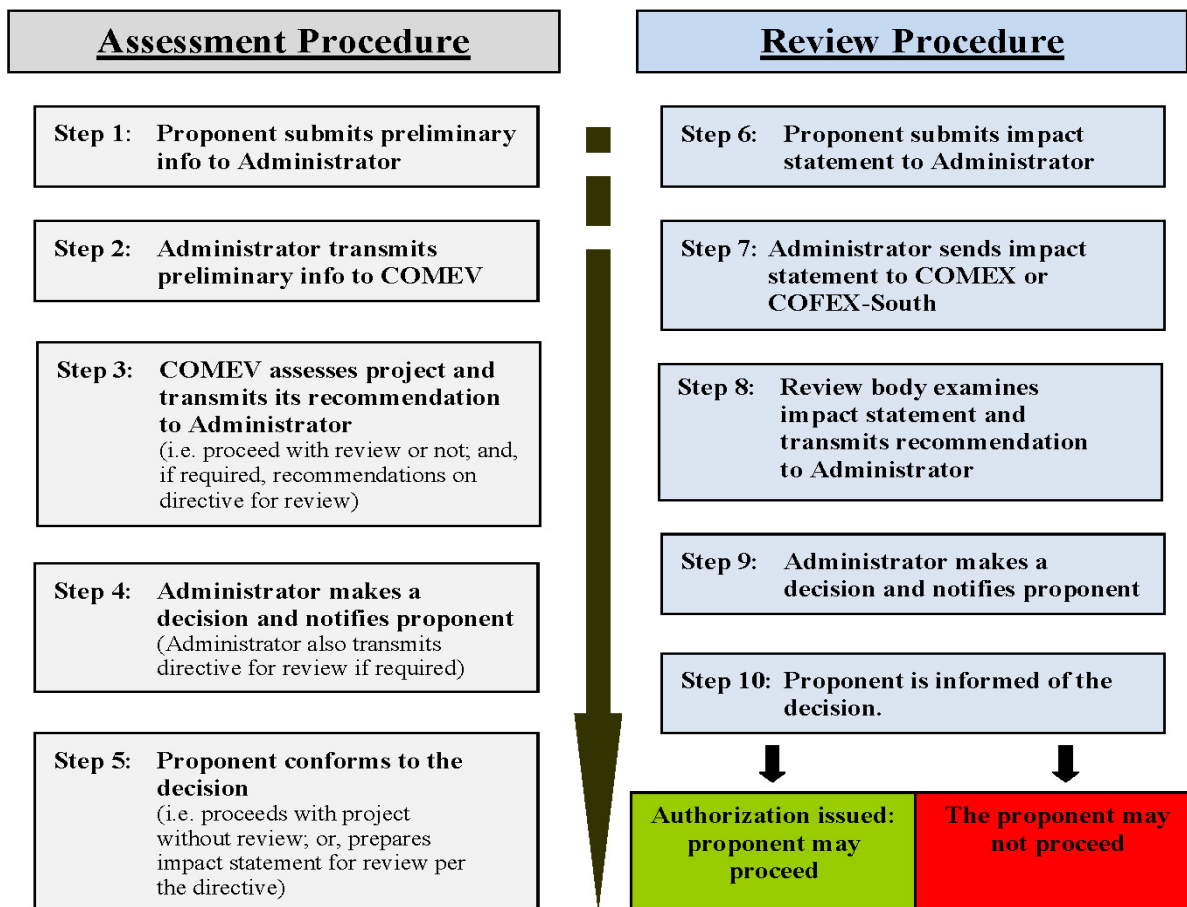
From this perspective, COMEV undertakes ‘screenings’ of all of the components of ‘grey zone’ projects in order to recommend to the Administrator if more thorough environmental and social impact reviews are required.

Environmental and social impact reviews conducted by COMEX and COFEX-South

Depending on jurisdiction, COMEX or COFEX-South will review a project after the proponent files an impact statement (either if the project is automatically subject to the review procedure or if it was a ‘grey zone’ project so subjected by the Administrator following an assessment by COMEV). Following the review, the applicable review body transmits its recommendations to the relevant regional, provincial or federal Administrator who then ultimately makes a decision regarding the approval of the project and the application of conditions as the case may be.

² Section 22 assessments of ‘grey zone’ projects by COMEV are also commonly referred to as ‘evaluations.’

Diagram of the Section 22 JBNQA environmental and social impact assessment and review procedure



Public consultations during Section 22 assessments and reviews

Formal public consultations (also commonly referred to as ‘public hearings’) can be held at any step during the Section 22 procedure by the assessment and review bodies.

They are now the norm for all projects subjected to Section 22 reviews, when COMEX or COFEX-South study environmental and social impact statements, before making recommendations to the Administrator concerned (step 8 in the [diagram](#)). These consultations are organized and held by the review bodies.

In practice, COMEX and COFEX-South – which include members appointed by the Cree Nation Government – exercise discretion and flexibility in defining the need, scope and depth of public consultation in relation to proposed projects.

Readers must note that the Territory’s Cree and Jamesian regional and local administrations may hold their own public consultations as they wish. Section 22 in no way limits the Territory’s local and regional administrations’ prerogatives in such matters. Indeed, on several occasions, Cree First Nations have held community-wide consultations in the context of development projects that were subject to Section 22 reviews.

Public access to information during Section 22 assessments and reviews

Although Section 22 does not set out specific obligations regarding what information must be made available to the public regarding development projects that are subject to the assessment and review procedure, it in no way limits what may be made publicly-available.

Indeed, several important advancements have been made in recent years in relation to the public's access to project-related information:

- COMEX has established an interactive [website](#) which includes project notices submitted by proponents, impact statement directives, impact statements and summaries, notices, transcripts, and documents obtained from the public consultation activities, COMEX recommendation reports, and links to authorizations issued by the provincial Administrator. The website also offers several guidance documents to assist proponents in their own engagement activities. Much of the said information is available in French, but a wealth of project-related information is accessible in Cree and in English. The website also hosts an interface through which the public may offer comments on projects subject to COMEX reviews.
- COFEX-South has a [register](#), hosted on the CEA Agency's online registry, which includes the preliminary information submitted by proponents, impact statement directives, impact statements and summaries, notices for public participation activities, information obtained from public consultations, the expertise received from consulted federal departments, the recommendation reports produced by COMEV and COFEX-South, as well as the authorizations issued by the federal Administrator– in English and in French.
- The province's Ministère du Développement durable, de l'Environnement et de la Lutte contre les changements climatiques (MDDELCC), intends to setup a province-wide register which will include the preliminary information submitted by proponents, impact statement directives, impact statements and summaries, notices for public participation activities, information obtained from public consultations, the recommendation reports produced by COMEV and COMEX, as well as the authorizations issued by the provincial Administrator.

Proponent-driven public engagement activities prior to and after Section 22 assessments and reviews

Section 22 does not specifically prescribe what public engagement measures or activities should be undertaken by proponents prior to Section 22 assessments or reviews. But, it in no way limits what they may choose to do. They thus have a very wide discretion to determine how and when to inform the public of their projects, and to obtain the public's suggestions and concerns in their regard.

Such engagement is an expected responsibility of proponents prior to assessments and reviews. The JBACE and the Section 22 assessment and review bodies now expect that proponent-driven engagement activities are to occur. It is expected that they be documented, that they serve to assist in the drafting of the preliminary information required for assessments, and for the preparation of impact statements.³

Now a standard condition in project approvals, proponents normally continue collaborative monitoring and information-exchange activities with project-affected communities after Section 22 reviews.

³ COMEX has recently published a guidance document which explicitly outlines such expectations (see [http://comexqc.ca/wp-content/uploads/Consultations-promoteurs Attentes-du-COMEX_VF_EN_1.pdf](http://comexqc.ca/wp-content/uploads/Consultations-promoteurs_Attentes-du-COMEX_VF_EN_1.pdf)).

In this regard, proponents are generally required to setup post-review monitoring committees in order to respect the conditions of their project approvals. Such conditions are binding.

Timelines for Section 22 assessment and reviews

No fixed overall timelines apply for the completion of Section 22 assessments and reviews. The assessment and review bodies thus have more latitude to undertake their respective tasks – including the planning and conduction of public consultations – in a manner that may accommodate for the following issues (not exhaustive):

- Scope of the project (e.g. large hydro-electric projects or mines may require more time);
- Adequacy and depth of the information provided by proponents (e.g. as above);
- Degree of public interest and concern regarding a project (e.g. as above);
- Consideration of a new type of development or technology in the Territory for which additional expertise and time may be required to ensure a thorough assessment and review (e.g. uranium exploration);
- Calendar of Cree traditional and cultural pursuits (e.g. moose and goose breaks).

Here again, COMEV, COMEX and COFEX-South have discretion to adapt the timeline of their assessments and reviews, and to plan out related public consultation activities, in relation to project specifics, community calendars, etc. Discretion, flexibility and adaptability are crucial elements of the Section 22 procedure, which empower the Section 22 bodies with the necessary leeway to complete their tasks in a timeframe commensurate with the specific nature and context of proposed projects.

Prior to outlining our recommendations, and in line with the Section 22 regime and assessment and review procedure as described above, the JBACE wishes to emphasize three pivotal contextual points:

1. Familiarity and adaptability of the Section 22 procedure

The Section 22 assessment and review bodies are intimately familiar with the Territory, its inhabitants and their concerns. Given that these bodies have also always included Cree representatives, they have a uniquely-honed and long-standing experience in adapting assessments and reviews in a manner that respects the will and intent of the JBNQA, the special status of the Cree, Cree wildlife harvesting rights, as well as the attribution of the Territory's local and regional governments.

These bodies' familiarity with the Territory, coupled with their ability to adapt assessment and review activities in light of project specifics and public concerns (for example), and with flexible timelines, are key elements that have built up the procedure's credibility in the Territory. It is a procedure in which the Cree and Jamesian inhabitants trust, and in which they actively participate.

- ⇒ The timelines currently prescribed in the *CEA Act - 2012* overly limit the required flexibility to adapt assessment activities when applied in the James Bay Territory; or, to time them in conjunction with the Section 22 assessment and review activities when both procedures apply for the same project.

- ⇒ The *CEA Act - 2012* sets out three specific federal authorities responsible for the environmental assessments conducted thereunder – the CEA Agency, the Canadian Nuclear Safety Commission (CNSC), and the National Energy Board (NEB). Apart from the CEA Agency, the CNSC and the NEB have had little or no implication in the assessment or review of development projects in the James Bay Territory.⁴
- ⇒ A mechanism for ensuring that these federal authorities – coined ‘*responsible authorities*’ in the Act – are adequately aware of the JBNQA, and of the Territory’s unique contexts, will be crucial if they are to successfully undertake assessments in a manner that aligns with the spirit of the JBNQA, and that facilitates the public’s trust and participation in the procedure.

2. Challenges relating to the duplication of environmental assessments and related public participation activities for the same project proposal

Section 22 outlines the adapted environmental and social impact assessment and review procedures for projects affecting the Territory in light of their respective natures; provincial, federal, or Cree jurisdiction. Environmental assessments under the *CEA Act - 2012* are also conducted for the same projects in the Territory when warranted.

The JBACE respectfully acknowledges the duties and responsibilities of federal authorities under the *CEA Act - 2012*. We understand that the *CEA Act - 2012* is a specific federal tool that is designed to provide the necessary advice to inform federal decisions. However, we are also aware that the present situation creates several very important challenges and inconveniences due to multiple assessments for the same project when such situations arise:

- Apprehension and confusion amongst proponents, affected communities, and other stakeholders;
- Project-specific information-exchange and Cree representation are done following an agreed upon approach not formally signed;
- Multiple assessment requirements, guidelines, methodologies, and review criteria;
- Incompatible scheduling of public participation activities and consultation fatigue;
- Undue stress on the capacities of the Territory’s regional governments and on the communities to mobilize in preparation for the multiple assessments and their related participatory activities;
- Inconsistent participation of expert resource persons during participatory activities (whether the resource persons have provincial, federal, or Cree affiliations);
- Differing contact points for obtaining information on the project;
- Potential for contradictory recommendations regarding project approvals, or regarding conditions that the proponents must conform to in light of the approvals (i.e. potential for conditions stemming from assessments under the Act that may differ from those set out after Section 22 reviews);

⁴ The CNSC was involved in Section 22 review of the first advanced uranium exploration project in Québec. It was concluded prior to the revision of the *CEA Act* in 2012. Apart from this occasion, the CNSC has not been implicated in any other project assessment or review in the Territory. The NEB has never been so implicated in the Territory.

- Differing modalities or conditions for monitoring and reporting back to affected communities and other stakeholders;
- Greater costs for all parties involved.

Example of a project subjected to a Section 22 review and an assessment per the CEA Act - 2012

The [Whabouchi Spodumene Mining Project](#), near the Cree community of Nemaska and proposed by Nemaska Lithium Inc., underwent a Section 22 review and an assessment per the *CEA Act - 2012*. The project proposal consisted of an open-pit mining operation with concentrator and associated infrastructures (e.g. waste rock, overburden, and tailings confinement areas, sedimentation ponds). Underground work would also eventually be entertained in a second phase.

The Section 22 review was immediately triggered, given that all mining exploitation projects are automatically subject to reviews regardless of their production capacities (per Schedule 1 of Section 22). On January 28th 2013, the CEA Agency determined that a federal assessment was required for the project pursuant to the *CEA Act - 2012* after having conducted a screening which considered the following factors as indicated in section 10 of Act:

- The description of the project provided by the proponent on December 4th 2012;
- The possibility that the carrying out of the project may cause adverse environmental effects;
- Comments received within a 20 day public commentary period.

Both exercises were done concurrently from 2012 to 2015. But, because no formal agreement to coordinate both exercises was arranged, they were done separately. The following thus occurred:

- The MDDELCC, COMEX, and the CEA Agency made the ad hoc decision to collaborate to the extent possible and to share information throughout the conduct of the exercises;
- As understood between the parties, the CEA Agency approached the Cree Nation Government to provide a Cree-appointed representative to sit on the team setup for the assessment per the *CEA Act - 2012*;
- The public was not adequately informed of the nuances and differences between the exercises, raising confusion;
- Multiple participatory activities were held, such that consultation fatigue occurred. Experts were not on-hand for all of them, and the logistical costs were appreciably higher than if the activities were held jointly;
- The dual but separate exercises, coupled with the multiple participatory activities, placed significant pressure on the local and regional administrations' capacities to prepare, and to mobilize in consequence.

3. The responsibility to enact legislation consistent with Section 22

The Government of Canada and the Gouvernement du Québec, as signatory parties, assented to the responsibility of ensuring that their respective laws of general application are not inconsistent with the said section. Per paragraph 22.2.3 of the JBNQA:

“All applicable federal and provincial laws of general application respecting environmental and social protection shall apply in Territory to the extent that they are not inconsistent with the provisions of the Agreement [the JBNQA] and in particular this Section [Section 22].”

In light of this, the JBACE is of the opinion that the current revision exercise offers an important opportunity to improve and facilitate the application of the *CEA Act - 2012* in the James Bay Territory, in concert with that set out in Section 22 (i.e. coordination).

Options for coordination

The JBACE holds that, ideally, a ‘one-project, one assessment’ approach is the most desirable.

With this in mind, the table on the following two pages outlines the JBACE’s understanding of the pre-requisite conditions, and of the positive and negative aspects of the three coordination mechanisms that are currently in the *CEA Act - 2012*, and that may facilitate this outcome.

As a minimum, the JBACE holds that joint public participation activities should be conducted whenever the Section 22 procedure and that per the *CEA Act - 2012* are conducted for the same project. An established course of action should be developed to facilitate such joint activities, as opposed to organizing them on a case by case basis.

*** Note that all of the three coordination mechanisms in the table below apply only for designated projects,⁵ and cannot be used for project environmental assessments that are referred to a review panel, under the *CEA Act - 2012*.***

Coordination mechanism in the <i>CEA Act - 2012</i>	Pre-requisite conditions	Positive (+) and negative (-) aspects	JBACE concerns and suggestions
<p>Delegation (ss. 26(1) to 26(2))</p> <p><i>Any part of the assessment, including the preparation of the assessment report, may be delegated to other bodies or jurisdictions.</i></p>	<ul style="list-style-type: none"> - The body or jurisdiction must meet the definition of ‘jurisdiction’ per s. 2(1)a-f; - The applicable federal responsible authority (RA) makes decisions on whether or not the project is likely to cause significant adverse effects only once it is satisfied that all delegated functions are performed per the Act. 	<ul style="list-style-type: none"> + The Section 22 bodies meet the definition of jurisdiction per s. 2(1)e;⁶ + The federal RAs ensure that the assessment meets federal needs; - The Section 22 bodies cannot waiver from the timelines currently prescribed in the Act (cannot adapt activities or work schedules). 	<p>⇒ Overly restricts the flexibility to adapt to project-specifics.</p>
<p>Substitution (ss. 32(1) to 36)</p> <p><i>The assessment procedure established under a provincial statute or other jurisdiction may be used as an appropriate substitute for the assessment of a designated project.</i></p> <p><i>This mechanism serves to substitute assessment procedures, but not decision-making responsibilities.</i></p>	<ul style="list-style-type: none"> - Cannot be used if the Canadian Nuclear Safety Commission (CNSC) or the National Energy Board (NEB) are the RAs; - The body or jurisdiction, other than a province, must meet the definition of ‘jurisdiction’ per s. 2(1)(e) or (f); - The Minister⁷ must approve the request, when coming from province, if the conditions set out in s. 34 are met (e.g. public will have access to info and an opportunity to participate in the assessment). The Minister does not have a similar obligation to approve requests from other jurisdictions, although the same conditions apply. 	<ul style="list-style-type: none"> + The Section 22 bodies meet the definition of jurisdiction per s. 2(1)e; + The Minister ensures that the substituted assessment meets federal needs and conditions sets in s. 33 and 34; + <u>In the absence of any additional conditions imposed by the Minister per s. 34(1)(f)</u>, the Section 22 bodies can adapt activities or work schedules at their discretion. 	<p>⇒ Provides for a maximum of coordination and flexibility to adapt to project-specifics.</p> <p>⇒ Maintains the decision-making independence of all involved.</p> <p>⇒ Because it cannot be used for projects where the CSNC and NEB are the RAs, or for those referred to review panels, these entities must be sensitized to the JBNQA if they are to operate in the Territory.</p>

⁵ Per the *Regulations Designating Physical Activities* (SOR/2012-147).

⁶ The Section 22 assessment and reviews bodies are indeed “...established under a land claims agreement referred to in section 35 of the *Constitution Act, 1982* and [have] powers, duties or functions in relation to an assessment of the environmental effects of a designated project” (text of s. 2(1)e of the *CEA Act - 2012*).

⁷ The federal Minister of the Environment responsible for the *CEA Act - 2012*.

Coordination mechanism in the CEA Act - 2012	Pre-requisite conditions	Positive (+) and negative (-) aspects	JBACE concerns and suggestions
<p>Equivalence (ss. 37(1) to 37(3))</p> <p><i>A procedure set out in a provincial statute is equivalent, such that CEA Act - 2012 does not apply for a designated project.</i></p> <p><i>The procedure set out under the provincial statute must be an appropriate substitute for the assessment of a designated project and must meet certain additional conditions.</i></p> <p><i>**In a sense, there is no coordination because only the procedure set out in the provincial statute applies.**</i></p>	<ul style="list-style-type: none"> - Cannot be used if the CNSC or the NEB are the RAs; - A province must request it. The Minister may recommend the equivalence to the Governor in Council, if, and only if, the conditions set out in ss. 33 and 34 are met; - Upon receipt of the recommendation, the Governor in Council may issue an order to exempt the project from the application of the CEA Act - 2012, if satisfied that: <ul style="list-style-type: none"> ▪ After the assessment, in light of appropriate mitigation measures, a decision will be made per the procedure set out under the provincial statute on whether the designated project is likely to cause significant adverse environmental effects; ▪ The implementation of the mitigation measures that are taken into account in making the said decision, and the implementation of a follow-up program, is ensured; ▪ Any other conditions that the Minister establishes are or will be met. 	<ul style="list-style-type: none"> + The Minister and Governor in Council ensure that the equivalent assessment procedure meets federal needs; + Flexibility to adapt the assessment and related activities, as is allowed for in the procedure set out in the provincial statute, can be applied. 	<ul style="list-style-type: none"> ⇒ One decision is made regarding project approval following the procedure set out in the provincial statute. ⇒ A provincial request must be made prior to using the mechanism. ⇒ The Section 22 environmental and social impact assessment and review procedure is, with some differences, reproduced in Chapter 2 of Québec's <i>Environment Quality Act</i> (CQLR c. Q-2). But, it is unclear what this may constitute for the use of this mechanism in the context of the James Bay Territory subject to a treaty such as the JBNQA. The signatory parties should reflect on this if entertaining its use.

Solutions and Recommendations

Coordination

1. In the interest of ensuring efficient, timely, and systematic assessments and reviews of development projects in the Territory, the JBACE is of the opinion that they must ideally be the object of one environmental and social impact assessment and review procedure. And, it is imperative that proponents, local administrations, and public stakeholders know what to expect.
2. The JBACE recommends that the federal government – itself a party to the JBNQA – consults with the Cree and provincial signatory parties to determine which of the three coordination mechanisms should be used (delegation, substitution or equivalent assessment).

The JBACE strongly encourages the federal government to recognize the adaptability, credibility, and uniquely-honed applicability of the Section 22 environmental and social impact assessment and review procedure in the Territory. We suggest that the discussions regarding coordination should consider directing all future federal assessments in the Territory through JBNQA structures.

3. In the event that all three mechanisms currently provided in the *CEA Act - 2012* (delegation, substitution or equivalent assessment) are deemed unsuitable, we recommend that the federal government develop and insert other coordination provisions and mechanisms in the Act to avoid the need for ad hoc decisions and to temper the significant challenges previously-described.

As an absolute minimum, we recommend ensuring that joint public participation activities be conducted whenever the Section 22 procedure and that set out under the *CEA Act - 2012* are conducted for the same project.

Timelines

4. Assessments or reviews in the Territory must benefit from a degree of flexibility to feasibly plan attendant activities in light of project-specifics, public interests, local realities, and established rights.
5. The overly constraining timelines currently prescribed in the *CEA Act - 2012* are problematic when applied to projects in the Territory; especially when the same projects are also subject to Section 22 assessments and reviews. The Act must be amended to remove these timelines in such cases.

Responsible bodies

6. A mechanism must be established to ensure that the federal authorities responsible for environmental assessments under the *CEA Act - 2012* are adequately familiar with the JBNQA, and with the Territory's unique contexts.

This will be crucial if these authorities are to undertake the assessments on their own (i.e. no coordination agreement), or if they are to successfully coordinate them along with the Section 22 bodies, in a manner that aligns with the spirit of the JBNQA, and that facilitates the public's trust and participation in the procedure.

Conclusion

Section 22 of the JBNQA offers a culturally adapted environmental and social protection regime for the Cree that safeguards the rights and protections as outlined in the JBNQA. This same section's environmental and social impact assessment and review procedure is a key element which covers a myriad of issues: protection of Cree traditional land tenure and resource allocation, wildlife harvesting rights and guarantees, the environment, ecosystems, local communities and economies. This reality is manifest in the special status afforded to the Cree via their involvement and implication throughout all facets of the environmental and social impact assessment and review procedure, and in the guiding principles of the environmental and social protection regime.

The *CEA Act - 2012* is based on rules of application, purposes, and institutions that are quite different from those set out in Section 22 of the JBNQA. As a result, the *CEA Act - 2012* does not address several fundamental elements outlined in the JBNQA.

All the while, The JBACE is of the opinion that in the interest of ensuring an efficient, timely, and systematic assessment and review process, development projects in the Territory must ideally be the object of one environmental and social impact assessment or review. A 'one-project, one assessment approach' would serve several important purposes:

- It would consolidate the unique requirements and special status of the Cree per Section 22, along with the responsibilities of federal authorities operating under the *CEA Act - 2012*, via a common assessment of the project;
- It would appreciably streamline the process when both procedures are triggered simultaneously, with well-defined roles and responsibilities for all of the actors;
- It would drastically reduce the severity of the challenges previously cited – namely, those relating to the capacities of local governments and public participation activities.

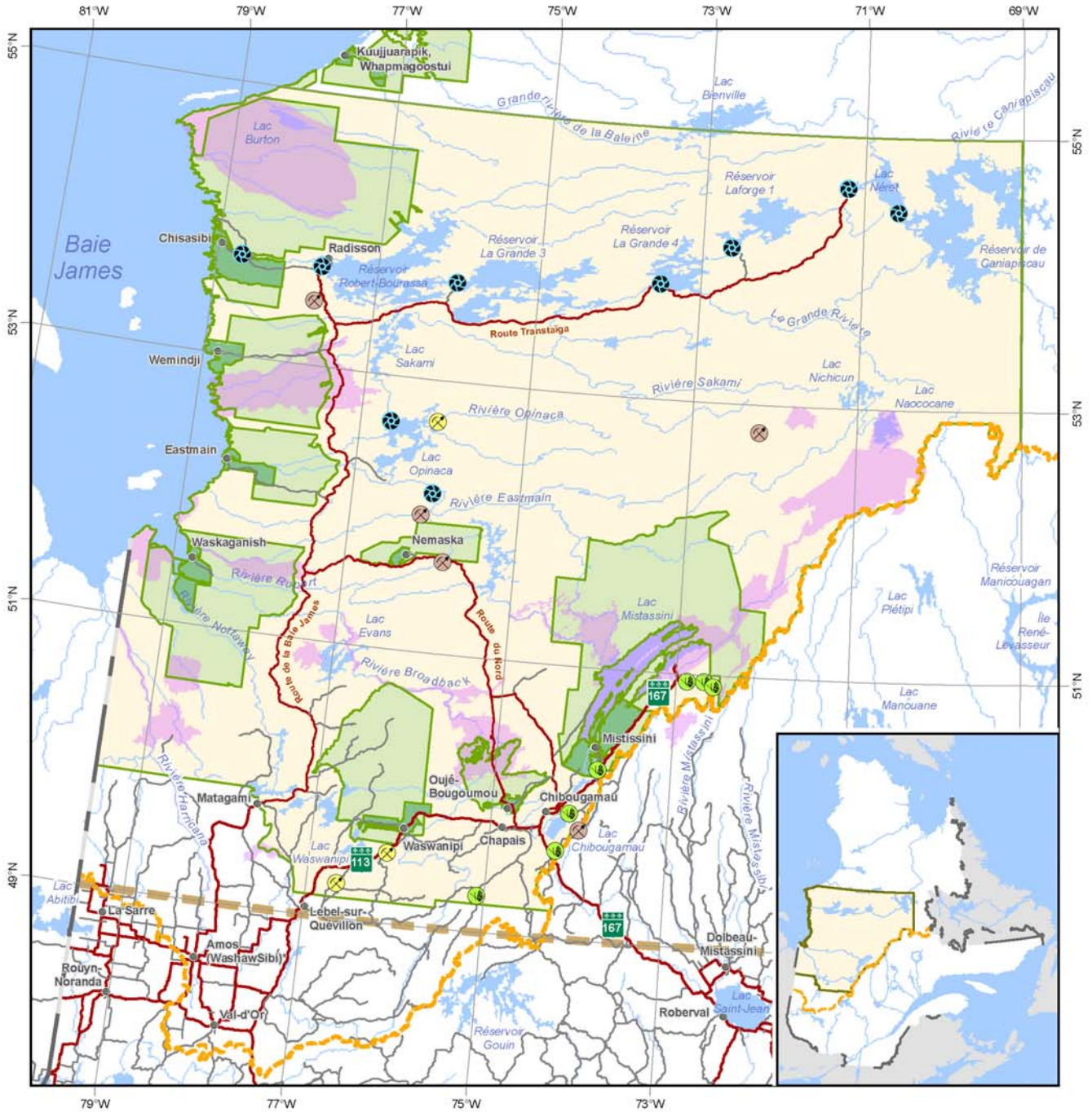
To achieve this, we recommend that the federal, provincial, and Cree governments (each a signatory party to the JBNQA) discuss on how best to coordinate single project assessments and reviews in a manner that may appease each party's requirements and expectations when both procedures apply to the same project in the Territory. It is important to ensure that the *CEA Act - 2012* contain the necessary legal provisions and mechanisms to permit this.

Here, we encourage the federal government to recognize the adaptability, credibility, and uniquely-honed applicability of the Section 22 environmental and social impact assessment and review procedure. The Section 22 bodies' familiarity with the Territory, coupled with their ability to adapt activities in light of project specifics and public concerns (for example), are key elements that have built up the procedure's credibility. It is a procedure in which the Territory's inhabitants trust, and in which they participate. We thus suggest that the discussions regarding coordination should consider directing all future federal assessments in the Territory through JBNQA structures.

The JBACE strongly recommends that clear marching orders be established that set out parameters, roles, and responsibilities for moving forward – including the familiarization of federal authorities to the Territory's unique contexts, and the amendment of currently applicable timelines.

Readers must note that this document represents the preliminary recommendations of the JBACE, for the purposes of the Expert Panel. The JBACE fully intends to exercise its mandate and to provide more in-depth recommendations and insights once a draft Bill has been tabled with proposed amendments to the *CEA Act - 2012*.

Appendix I Map of the James Bay Territory



Limits

- Territory covered by the regime ¹
- Cree Category I lands
- Cree Category II lands
- Southern limit of JBNQA Territory
- Border
- Southern limit of Plan Nord territory

Conservation areas

- Exceptional forest ecosystem
- Protected area

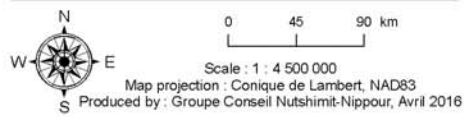
¹ The Crees do not recognize the southern limit of the regime as defined on this map
 * The Washaw Sibi Eeyou Association is temporarily based in Amos

Sources

Land division, mine site, MÉRN 2016
 Exceptional forest ecosystem, MÉRN, 2016
 Protected area, MDDLCC, 2016
 Hydroelectric infrastructures, CEHQ, 2016

Infrastructures

- Mine
- Mine project
- Hydroelectric power station



Comité consultatif pour l'environnement de la Baie James
 James Bay Advisory Committee on the Environment
 ᐱᐱᐱᐱᐱᐱ ᐱᐱᐱᐱᐱᐱ ᐱᐱᐱᐱᐱᐱ

Appendix II Cree participation and representation in the Section 22 environmental and social impact assessment and review procedure

		Assessment and review procedure per Section 22
A. Cree decision-making on Category I and II lands		In the case of proposed development in Category I and II lands, the Cree Regional Administrator, appointed by the Cree Nation Government, is responsible for the protection of the environment.
B. First Nation representation on the assessment and review committees, panels or boards		Cree representatives sit on the Evaluating Committee (COMEV) and the review committees (COMEX, COFEX-South), thereby guaranteeing Cree participation and representation at all times and through all phases of the procedure.
C. Assessment and review process	Assessment Phase	E.g. The environmental and social issues are identified by a permanent assessment committee, which includes Cree representatives. A decision on whether the project should be subject to a review is thus formulated with active and significant Cree participation, as are the scope and directives for the review if one is required.
		E.g. Development of the proponent’s directives are formulated with active and significant Cree participation.
	Review Phase	E.g. Environmental and social issues or impacts are evaluated by permanent review committees, which include Cree representatives.
		E.g. Recommendations are formulated by permanent review committees, which include Cree representatives.

Appendix III Cree wildlife harvesting rights and guarantees as recognized in Section 24 of the JBNQA⁸

Cree rights and guarantees	Section 24 paragraph(s)
The sole and exclusive right to harvest (hunt, fish and trap any species of wild fauna).	24.3.1, 24.3.3, and 24.3.19
Right to harvest at all times of the year without prior administrative authorization, and in all of the Territory, with a minimum of control or regulations applied to them.	24.3, 24.3.10, 24.3.18, and 24.4.30
Crees' harvesting activities are subject to the Principle of Conservation (they may not harvest species requiring complete protection to ensure their continued existence or that of a population).	24.2.1; 24.3.2
Crees' harvesting activities are subject to limitations to ensure public safety (no harvesting within non-Native settlements; possible restrictions on harvesting methods and equipment).	24.3.5, 24.4.7, 24.3.9, 24.3.12, and 24.3.14
Right to personal and community use and to the exchange and sale of harvests between Cree communities and between members of a Cree community (ies).	24.3.11a, and 24.3.11c
Right to possess and transport the products of harvesting activity.	24.3.15
Right to commerce and trade in all harvest-related by-products.	24.3.16
The exclusive right to trap in the Territory, including the right to trap for commercial purposes.	24.3.19
Exclusive right to establish and operate, within Cat. I & II lands, commercial fisheries related to the species reserved to the Crees	24.3.26
Exclusive right to hunt for commercial purposes in designated areas where Crees have harvesting rights the species listed in Schedule 7 of Complementary Agreement # 12.	24.3A
Exclusive right to keep in captivity or practice the husbandry of the species listed in Schedule 8 of Complementary Agreement # 12	24.3A
Priority of Cree harvesting – whereby, in the event of scarcity or rarity of harvestable species, priority must be afforded to Cree harvesters in light of non-Native interests (e.g. sport hunting and fishing).	24.6.2, and 24.6.3
Certain species of mammals, fish and birds are reserved for the exclusive use of the Crees.	24.7.1, and Schedule 2 of Section 24
The Crees have the exclusive right to hunt and fish within Category I & II lands within the Cree area of interest.	24.8.2
Control is exercised over the number of non-Natives permitted to hunt and fish in Category III lands and over the places therein and times where they may hunt and fish with a view to giving effect to the principle of conservation and the rights and guarantees in favour of the Cree s established by and in accordance with the harvesting regime.	24.8.6
Outfitting, being considered as a principal means of controlling non-Native hunting and fishing activity above the 50 th parallel, and the Crees have a right of first refusal to operate as outfitters in Category III lands for a period of 30 years.	24.8.7, and 24.9.3

⁸ For the purposes of the current brief, the JBACE mentions 'Cree wildlife harvesting rights and guarantees.' We recognize that Section 24 applies to all eligible Native persons, party to the JBNQA, and defined as such per the provisions of Schedule IV of Section 24 therein (modified pursuant to Complementary Agreement # 1).