YESAB
Yukon Environmental and
Socio-economic Assessment Board

# POLICY GUIDANCE

# REGIONAL LAND USE PLAN CONSIDERATIONS IN YESAA PROJECT ASSESSMENTS

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**Disclaimer:** This document is not intended to provide legal advice or direction. It is for information purposes only and should not be used as a substitute for the Act or its associated regulations and rules. In the event of a discrepancy, the Act, regulations, and rules prevail. YESAB retains the discretion to deviate from the procedures described in this guidance where appropriate.

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## ***Yukon Environmental and Socio-Economic Assessment Act and the Umbrella Final Agreement***

This policy guidance includes references to the *Yukon Environmental and Socio-economic Assessment Act* ("YESAA"). Where applicable, the corresponding provisions of the *Umbrella Final Agreement* are also identified.

YESAA was enacted to meet a commitment in the Umbrella Final Agreement between the Government of Canada, the Council of Yukon First Nations and the Government of Yukon

The *Umbrella Final Agreement* ("UFA"), and Chapter 12 in particular, sets out an over-arching framework for a development assessment process in Yukon. The agreement required and contemplated that elements of this process would be further developed through legislation enacted by Canada or Yukon.

In 2003, ten years after the UFA was signed, YESAA was given Royal Assent. YESAA specifies that in the event of an inconsistency or conflict between a final agreement and YESAA, the agreement prevails to the extent of the inconsistency or conflict YESAB has a special relationship with the UFA and the unique environmental and socio-economic assessment legislation that it created. We recognize that we are one of many organizations with a role to play in meeting its spirit, intent and purpose.

As the Government of Canada works towards the implementation of the *United Nations Declaration of the Rights of Indigenous Peoples Act*, YESAB will continue to incorporate many of the principles underlying UNDRIP and the Truth and Reconciliation Commission's calls to action via YESAB rules and organizational initiatives.

# Preface

This policy guidance (guidance) provides Decision Bodies, First Nations, proponents, and other assessment participants with information regarding:

- the mechanisms set out in the Yukon Environmental and Socio-economic Assessment Act (YESAA) and the Umbrella Final Agreement (UFA) linking the regional land use planning processes to the assessment processes in Yukon; and
- more specifically: how pending and final regional land use plans (plans) will be considered in YESAB assessments.

Note that this guidance does not address or speak to the other half of the link between Chapters 11 and 12 of the UFA. Specifically, how assessment processes can help inform regional land use planning processes. That element of the relationship between Chapters 11 and 12 is best addressed by the entities empowered to undertake the regional land use planning processes.

This guidance includes information regarding the conformity check process for projects in regions where a regional land use plan is in effect. This content was previously set out in the December 2022 information bulletin entitled "Conformity Check Processes Under YESAA". While that bulletin has now been incorporated into this guidance piece, note that the overall approach and position regarding conformity checks for projects in regions where a regional land use plan is in effect remains unchanged.

For the purposes of this guidance the Designated Office, the Executive Committee and Panel of the Board will be collectively referred to as YESAB. Additionally, for the purposes of this guidance, "plans" or "land use plans" refers to regional land use plans undertaken pursuant to chapter 11 of the Umbrella Final Agreement ("UFA"). This guidance applies to all regional land use planning (planning) processes, provided that the planning work has begun. Specifically, once the regional planning commission (commission) has been established. This guidance does not apply to plans or planning processes undertaken outside of Chapter 11.

# Introduction

The Umbrella Final Agreement ("UFA") includes provisions for regional land use planning and the assessment process. Planning processes are set out under Chapter 11 of the UFA. The *Yukon Environmental and Socio-economic Assessment Act* (YESAA) gives effect to the assessment process set out in Chapter 12 of the UFA.

The UFA established boards and committees involved with land and resources, including the Yukon Land Use Planning Council (YLUPC) and YESAB. The YLUPC and commissions established by the parties are responsible for the support and undertaking of planning, respectively, and YESAB is responsible for the assessment of project proposals in the Yukon.

A plan is a collective statement about how to manage land, water and resources within a geographic area.[1] It provides guidance for land and resource use decision-making that helps to achieve the kind of future people in the region want to see, including an objective of sustainable development as defined in the UFA. Plans may also provide for the protection of land, water and resources within the region. Plans provide management direction for all

[1] Recommended Dawson Regional Land use Plan pg. 311

Yukon public lands and all First Nations Settlement Lands within the planning region and are intended to be living documents that are open to periodic review and amendment to ensure that the plan is achieving its vision, goals and objectives.[2] While providing guidance for decision-making, plans are not a legal document.[3] There are currently two finalized plans in effect in the Yukon: The North Yukon Regional Land use Plan and the Peel Watershed Regional Land use Plan. In both instances, the applicable commission was discontinued after the plan was approved by the Yukon government and affected First Nations governments. This has created a gap in respect of fulfilling the conformity check process contemplated under s.44 of YESAA.

The assessments completed by YESAB evaluate the environmental and socio-economic effects of assessable projects proposed in the Yukon. Under YESAA when an assessment is complete, unless the assessor refers the project, the assessor will recommend to the decision body(s) that the project: proceed as proposed; proceed with terms and conditions; not proceed. YESAB makes its recommendations to a relevant decision body(s) which can be federal, territorial and/or First Nation governments. There can be multiple decision bodies for a project, depending on the location of the project and authorizations required. Decision bodies issue a decision document.

Plans are an important part of the assessment process set out under YESAA. In carrying out project assessments, YESAB assessors draw on applicable finalized and pending plans to understand the local environmental and socio-economic context where the project is being proposed.

## Legislative Context

The UFA and YESAA set out and provide for processes aimed at integrating plan considerations into the assessment processes conducted under YESAA. The processes applicable to projects in regions for which a regional land use plan is in effect (finalized plan) are set out under s.44 of YESAA. This section states:

44 (1) If a regional land use plan is in effect in a planning region established under a final agreement, a designated office, the executive committee or a panel of the Board shall, when conducting an assessment of a project proposed in the planning region, request the planning commission established under the final agreement to advise it as to whether the project is in conformity with the regional land use plan, unless such a request has already been made in relation to the project.

(2) A designated office, the executive committee or a panel of the Board shall, if advised by the planning commission for a planning region, before or during its assessment of a project, that the project is not in conformity with the regional land use plan, consider the regional land use plan and invite the planning commission to make representations to it with respect to the project.

(3) Where a designated office, the executive committee or a panel of the Board recommends that a project referred to in subsection (2) be allowed to proceed, it shall, to the extent possible, recommend terms and conditions that will bring the project into conformity with the regional land use plan [emphasis added].

[2] Recommended Dawson Regional Land use Plan pg. 287-288

[3] Peel Watershed Regional Land use Plan pg. 2

Section 44(1) and 44(2) of YESAA implements and gives effect to sections 12.17.1 and 12.17.3 of the UFA. For reference, those sections of the UFA state:

12.17.1 Where YDAB or a Designated Office receives a Project application in a region where a regional land use plan is in effect, YDAB or the Designated Office, as the case may be, shall request that the Regional Land Use Planning Commission for the planning region determine whether or not the Project is in conformity with the approved regional land use plan.

12.17.3 Where a panel is reviewing a Project and a Regional Land Use Planning Commission has determined pursuant to 12.17.1 that the Project does not conform with an approved regional land use plan, the panel shall consider the regional land use plan in its review, invite the relevant Regional Land Use Planning Commission to make representations to the panel and make recommendations to the decision body that conform so far as possible to the approved regional plan [emphasis added].

The processes applicable to projects in regions for which a plan is pending are set out under s.45 of YESAA. This section states:

45 (1) When a planning commission established for a planning region under a final agreement notifies the executive committee and designated offices that it is preparing a regional land use plan pursuant to the final agreement, the executive committee and each designated office whose assessment district includes any part of the planning region shall provide the planning commission with the information in its possession about every project in the planning region for which an assessment is pending.

(2) The executive committee shall invite a planning commission that is preparing a land use plan to make representations to it and to each panel of the Board that is conducting a review of a project, and each designated office that is conducting an evaluation of a project shall invite the planning commission to make representations to it.

Section 45(1) and 45(2) of YESAA implements and gives effect to sections 12.17.2 of the UFA. For reference, those sections of the UFA state:

12.17.2 Where a Regional Land Use Planning Commission is preparing a regional land use plan, YDAB or a Designated Office, as the case may be, shall provide the Regional Land Use Planning Commission with the information it has on any Project in the planning region for which a review is pending and shall invite the Regional Land Use Planning Commission to make representations to the panel or the Designated Office.

## HOW DOES YESAB CONSIDER REGIONAL LAND USE PLANS?

In carrying out project assessments, YESAB assessors draw on several information sources to understand the local environmental and socio-economic context of where the project is being proposed. Plans (both finalized and pending) and associated process requirements under YESAA help inform valued environmental and socio-economic component (VESEC) selection, provide baseline information and provide important context to support YESAB assessors with characterizing project effects and determining the significant adverse effects of projects. Plan concepts (developed to date) that can inform project assessment include landscape management units (LMUs), land use designation systems, general and special management directions, cumulative effects

framework, and plan strategies to minimize project effects[4].

While both finalized plans and pending plans can inform assessments, the considerations and weight attached to each are unique, and are discussed individually below.

## How does YESAB consider Finalized Regional Land Use Plans?

If a project occurs in an area where a finalized land use place is in effect, this triggers specific processes and correspondence regarding project conformity with the finalized plan.

Ultimately, these inputs and the finalized plan are considered and taken into account in the assessment.

These processes, and subsequent mechanisms by which finalized plans are considered in the assessment are outlined below.

### *Conformity Check Process Under YESAA*

Conformity checks, and assessors' powers and obligations under s.44 of YESAA are the legislated mechanisms for ensuring that finalized plans will have meaningful impacts on project assessments. Notably, the obligations arising under s.44 of YESAA relate to input solicited and received by the commissions established under the applicable Final Agreement(s). To date, the Parties have made the decision to discontinue commissions once the plan has been finalized. In view of this gap, the Parties have asked the YLUPC to provide input to regulators and assessors with respect to adherence to finalized plans. The YLUPC has agreed to do so and has been providing "consistency opinions" to assessors.

### *Consistency Opinions*

For both the North Yukon and Peel Regional Land Use Plans, the applicable commission was discontinued after the plan was approved by the Yukon government and affected First Nations governments. Further, upon request of the parties, the YLUPC staff are currently providing a consistency opinion as to whether the proposed project is consistent with the finalized plan, and what practices and strategies recommended in the plan would be the most relevant to the proposed project. If the YLUPC is willing to provide a consistency opinion, the assessor will consider that input. However, this consistency opinion is not, and cannot be equated with, the conformity check which both YESAA and the UFA state is to be performed by the commission. The YLPUC is a distinct entity, and cannot simply be substituted for the commission. In short, the conformity check process set out and provided for under s.44 of the Act/s.12.17.1 and 12.17.3 of the UFA is inoperable if the applicable commission is discontinued after plan approval. Furthermore, this gap renders inoperable the stand-alone basis, under s.44(3) of the Act, for assessors to recommend terms and conditions aimed at bringing otherwise non-conforming projects into conformity with the plan.

### *Valued Environmental and Socio-economic Component (VESEC) Selection*

Finalized plans describe key values within each LMU in the planning region (e.g. number and type of wildlife species). These descriptions can help YESAB assessors with identifying relevant VESECs to be considered in the assessment. Plans may also assist with identifying spatial and temporal boundaries[5] of VESECs by describing known land uses within each LMU and helping

[4] Note these strategies/methods employed in the plans approved and developed to date may not be used in future planning processes.

[5] Examples of spatial boundaries could include migration routes and access corridors. Temporal boundaries could include migration windows and periods of seasonal use.

assessors identify possible interactions between project activities and VESECs. Plans can also help identify and describe baseline conditions of certain VESECs (e.g. physical, biological, socioeconomic and cultural data). Identifying baseline conditions for VESECs provides YESAB with an important reference point to analyze the predicted changes to the state of a VESEC as a result of the proposed project's activities and associated effects.

### *Significance Determination and Contextual Considerations*

YESAB assessors draw on finalized plans to understand the local environmental and socio-economic context where the Project is being proposed. Specifically, common contextual factors considered by YESAB when determining the significance of effects include, but are not limited to applicable legislation, standards, plans and policies, asserted and established Aboriginal and treaty rights, the cumulative effects of other past, present, and likely future projects or activities, ecological or social limits and thresholds, vulnerability and resiliency of social and/or ecological systems and components and political and cultural setting.[6] Information about many of these contextual factors can be found in a finalized plan.

Plans also inform what level of activity is considered acceptable in each LMU, whether thresholds for certain values/and or LMUs have been surpassed, and how the long-term objectives for a LMU should be considered.

### *YESAB Recommendations*

Under YESAA, if YESAB determines that a proposed project will or is likely to have significant adverse effects, YESAB will include in its recommendation terms and conditions or measures to mitigate those effects. Recommended best management practices in the plan can inform mitigations that YESAB recommends, particularly if best management practices are not included within the proposed project's design. There may also be circumstances where YESAB determines that likely significant adverse effects cannot be mitigated and recommends that the proposed project not proceed. This is the case for all projects, irrespective of whether they are located within an area which is subject to a final plan. To this end, YESAB notes that the UFA and YESAA contemplate that an assessor can recommend that a proposed project proceed even if it does not conform with a finalized plan.[7] Further, YESAB does not equate conformity with significance, or vice-versa. In other words, YESAB may determine that a project that does not conform with the plan does not have significant adverse effects. Conversely, YESAB may find that, notwithstanding the fact that a project conforms with the plan, it does have significant adverse effects.

YESAB assessors can recommend terms and conditions to mitigate otherwise likely, significant adverse effects (s.56(1)(b)/58(1)(b)/72(4)(b) of YESAA). As noted above, YESAA provides a second, potential basis for recommended terms and conditions in respect of projects proposed in areas with a finalized land use plan. Specifically, if a commission was in place following finalization of a land use plan, and that commission advised an assessor that a proposed project did not conform with the finalized land use plan, the processes set out under 44(2) and (3) of YESAA would be engaged. With respect to terms and conditions: if an assessor recommended a project proceed in such circumstances, s.44(3) would enable, and require, the assessor to recommend terms and conditions aimed at

[6] YESAB's Assessment Methodology Information Bulletin.

[7] See 11.7.0, 12.17.3 and 12.17.4 of the UFA and s.44(3) of YESAA

bringing otherwise non-conforming projects into conformity with regional land use plans. However, and as stated above, assessors' powers and responsibilities under s.44 (3) of YESAA cannot be engaged without a conformity check conducted by the applicable commission. For further clarity, in the absence of a conformity check from a commission, assessors can still recommend terms and conditions in accordance with s.56(1) (b)/58(1)(b)//72(4)(b) of the Act.

For more information on YESAB's assessment methodology and steps, refer to YESAB's Environmental and Socio-economic Assessment Methodology Information Bulletin. Additional information on YESAB's significance determination process can be found in YESAB's A Framework for Determining the Significance of Adverse Effects of Projects Assessed under YESAA Information Bulletin .

## How are RLUPs that are pending, and potential project impacts on the planning process, considered in the assessment?

Plans that are pending will generally inform a project assessment in the same manner described in the How does YESAB consider finalized Regional Land use Plans? section above.[8] The main difference is that more weight will be attached to a finalized plan by YESAB assessors that has been approved by the Yukon government and identified First Nations governments than a pending plan. Further, from a process perspective, for pending plans: YESAB receives input directly from the applicable commission, as opposed to from a third party such as the YLUPC.

As mentioned previously, under section 45 of YESAA and UFA 12.17.2, commissions can "make representations" to YESAB on projects being assessed in a pending planning region. This offers an opportunity for the commission to comment on projects, and to advise on matters including if there are proposed project elements that are inconsistent with their recommended management intent of certain LMUs. Relatedly, comments provided to YESAB from a commission can help inform an understanding of long-term objectives or acceptable activities of certain areas in the planning region. This type of information can provide valuable context during the significance determination stage and will be considered by YESAB before issuing a recommendation about a project in the pending planning region.

In certain cases, the assessment may also include consideration of the project's potential impacts on the planning process itself. It is important to note that YESAA and the UFA do not contemplate pausing development until the completion of plans. However, YESAB recognizes the principle that if a project proceeds in an area which is subject to on-going land use planning, this could undermine the planning process by reducing the amount of undeveloped land available in the planning area. As a result, if a regulator ultimately decides that a proposed project can proceed in such circumstances, in some cases this could impact the integrity of the pending land use planning process and associated Aboriginal and treaty rights. From a practical perspective, the

[8] Note YESAB will consider input from a commission from the time that they are established i.e. predevelopment of a draft plan.

degree to which the assessment will take into account the proposed projects' potential effects on the planning process itself will likely be heavily dependent upon the level of detail and information the assessor has received about the pending plan, how far the planning process has advanced, and the degree to which parties to the planning process indicate agreement on elements of the pending plan as applied to the project. For more information on how impacts to rights are taken into account in YESAB assessments see YESAB's Consideration of Aboriginal and Final Agreement Rights In YESAB Assessments Information Bulletin.

## Conclusion

Plans are an important part of the assessment process set out under YESAA. Applicable plans support YESABs assessment of project proposals and provide valuable context to understand the local environmental and socio-economic context where the project is being proposed.

For more information regarding YESAB, please contact YESAB or visit www.yesab.ca.

# Explanation of Key Terms

This section provides an explanation of key terms used in this policy guidance.

**Activities** - Anthropogenic actions that alter the human or biophysical environment (where those alterations are observable/ measurable/ detectable).

**Assessment** - An evaluation of a proposed project by a Designated Office, a screening by the Executive Committee or a review by a Panel of the Board.

**Baseline Condition** - A reference point to analyze the predicted change in condition of a VESEC as a result of the proposed project activities and associated effects.

**Consider (as in "consider a factor")** - Means take into account but does not require a resolution or a determination of this specific factor.

**Conformity Check** - The document generated by the applicable commission determining whether a proposed project conforms with the applicable finalized plan. Both the UFA (section 12.7.1) and the YESAA (section 44) these checks are performed by the applicable commission. This check is the legislated mechanism for ensuring that finalized plans will have meaningful impacts on project assessments.

**Consistency Opinion** - YLUPC staff fill out a form to provide an opinion as to whether or not projects are consistent with the plan, and what practices and strategies recommended in the plan would be the most relevant. Note that these consistency opinions are not the conformity checks which both YESAA and the UFA require to be conducted by the Commission.

**Context** - The particular environmental and/or socioeconomic setting within which the project occurs.

**Contextual Factors** - The specific context-based considerations that help situate a likely project effect.

**Cumulative Effects** - Changes to a Valued Environmental and Socio-economic Component (VESEC) caused by an activity (related to a project being assessed) in combination with other past, present, and likely future projects or activities.

**Cumulative Effects Framework:** A structural approach within regional land use plans to bring together different indicator tools and management actions or strategies to address cumulative effects management objectives.

**Determine** - As in "determine if there are significant adverse effects" — make a finding, decide or resolve

**Decision Body(s)** - Decision makers as set out in Section 2 of YESAA. They can be federal, territorial and/or First Nation governments.

**Decision Document** - A published response from a decision body(s) to YESAB's recommendation that accepts, rejects or varies the recommendation(s).

**Finalized Plan –** A Regional land use plan that has been approved by the parties to the plan i.e. the Yukon government and identified First Nation governments.

**General Management Directions** -General Management Directions guide land use decisions in the Planning Region. They are communicated in the Plan in the form of strategies and recommendations and are intended to be integrated into existing regulatory processes

**Land Use Designation** - The purpose of a Land Use Designation System is to describe the management intent of each identified Landscape Management Unit (LMU).

**Landscape Management Unit (LMU)** - An LMU is a discrete area of land. Each LMU is identified and delineated from the others based on a review of human use, ecological properties, current and anticipated levels of development, and/or identified land use issues. Each LMU has a distinct management intent which translates to differences in how they are designated for land use.

**Mitigation(s)** - Measures for the elimination, reduction or control of adverse environmental or socio-economic effects

**Pending Plan –** A draft or recommended plan that has been produced by an established regional planning commission. YESAB will consider input from a commission from the time that they are established i.e. predevelopment of a draft plan.

**Pending Planning Region** – Once a regional planning commission is formed and can make representations to YESAB.

**Project** - An activity or interrelated group of activities, for which one of the activities requires an assessment under the Yukon Environmental and Socio-economic Assessment Act (YESAA)

**Project Effect(s)** - A change in the condition of a value or valued environmental and socio-economic component caused either directly or indirectly by a project.

**Recommended Best Management Practices** - A range of practices that have been determined to be the most effective and practical means of preventing or reducing the time, intensity, or duration of human-based activities on the land base on/in land, air, or water

**Regional Planning Commission (Commission)** – Regional land use planning commissions are independent bodies that develop the regional land use plan. The commissions recommend the plan be accepted and implemented by the Government of Yukon and the Governments of the affected First Nations.

**Regional Land Use Plan** - A collective statement about how to use and manage land and resources within a geographic area.

**Special Management Directions** - Special management directions are conditions to be applied to specific Land Management Units where development is permitted.

**Terms and Conditions** - Mitigations proposed by YESAB to eliminate, reduce or control likely significant adverse environmental and/or socio-economic effects resulting from the project.

**Values -** Things deemed important by society and governments for assuring the integrity and well-being of communities, the environment, and economies

**Valued Environmental and Socio-economic Components (VESECs)** - Components of the physical and socio-economic environment that are viewed as important in the setting of a given project (i.e. for environmental, scientific, social, traditional, or cultural reasons), and are predicted to be adversely affected by the proposed project and warrant consideration in an assessment.

**Yukon Environmental and Socio-economic Assessment Act (YESAA)** – the legislation enacted to fulfill the requirements of Chapter 12 of the UFA. Specifically, the Yukon First Nations Final Agreements called for the establishment by federal legislation of an assessment process that would apply to all lands within Yukon: federal, territorial, First Nation and private. The Yukon Environmental and Socio-economic Assessment Act (YESAA) was given Parliamentary Royal Assent on May 13, 2003. The federal legislation outlines the assessment process for assessable projects in Yukon.

**Yukon Environmental and Socio-economic Assessment Board (YESAB)** - YESAB is an independent arms-length body, responsible for the assessment responsibilities of the Yukon Environmental and Socio-economic Assessment Act (YESAA) legislation and regulations.

**Yukon Land use Planning Council (YLUPC) -** The YLUPC is a body created through the signing of the Umbrella Final Agreement (UFA) under the provisions of Chapter 11. The YLUPC is intended to make recommendations to the Government of the Yukon and the respective affected First Nation(s) on matters pertaining to land use planning. Specifically, the Council makes recommendations on policies, goals, priorities, timeframes, and boundaries for land use planning.

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