

Joint Operating Procedures for First Nations Consultation on Energy Resource Activities

June 10, 2015

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Agreement

Under the *Joint Operating Procedures for First Nations Consultation on Energy Resource Activities (Procedures)*, the Aboriginal Consultation Office (ACO) and the Alberta Energy Regulator (AER) agree to the following:

- 1) The ministerial order issued on October 31, 2014 (*Energy 105/2014 and Environment and Sustainable Resource Development 53/2014*) and the *Procedures* apply only to applications made to the AER under the specified enactments, as defined by the *Responsible Energy Development Act* (i.e., *Public Lands Act, Mines and Minerals Act (Part 8), Water Act, and the Environmental Protection and Enhancement Act*), in respect of energy resource activities.
- 2) The *Procedures* sets out the procedures to administer and coordinate the operations of the ACO and the AER on matters relating to First Nations consultation in accordance with the directions provided to the AER in the ministerial order.
- 3) In addition to following the defined procedures, ACO and AER staff are encouraged to informally engage one another, as needed, to coordinate the processing of individual files or applications.
- 4) The *Procedures* operates as a standing request from the AER to the ACO for advice on mitigating potential impacts on Treaty rights and traditional uses, under section 7 of the ministerial order, for all decisions made by the AER under the specified enactments.
- 5) The *Procedures* will be revised or updated as needed with the involvement of both the ACO and the AER.

<original signed by>

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<Original signed December 10, 2014>

Date

Revision History

Version date	Description
December 10, 2014	Release of the <i>Procedures</i> .
June 10, 2015	Section 2.3 and 4 amended to reflect updated AER application requirement.

Definitions of Key Terms

The following terms are defined for the purposes of the *Procedures*.

Term	Definition
ACO report	A written report from the ACO to the proponent, First Nations, and the AER that contains the ACO's finding on consultation adequacy and that may also contain advice to the AER on any impacts on Treaty rights and traditional uses identified during consultation.
ACO hearing report	A written report from the ACO that may contain advice to the AER on any impacts on Treaty rights and traditional uses that were raised during an AER hearing and that had not been previously addressed by the consultation process. The ACO hearing report may be submitted during an AER hearing and is permitted by section 49(2) of the <i>Responsible Energy Development Act</i> .
Consultation	As defined in <i>The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013</i> , a process intended to understand and consider the potential adverse impacts of anticipated Crown decisions on First Nations' Treaty rights, with a view to substantially address them.
Delegated consultation	Those procedural aspects of consultation (as defined above) that the Crown delegates to and are carried out by the proponent.
First Nation	First Nation "bands" as defined by the <i>Indian Act</i> (Canada).

1 Background

The Government of Alberta (Alberta), under *The Government of Alberta's Policy on Consultation with First Nations on Land and Resource Management, 2013*, created the Aboriginal Consultation Office (ACO), which reports to the minister of Aboriginal Relations. The ACO was established to manage all aspects of aboriginal consultation, including working with the Alberta Energy Regulator (AER) to ensure that any needed consultation occurs for decisions on energy applications within the AER's mandate.

The AER has jurisdiction under the *Responsible Energy Development Act (REDA)* for the entire life cycle of upstream energy resource development in the province, including upstream oil, natural gas, oil sands, and coal activities. The AER combines the regulatory functions provided by its predecessor, the Energy Resources Conservation Board, with those regulatory functions previously provided by Alberta Environment and Sustainable Resource Development (ESRD) under the specified enactments (*Public Lands Act, Mines and Minerals Act (Part 8), Water Act, and the Environmental Protection and Enhancement Act [EPEA]*) in respect of energy resource activities. *REDA* excludes the AER from determining the adequacy of consultation.

The *Joint Operating Procedures for First Nations Consultation on Energy Resource Activities (Procedures)* sets out the procedures to administer and coordinate the operations of the ACO and AER on matters relating to First Nations consultation in accordance with the ministerial order issued on October 31, 2014 (*Energy 105/2014 and ESRD 53/2014*). The *Procedures* supports the ACO's ability to rely on the AER's regulatory process to form part of Alberta's consultation process, when necessary.

The *Procedures* works in conjunction with

- the ministerial order on aboriginal consultation direction (*Ministerial Order 105/2014 and 53/2014* issued on October 31, 2014, and any amendments),
- *The Government of Alberta's Policy on Consultation with First Nations on Land and Natural Resource Management, 2013 (Consultation Policy)*,
- *The Government of Alberta's Guidelines on Consultation with First Nations on Land and Natural Resource Management (Consultation Guidelines)*, and
- any other relevant Alberta aboriginal consultation policy, guideline, or procedure.

2 Approach

2.1 Activities Not Requiring Consultation

An activity or application does not require consultation if (1) the activity or application is listed in appendix C of the *Consultation Guidelines* or (2) the ACO determines during a pre-consultation assessment that consultation is not required. The AER will accept applications for activities listed in appendix C of the *Consultation Guidelines* or will require the pre-consultation assessment from the ACO as part of the AER application to confirm consultation was not required by the ACO.

2.2 Statements of Concern

The AER will provide any statement of concern received from a First Nation or other aboriginal group and proponent responses directly to the ACO. The AER will also forward statements of concern received from individuals who may be representing a First Nation or other aboriginal group. The ACO will review these statements of concern for information about potential adverse impacts on Treaty rights and traditional uses.

2.3 First Nations Impacts and Mitigation Table

Unless an application is for an activity listed in appendix C of the *Consultation Guidelines*, the proponent must submit an application supplement on First Nations consultation. If consultation on the application was required, the proponent will have to do one of the following: (1) fill in the First Nations impacts and mitigation table in the supplement, (2) provide the information requested in the table in a separate document attached to the supplement, or (3) attach the ACO report to the supplement. Information in the table is drawn from the records already required and verified by the ACO (i.e., consultation log) or from the ACO report.

The First Nations impacts and mitigation table is specifically intended to document any potential adverse impacts of the proposed energy resource activity on existing rights of aboriginal peoples as recognized and affirmed under Part II of the *Constitution Act, 1982*, and on traditional uses as defined in the *Consultation Policy*.

2.4 Statement-of-Concern Period and Closing Consultation

In cases where consultation has been occurring for an extended period prior to the submission of an AER application (e.g., large, complex projects), there is a need to “reconnect” the consultation and regulatory processes in advance of making a regulatory decision. The goal is for the delegated consultation and the AER’s statement-of-concern period to end at the same time, so that all input can be assessed and considered in the regulatory decision.

Coordination between the ACO and AER will begin during a proponent's consultation planning, with the ACO providing information about consultation requirements and the AER providing information about its statement-of-concern period. Throughout the consultation period, the ACO will monitor the consultation reports regularly provided by the proponent and will advise the proponent if the consultation is likely to be considered adequate. This information will allow the proponent to determine if they can apply to the AER and be able to close the delegated portion of consultation within the time allotted for submitting a statement of concern.

2.5 ACO Adequacy Assessment and ACO Report

The ACO will provide to the proponent, First Nations, and the AER an ACO report that contains its finding on consultation adequacy and any advice to the AER on mitigating impacts on Treaty rights and traditional uses. The AER will not make a decision on an application until after receiving the ACO report.

2.6 AER Hearings

If the AER calls a hearing on an application, the ACO may observe the hearing and may provide an ACO hearing report containing advice on any impacts on Treaty rights and traditional uses that were raised during the hearing and not previously addressed by the consultation process.

2.7 Regulatory Appeals, Reconsiderations, and Appeals to the Court of Appeal

The AER will notify the ACO if a First Nation or other aboriginal group is requesting a regulatory appeal or leave to appeal to the Court of Appeal, and if the AER is reconsidering a decision. The ACO will not participate in any regulatory appeal proceedings by the AER, but may rely on the regulatory proceedings to help mitigate any project impacts on Treaty rights and traditional uses.

2.8 Alternative Dispute Resolution

The AER will notify the ACO if a First Nation or other aboriginal group is to participate in alternative dispute resolution (ADR). The ACO will not participate in an ADR process.

3 Joint Operating Procedures

ACO-AER processes (table 3.1) are triggered by the type of consultation required by the ACO (i.e., no consultation, streamlined, standard, or extensive) and the type of AER application submitted (i.e., Enhanced Approval Process [EAP] and non-EAP applications). The AER does not categorize its applications based on the level of consultation or the associated ACO-AER process.

Table 3.1 AER application type and ACO consultation requirements for each ACO-AER process

ACO-AER process	AER application type	ACO consultation requirements
ACO-AER process 1	Applications requiring no consultation	None
ACO-AER process 2	EAP applications	Streamlined or standard (level 1 or 2)
ACO-AER process 3	Non-EAP applications	Streamlined or standard (level 1 or 2)
ACO-AER process 4	Non-EAP applications requiring extensive consultation	Extensive (level 3)

3.1 ACO-AER Process 1 (No Consultation Required)

ACO-AER process 1 applies to applications for activities where consultation is not required by Alberta (figure 3.1, table 3.2). For these applications, the AER will confirm either that the application submitted is for an activity listed in appendix C of the *Consultation Guidelines* or that the application is accompanied by the ACO’s pre-consultation assessment indicating that no consultation is required.

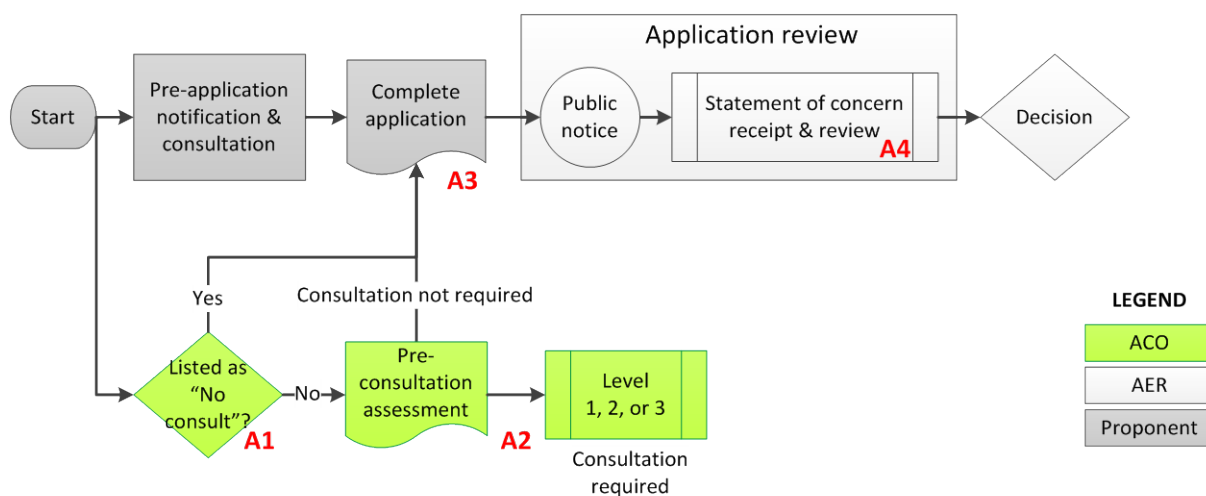


Figure 3.1 Illustration of ACO-AER process 1

Table 3.2 Process steps and description for ACO-AER process 1

Step	Description
A1	<p>No consultation required</p> <ul style="list-style-type: none"> The proponent checks appendix C of the <i>Consultation Guidelines</i> to determine if consultation is not required by Alberta (i.e., the activity is listed in the appendix). <ul style="list-style-type: none"> If the activity or application is listed, the proponent may proceed to apply to the AER. If the activity or application is not listed, the proponent proceeds to step A2.
A2	<p>Pre-consultation assessment (if required)</p> <ul style="list-style-type: none"> The proponent requests a pre-consultation assessment from the ACO. The ACO conducts the assessment to determine if aboriginal consultation is required. If the assessment indicates that no consultation is required, the proponent may apply to the AER, attaching the pre-consultation assessment to the AER application. If the assessment indicates level 1, 2, or 3 consultation is required, the proponent proceeds with the required consultation, and the applicable ACO-AER process will be used.
A3	<p>Complete application</p> <ul style="list-style-type: none"> The AER confirms that the application is for an activity or application listed in appendix C of the <i>Consultation Guidelines</i> or that the application is accompanied by an ACO pre-consultation assessment indicating that no consultation is required. <ul style="list-style-type: none"> The AER will not accept applications that do not meet either of these requirements and will direct the proponent to the ACO. Once the AER has confirmed that no consultation is required, the application proceeds to the decision-making step.
A4	<p>Statement of concern¹</p> <ul style="list-style-type: none"> The AER addresses through its established processes any statements of concern that it receives. <ul style="list-style-type: none"> Applications made to the AER under the <i>Mines and Minerals Act</i> (Part 8) follows the process outlined in that enactment. The AER provides any statements of concern received from First Nations or other aboriginal groups and proponent responses to the ACO.

¹ Under the AER's regulatory process, "a person who believes that the person may be directly and adversely affected by an application may file a statement of concern with the Regulator in accordance with the rules." (*REDA*, section 32).

3.2 ACO-AER Process 2 (Enhanced Approval Process Applications)

Certain land-use applications for energy resource activities made under the specified enactments are handled through the AER's EAP. For EAP applications, the ACO may require streamlined (level 1) or standard (level 2) consultation, which must be completed before the proponent applies to the AER (figure 3.2, table 3.3). Once the consultation has been completed, the ACO may provide advice to the AER on mitigating impacts on Treaty rights and traditional uses and will inform the AER of whether the ACO has found the consultation to be adequate or adequate pending the outcome of the AER's process.

Once the ACO indicates that the consultation is complete, the proponent is able to submit its application electronically to the AER through the EAP. Submissions to the EAP require a valid First Nations consultation (FNC) number, issued through the Electronic Disposition System (EDS). As part of the AER application, proponents will be required to submit the First Nations impacts and mitigation table, based on their record of consultation.

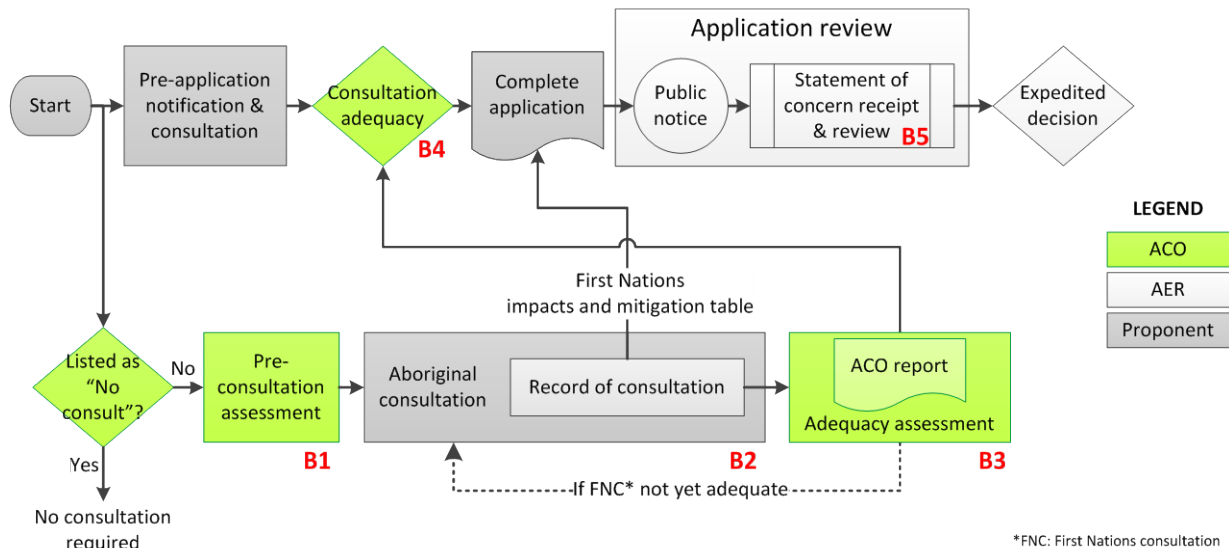


Figure 3.2 Illustration of ACO-AER process 2 for EAP applications

Table 3.3 Process steps and description for ACO-AER process 2 for EAP applications

Step	Description
B1	<p>Pre-consultation assessment</p> <ul style="list-style-type: none"> The proponent applies to the ACO requesting a pre-consultation assessment to determine the level of First Nations consultation required. The proponent proceeds to step B2 if the assessment indicates that streamlined consultation (level 1) or standard consultation (level 2) is required. If extensive consultation (level 3) is required, refer to ACO-AER process 4.
B2	<p>Consultation with First Nations</p> <ul style="list-style-type: none"> The proponent provides project information to First Nations and consults on project-specific impacts on Treaty rights and traditional uses, in accordance with the <i>Consultation Guidelines</i>. As part of the AER application, proponents will be required to submit the First Nations impacts and mitigation table.
B3	<p>ACO report</p> <ul style="list-style-type: none"> The ACO assesses adequacy in accordance with the <i>Consultation Policy</i> and <i>Consultation Guidelines</i>. <ul style="list-style-type: none"> In cases where proponent consultation is not adequate, the ACO may require further consultation. The ACO completes the adequacy assessment and generates the ACO report within the time specified in the <i>Consultation Guidelines</i>. The ACO report to the First Nations and the AER contains the ACO’s finding on consultation adequacy and may also contain advice on whether actions may be required to address potential adverse impacts on Treaty rights and traditional uses identified during First Nations consultation.
B4	<p>Consultation adequacy</p> <ul style="list-style-type: none"> Once the ACO has determined consultation adequacy and has generated an ACO report, the proponent may submit its application to the AER. The AER proceeds with its review of the application so that it may issue a regulatory decision.

(continued)

Step	Description
B5	<p>Statement of concern¹</p> <ul style="list-style-type: none"> The AER addresses through its established processes any statements of concern that it receives. <ul style="list-style-type: none"> Applications made to the AER under the <i>Mines and Minerals Act</i> (Part 8) follows the process outlined in that enactment. The AER provides any statements of concern received from First Nations or other aboriginal groups and proponent responses to the ACO.

¹ Under the AER’s regulatory process, “a person who believes that the person may be directly and adversely affected by an application may file a statement of concern with the Regulator in accordance with the rules.” (REDA, section 32).

3.3 ACO-AER Process 3 (Non-Enhanced Approval Process Applications)

Non-EAP land-use applications, including applications made under the *Public Lands Act*, *Mines and Minerals Act* (Part 8), *Water Act*, and *EPEA*, follow a modified ACO-AER process 2 (figure 3.3, table 3.4). The AER will accept applications and begin a technical review while consultation is ongoing (i.e., consultation and the technical review run concurrently). Statements of concern received by the AER from a First Nation or other aboriginal group and proponent responses are provided to the ACO and may inform consultation.

Once the consultation has been completed, the proponent will be required to submit the First Nations impacts and mitigation table to the AER. The ACO will assess consultation adequacy and will generate an ACO report to inform First Nations and the AER of whether the ACO has found the consultation to be adequate or adequate pending the outcome of the AER’s process. The ACO report may also contain advice to the AER on whether actions may be required to address potential adverse impacts on Treaty rights and traditional uses. The AER will not proceed with a decision on the application until the ACO has provided its finding on consultation adequacy.

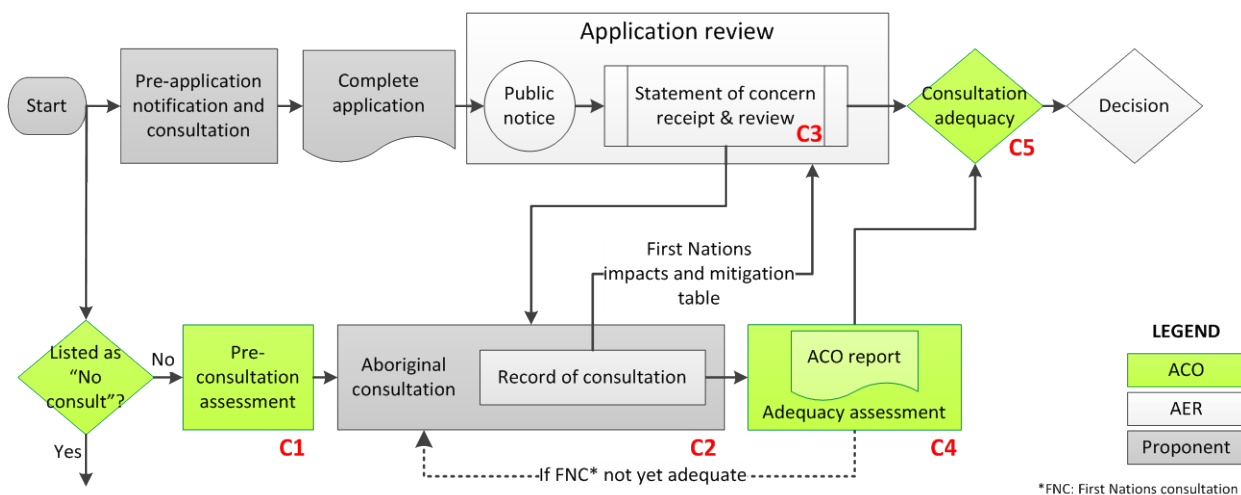


Figure 3.3 Illustration of ACO-AER process 3 for non-EAP applications

Table 3.4 Process steps and descriptions for ACO-AER process 3 for non-EAP applications

Step	Description
C1	<p>Pre-consultation assessment</p> <ul style="list-style-type: none"> The proponent applies to the ACO requesting a pre-consultation assessment to determine the level of First Nations consultation required. The proponent proceeds to step C2 if the assessment indicates that streamlined consultation (level 1) or standard consultation (level 2) is required. If extensive consultation (level 3) is required, refer to ACO-AER process 4.
C2	<p>Consultation with First Nations</p> <ul style="list-style-type: none"> The proponent provides project information to First Nations and consults on project-specific impacts on Treaty rights and traditional uses, in accordance with the <i>Consultation Guidelines</i>. As part of the AER application, proponents will be required to submit the First Nations impacts and mitigation table. Proponents may file their application with the AER so that the application review process can begin.
C3	<p>Statement of concern¹</p> <ul style="list-style-type: none"> The AER addresses through its established processes any statements of concern that it receives. <ul style="list-style-type: none"> Applications made to the AER under the <i>Mines and Minerals Act</i> (Part 8) follows the process outlined in that enactment. The AER provides any statements of concern received from First Nations or other aboriginal groups and proponent responses to the ACO. The ACO may direct the proponent to address potential impacts on Treaty rights and traditional uses identified in the statements of concern as part of the ongoing consultation with First Nations.
C4	<p>ACO report</p> <ul style="list-style-type: none"> The ACO assesses adequacy in accordance with the <i>Consultation Policy</i> and <i>Consultation Guidelines</i>. <ul style="list-style-type: none"> In cases where proponent consultation is not adequate, the ACO may require further consultation. The ACO completes the adequacy assessment and generates the ACO report within the time specified in the <i>Consultation Guidelines</i>. The ACO report to the First Nations and AER contains the ACO's finding on consultation adequacy and may also contain advice on whether actions may be required to address potential adverse impacts on Treaty rights and traditional uses identified during First Nations consultation.
C5	<p>Consultation adequacy</p> <ul style="list-style-type: none"> Once the ACO has determined consultation adequacy and has submitted an ACO report, the AER may complete its application review and issue a regulatory decision.

¹ Under the AER's regulatory process, "a person who believes that the person may be directly and adversely affected by an application may file a statement of concern with the Regulator in accordance with the rules." (*REDA*, section 32).

3.4 ACO-AER Process 4 (Extensive Consultation)

ACO-AER process 4 (figure 3.4, table 3.5) applies to energy resource activities for which the ACO requires extensive consultation (level 3). The coordination of the consultation and regulatory processes between the ACO and AER will begin during the development of a consultation plan by the proponent, which is required by the ACO on projects requiring extensive consultation.

The consultation process and regulatory process reconnect as the regulatory process draws close to a decision point. This reconnection occurs with the period for delegated consultation ending at the same time as the period for submitting a statement of concern.

If a hearing is called by the AER on an application, the ACO may observe and may provide advice on any potential impacts on Treaty rights and traditional uses that are raised that had not been previously addressed by the consultation process.

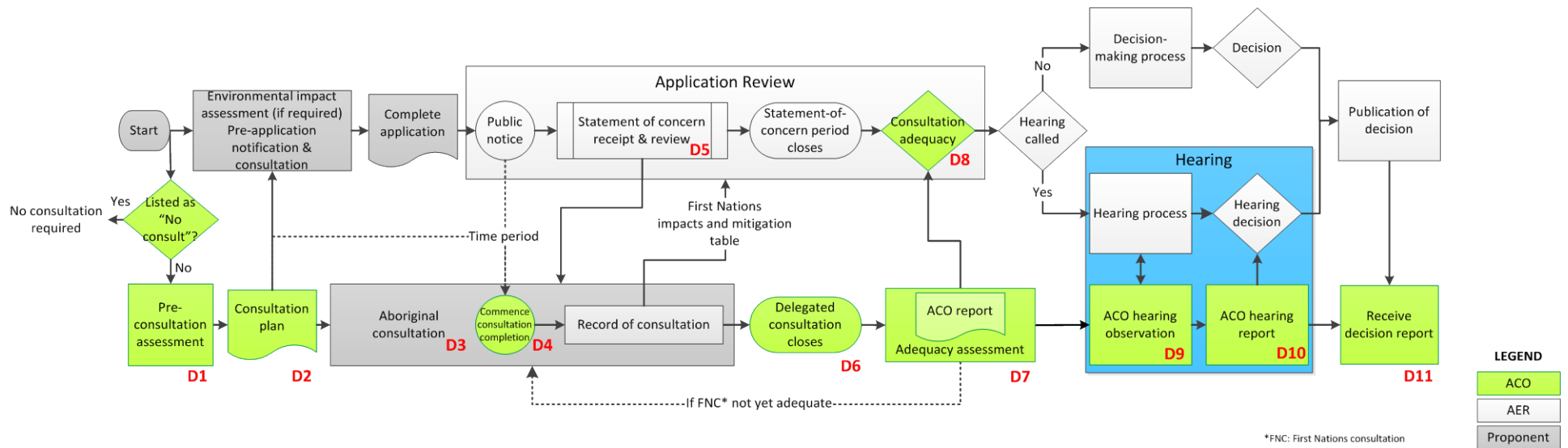


Figure 3.4 Illustration of ACO-AER process 4

Table 3.5 Process steps and description for ACO-AER process 4

Step	Description
D1	<p>Pre-consultation assessment</p> <ul style="list-style-type: none"> The proponent applies to the ACO requesting a pre-consultation assessment to determine the level of First Nations consultation required. The proponent proceeds to step D2 if the assessment indicates that extensive consultation (level 3) is required.
D2	<p>Consultation plan</p> <ul style="list-style-type: none"> The proponent prepares and submits a consultation plan to the ACO outlining its approach to consultation. The ACO will provide the proponent information about consultation requirements and the AER will provide the proponent information about the AER's statement-of-concern period.
D3	<p>Consultation with First Nations</p> <ul style="list-style-type: none"> The proponent provides project information to First Nations and consults on project-specific impacts on Treaty rights and traditional uses, in accordance with the <i>Consultation Guidelines</i>. As part of the AER application, proponents will be required to submit the First Nations impacts and mitigation table. Proponents may file their application with the AER so that the application review process can begin.
D4	<p>Consultation completion notice</p> <ul style="list-style-type: none"> The ACO prepares a consultation completion notice that indicates to the proponent and First Nations that the period for delegated consultation is soon coming to an end. The period remaining for delegated consultation specified in the consultation completion notice is the same as the period stated in the AER's public notice of application for receiving statements of concern. Delegated consultation may continue to occur during the period in which the AER will accept statements of concern, but will end at the same time as the deadline for submitting statements of concern.
D5	<p>Statement of concern¹</p> <ul style="list-style-type: none"> The AER addresses through its established processes any statements of concern that it receives. <ul style="list-style-type: none"> Applications made to the AER under the <i>Mines and Minerals Act</i> (Part 8) follows the process outlined in that enactment. The AER provides any statements of concern received from First Nations or other aboriginal groups and proponent responses to the ACO for its information. The ACO may direct the proponent to address potential impacts on Treaty rights and traditional uses identified in the statements of concern as part of the ongoing consultation with First Nations.
D6	<p>Delegated consultation closes</p> <ul style="list-style-type: none"> The portion of the delegated consultation comes to an end at the same time as the deadline for submitting a statement of concern to the AER.
D7	<p>ACO report</p> <ul style="list-style-type: none"> The ACO assesses adequacy in accordance with the <i>Consultation Policy</i> and <i>Consultation Guidelines</i>. <ul style="list-style-type: none"> In cases where proponent consultation is not adequate, the ACO may require further consultation. The ACO completes the adequacy assessment and generates the ACO report within the time specified in the <i>Consultation Guidelines</i>. The ACO report to First Nations and the AER contains the ACO's finding on consultation adequacy and may also contain advice on whether actions may be required to address potential adverse impacts on Treaty rights and traditional uses identified during First Nations consultation.
D8	<p>Consultation adequacy</p> <ul style="list-style-type: none"> Once the ACO has determined consultation adequacy and has submitted an ACO report, the AER may complete its review of the application and issue a regulatory decision or call a hearing.

(continued)

Step	Description
D9	<p>ACO hearing observation</p> <ul style="list-style-type: none"> • If it appears to the AER at the time that a hearing is called that First Nations will be participating, the AER will notify the ACO of the hearing. The ACO may elect to observe or monitor the hearing. • The ACO has discretion to participate beyond observing or monitoring the hearing. • If information is revealed during the hearing about impacts on Treaty rights and traditional uses, the ACO may provide a hearing report.²
D10	<p>ACO hearing report</p> <ul style="list-style-type: none"> • The ACO considers all relevant evidence submitted during the hearing before preparing a hearing report. • The ACO provides the hearing panel and the parties with the ACO hearing report (under <i>REDA</i>, section 49(3)) prior to or at the close of the evidentiary portion of the hearing and before the final submissions of the parties. <ul style="list-style-type: none"> - The ACO hearing report addresses the adequacy of consultation and may contain advice on whether actions may be required to address potential adverse impacts on Treaty rights and traditional uses raised during the hearing. - The ACO hearing report deals only with matters raised during the hearing and is not subject to cross-examination.
D11	<p>Decision report</p> <ul style="list-style-type: none"> • The AER publishes the decision report, making it available to the ACO and First Nations. • Hearing participants, if a hearing occurs, receive a copy of the decision report from the AER.

¹ Under the AER's regulatory process, "a person who believes that the person may be directly and adversely affected by an application may file a statement of concern with the Regulator in accordance with the rules." (*REDA*, section 32).

² The ACO hearing report is a written statement from the Crown permitted by section 49(2) of *REDA*.

4 AER Application Requirement

For activities listed in appendix C of the *Consultation Guidelines*, there are no additional AER application requirements.

For all applications under the specified enactments submitted to the AER, except those applications for activities listed in appendix C of the *Consultation Guidelines*, an application supplement on First Nations consultation is required effective July 1, 2015.

The supplement is provided on the AER's website.