



Framework Agreement
Lands Advisory Board

Virtual Resource Centre



Environmental Site Assessment

Framework Agreement on First Nation Land Management

Version 2 – September 2017

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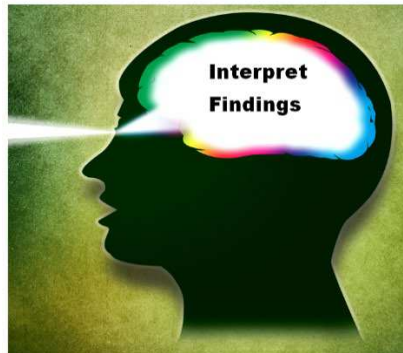
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1. Welcome

Welcome to the Environmental Site Assessments and the *Framework Agreement on First Nation Land Management (Framework Agreement)* courselet. <http://labrc.com/wp-content/uploads/2014/03/Framework-Agrmt-Exec-Summary-June-2013.pdf>

This courselet will help Lands Governance Directors (LGDs) to:

- Interpret the findings of Environmental Site Assessments (ESA) that were completed during the Developmental phase prior to their reserves becoming Operational under the *Framework Agreement*
http://www.labrc.com/public/userfiles/files/Developmental%20Phase%20Chart%20v_March%202012.png%20
http://www.labrc.com/public/userfiles/files/Operational%20Phase%20Chart%20v_March%202012.png%20
- To develop Terms of Reference for future ESAs



The material provided in this courselet is current to date of courselet. Thank you to the environmental experts to the Lands Advisory Board (LAB), for aiding in the development of this courselet. <https://labrc.com/>

2. Big Picture

The Chiefs that negotiated the *Framework Agreement* wanted to environmentally protect their reserve lands.

They wanted to ensure that they had the authority to make environmental protection (EP) and environmental assessment (EA) laws once the Indian Act did not apply.



Chippewas of Georgina Island First Nation
Framework Agreement Signing February 12, 1996



Signatory Chiefs

The original *Framework Agreement* Signatory Chiefs wanted their First Nations (FN) to have a clear picture of:

- What issues would impact their FN's own land governance activities
- What Canada would fix
- What lands that Indigenous and Northern Affairs Canada (INAC) would continue to manage and to identify these lands

Informed Consent

The parties that designed the *Framework Agreement* <http://labrc.com/wp-content/uploads/2014/03/Framework-Agreement-Amendment-5-edited.pdf%20> decided that before a FN could make informed decisions about transferring authority to manage First Nations Lands, a Phase I ESA should be conducted during the developmental phase.

A Phase I ESA provides information about contamination that may be present on a reserve. Additional studies are needed to establish the actual presence, extent, and risk posed by contamination.

ESA information is part of the due diligence required for a FN to make informed decisions about the transfer of land management authority

3. ESA and the *Framework Agreement*

Introduction

The Chiefs that negotiated the *Framework Agreement* needed a way for their FNs to identify and describe what environmental issues were because of *Indian Act* management, mismanagement or neglect.

Canada agreed that they need to provide FNs with this environmental information.



Framework Agreement

The *Framework Agreement* ESA was developed to satisfy the identification of known environmental issues at the time of transfer of land governance authority to Operational FNs. The ESA process is intended to be a snapshot in time.

The *Framework Agreement*:

- Outlines Canada's responsibilities regarding environmental information
- Provides for the exclusion of lands if they are environmentally unsound
- Outlines the requirements of the Individual Agreement and the need for environmental information on reserve lands <http://labrc.com/wp-content/uploads/2015/02/s44-sample-individual-agreement-summary.pdf>



Canada's Responsibility



Canada under Section 6.3 of the *Framework Agreement* has committed to provide a FN, at its request, with all existing information, in Canada's possession, respecting any potential or actual environmental problems with the proposed FN reserve lands.

In order for Canada to provide FNs with this environmental information, Canada determined that a Phase I ESA was required. The lands on which the Phase I ESA will be conducted include the existing reserve lands of the FN.

A Phase I ESA aids both parties to understand the condition of reserve lands before it is transferred over to the FN. This information may be inadequate to fully describe the condition of reserve lands.

Excluding Lands

Section 4.4 of the *Framework Agreement* provides for the FN and Canada (both need to agree) to exclude reserve lands from FN jurisdiction and the application of the LC.

These lands can be excluded if they are in an environmentally unsound condition and if those lands cannot be remedied by technical or financial means prior to the LC being submitted for community approval or if lands are uninhabitable or unusable due to natural disaster.



Individual Agreement

In the *Framework Agreement* Canada and FN are to enter into an Individual Agreement, <https://labrc.com/wp-content/uploads/2015/02/s44-individual-agreement-on-fnlm-english.pdf> to allow FNs to exercise jurisdiction, management and administration of their reserve lands and resources.

Before Canada can transfer the reserve lands in the Individual Agreement a FN needs to know the environmental status of those lands.

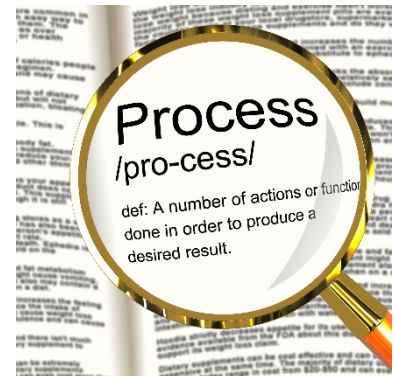
Important Note Sticky: Before approving an Individual Agreement, a FN should meet with INAC to resolve responsibility for contamination and remediation.



Individual Agreement Process

As part of the Individual Agreement process, a Phase I ESA shall be completed by a Qualified Environmental Assessor (QEA) to determine the environmental condition of the reserve lands of the FN.

The Phase I may identify that there is a need for a Phase II and Phase III ESAs to be done. These Phase I recommendations can form part of a workplan identified in the Individual Agreement. These additional phases will be done while a FN is operational.



Individual Agreement Workplans



Because Phase 1 ESAs do not identify the entire extent of contamination on reserve land, a FN ideally should ensure that it's Individual Agreement and work plan contain a commitment by Canada to assist the FN in identifying contaminated sites on reserve and a timeline to remediate them.

It is imperative that the nature and scope of further environmental work be included in the Individual Agreement work plan before a FN signs off on its Individual Agreement. Because Canada has funded only Phase I ESAs for most developmental FNs, it is important for an operational FN to continue to pressure Canada to implement work plans contained in Individual Agreements that involve follow up to Phase I ESAs continuing to remediation of known contaminated sites.

4. ESAs Before and After Land Code is in Effect

Introduction



Since Canada has established a Phase I ESA is required before lands can be transferred over to a FN, we will take a further look at Phase I ESAs before a Land Code (LC) comes into effect and look at what, if any, ESAs need to be done after a LC is in effect. http://labrc.com/wp-content/uploads/2015/02/s14-land_code_summary.pdf

Phase I ESA

A Phase I ESA https://labrc.com/wp-content/uploads/2015/02/s9-phase_1_environmental_site_assessment_summary.pdf is done through the Developmental Phase and is captured in the FN Implementation of Phase I & II of the Framework Agreement (ID). https://labrc.com/wp-content/uploads/2015/02/implementation_document_english.pdf A Phase I ESA, if required, is the responsibility of INAC and therefore is funded by them.

In Annex B, of the ID, the parties (INAC/FN) agree to fulfill their developmental activities and their respective roles and responsibilities.

Phase II ESA

Since Canada only does a Phase I ESA during the developmental phase process a Phase II ESA will in all likelihood be done after the LC is in effect.

If Phase II ESAs (and additional investigations, if needed) cannot be completed before selecting lands to be included in an Individual Agreement, the ESAs should be conducted as soon as feasible after a FN becomes operational.

A FN should ensure that the Individual Agreement commits Canada to conduct Phase II ESAs, risk assessments, remediation planning, and other related studies as appropriate. If the Individual Agreement does not include these commitments, then direct discussions with INAC should be held to determine how to collect the information necessary for a FN to understand the condition of its reserves.

Legacy Issues

Although the parties had hoped that FNs would be assuming jurisdiction over lands that had been thoroughly remediated, they quickly found out that the resolution of *Indian Act* legacy issues needed significant time and resources to complete.

There were instances where FNs who did a Phase II found that the Phase II process “held up” ratification votes because of late funding or disagreement over findings or testing methodology. These indefinite delays due to outstanding *Indian Act* issues greatly expanded the cost and time of the developmental phase.

Other ESAs After Land Code Vote

The parties agreed that the intention of the *Framework Agreement* is to recognize FN governance authority over lands and resources, not “solve” Canada’s ongoing responsibilities by delaying FNs indefinitely because of unforeseen issues.

Hence, it was agreed that only an identification of the outstanding *Indian Act* obligations would be undertaken and a workplan for their follow up would be included in the Individual Agreement. Since the Phase II ESA did not include any remediation, it was decided by the parties to complete it and any other further ESAs post LC ratification vote.

5. Decision Making Authority

Introduction



Before we can get into describing ESAs and specifically Phase I ESAs that are done during the developmental phase, it is important to know who had the sole decision-making authority over reserve lands before and after a FN approves and enacts its LC.

Indian Act



To understand decision making authority on reserve lands before a LC takes effect one must look to the *Indian Act*.

The *Indian Act* vests sole decision-making authority over reserve lands in Canada through the Minister of Indian Affairs. This includes managing, regulating, maintaining and protecting reserve lands.

As one can imagine, this hasn't always been done in a proper fashion. The architects of the *Framework Agreement* were aware of the copious issues that exist on reserve lands, in no way were FNs willing to let Canada “Off the Hook” for the creation of these persistent situations.

Before a Land Code Takes Effect

Canada continues to be responsible for all errors or omissions occurring during the time of its management (before a LC takes effect).

Section 50.1 of the *Framework Agreement* states:

The First Nation will not be liable for acts or omissions of Canada or any person or entity authorized by Canada to act in relation to First Nation land that occurred before the First Nation's land code takes effect.

Canada indemnifies a FN for any loss suffered by the FN as a result of an act or omission of Canada prior to the coming into force of its LC. Therefore, Canada may be liable for any environmental damages to the First Nation Land before the LC comes into effect.

Canada's environmental responsibility includes the following:

- Responsible for any known and/or existing contaminated sites
- Liable for any of its actions that may have caused the problem
- Responsible for cleanup of any environmental contamination

Click on: Canada's Responsibility for Contamination Before a Land Code is in Effect chart.

<https://labrc.com/wp-content/uploads/2017/08/canadaresponsibilityprevotechart-2017.pdf>

After a Land Code Takes Effect

After a LC takes effect it is the FN that is liable for its acts or omissions on First Nation Lands.

Section 50.2 of the *Framework agreement* says:

Canada will not be liable for acts or omissions of the First Nation or any person or entity authorized by the First Nation to act in relation to First Nation land that occur after the First Nation's land code takes effect.

The principle applies vis a vis Canada, to acts and omissions of the FN, after the LC comes into effect.

CROWN RELATIONSHIP

The Chiefs wanted to ensure that the special relationship to the Crown is retained and title to First Nation Land is not affected by the *Framework Agreement* or the legislation.

So under Clause 1.4 of the *Framework Agreement* the Crown (federal government) still has responsibility towards First Nations as long as their First Nation Land remains reserve lands.

What this means is that Canada will still retain a fiduciary obligation to the First Nation respecting First Nation Lands. But the transfer to the First Nation of its reserve lands listed in its Land Code and responsibility for matters respecting the management of First Nation Lands that, before Land Code enactment, were provided for in the 30+ sections of the Indian Act, will, in practice, effectively eliminate Canada's liability exposure respecting those matters.

Individual Agreement

Thus, part of the negotiation of the Individual Agreement includes identifying, and where possible, remediation of contaminated site that exist prior to the FN's LC coming into force.

In the developmental phase, Canada funds only a Phase I ESA, in this process. Key Transitional Issues



6. What are Environmental Site Assessments?

ESAs confirm the absence or presence of contamination.

ESAs originally were developed to provide information to banks or other mortgage lenders about the environmental liability associated with properties.

Hence, ESAs focus on identifying contaminants that could reduce the value of a property or that could result in risk or liability associated with environmental or human health effects of contaminated land

7. Technical Content of ESA

Technical Content of ESAs



Introduction

The technical content of ESAs is based on the specifications contained in Canadian Standards Association (CSA) Standard. This standard establishes the principles and practices that are applicable to a Phase I and Phase II ESA. It is intended to provide a consistent framework and minimum requirements for conducting ESAs that can accommodate broader regulatory and liability requirements, as well as address pertinent site-specific requirements.

The CSA standard establishes the kinds of investigations to be conducted for several “phases” of ESA. The CSA has been accepted in Canada as reasonable environmental ‘due diligence’ for property transactions. It is acknowledged as appropriate environmental ‘risk assessment’ for real estate investments.

Phase I ESA

Phase I ESAs are guided by CSA Standard Z-768-01 (R2016) <http://shop.csa.ca/en/canada/environmental-auditing-and-related-investigations/z768-01-r2012/inv/27015182001> and establish the principles and practices that are applicable. This framework involves preparing for and undertaking an investigation and interpreting and reporting on the information gathered. A Phase I ESA only determines the potential for contamination to exist on a property, and are based on a site inspection, review of maps, reports, historical files, and interviews with landowners and government officials. CSA standards do not require sampling in a Phase I ESA, which instead identifies “Areas of Potential Environmental Concern (APEC).” Some FNs have conducted enhanced Phase I ESAs, in which limited samples of soil or water are analyzed.



Phase II ESA

Phase II ESAs are guided by the CSA Standard Z769-00 (R2013). <http://shop.csa.ca/en/canada/environmental-auditing-and-related-investigations/canca-z769-00-r2013/inv/27010352000?source=ProductDetailCrossSell> Phase II ESAs are intended to test the results of a Phase I ESA, and to determine whether contamination actually exists on a site.

This framework involves developing a sampling plan, preparing for and undertaking an investigation for sampling and measuring, and interpreting and reporting on the information gathered. This Standard is intended as a follow up to CSA Standard Z-768-01 (R2016).

Soil, water, and air samples may be collected and subjected to field or laboratory tests. Analysis may reveal the presence of metals, hydrocarbons, solvents, or other contaminants of concern. The results of these tests are typically compared with federal guidelines and provincial standards. If contaminant concentrations exceed these established levels, then “Areas of Environmental Concern (AEC)” may be identified.

Phase III ESA

Phase III ESAs examines the need for, and methods of, remediating identified contamination on a site. If delineation was not conducted during the Phase II investigations, Phase III sampling is conducted to delineate the physical extent of previously-identified contamination. Phase III investigations may involve intensive testing, sampling, and monitoring, “fate and transport” studies and other modeling, and the design of feasibility studies for remediation and remedial plans. A Phase III study normally involves assessment of alternative cleanup methods, risk management strategies, and costs and logistics.

Phase III reports detail the steps needed to minimize human or ecological risk, to perform site cleanup, and conduct follow-up monitoring for residual contaminants.

If a Phase II confirms contamination and determines that unacceptable levels of contamination exist, a Phase III Remedial Investigation should be carried out to determine what approach should be taken to cleanup or contain the contaminants present at the site.

Click on link: Phase II and Phase III ESA Summary.

[http://www.labrc.com/public/userfiles/files/Overview%20of%20Phase%20II%20and%20Phase%20III%20ESAs\(1\).docx%20](http://www.labrc.com/public/userfiles/files/Overview%20of%20Phase%20II%20and%20Phase%20III%20ESAs(1).docx%20)

8. Identifying Activities of Different Types of ESAs

Introduction



We will now take a look at the different kinds of activities to be conducted in Phase I, II and III ESAs.

Activities conducted in Phase III or higher ESAs are more variable.

Phase I ESA Activities



The activities required for completing a Phase I ESA are:

- Records Review (i.e. reviewing environmental files and information about past and present uses of the site)
- Interviews (i.e. gathering information from elders about past and present uses of the site)
- Site Visit
- Evaluation of information and reporting

The result determines the need for further site-specific investigation such as the need for any type of intrusive sampling and analysis or may indicate that further investigation is not warranted.

Phase II ESA Activities



The activities required for completing a Phase II ESA focus on gathering specific information as required about the property and can include:

- Collection of laboratory analyses of samples of soil groundwater, or other materials
- Above/underground storage tank content
- Sampling Polychlorinated Biphenyls (PCB)
- Directly measuring conditions such as noise levels or radiation

- Evaluate the potential migration of contamination

The result determines the need for remedial work plan and may also allow the determination of whether conditions or events at the site are causing or likely to cause adverse effects and will require notification to the appropriate regulatory authority. There are also detailed Phase II ESAs, limited Phase II ESAs, and Supplementary Phase II ESAs. The extent of a contaminated area may be delineated in a Phase II ESA or conducted in a separate Phase III ESA.

Phase III ESA Activities (14)



Phase III ESAs may include:

- Conducting an intrusive investigation comprising of further test pitting and sampling to characterize and delineate a contaminant (e.g. petroleum hydrocarbon impacts in soil and groundwater that were previously identified in a Phase II)
- Undertake groundwater monitoring
- Collection and submission of soil and groundwater samples for laboratory analyses of contaminants of concern
- Develop a Remedial Action Plan

Actual site remediation or such work may occur in a separate study that follows a Phase III ESA.

Indigenous and Northern Affairs Canada's Approach



INAC's approach to contaminated site studies features a combination of:

- CSA-based approaches to contaminated site assessment (i.e., Phase I and II ESAs)
- Use of guidelines developed by the Canadian Council of Ministers of the Environment (CCME) (<http://ceqg-rcqe.ccme.ca/>), and
- The Treasury Board's Policy on the Management of Real Property <http://www.federalcontaminatedsites.gc.ca/default.asp?lang=En&n=1F9527BF-1>
- INAC applies the Contaminated Sites Management Policies <https://www.aadnc-aandc.gc.ca/eng/1100100034643/1100100034644>

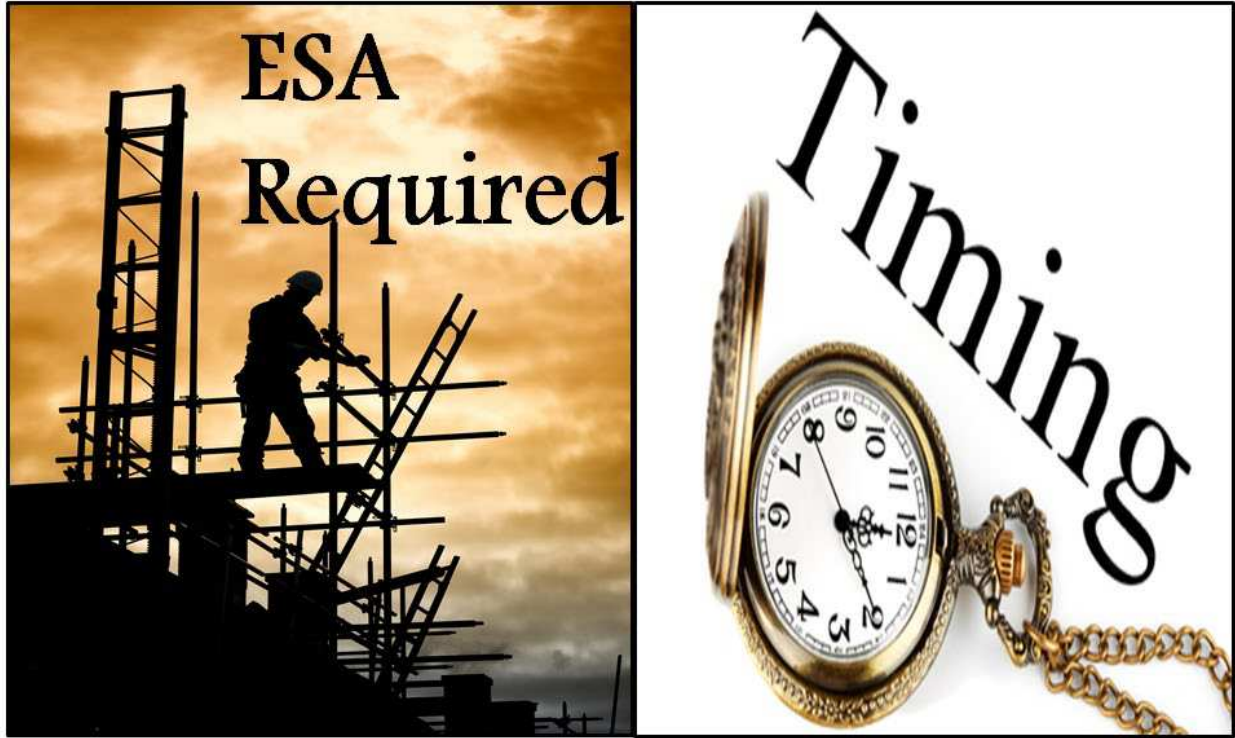
Remediation



If an ESA identifies contamination, INAC requires additional studies before agreeing to remediate sites. For example, INAC expects human and ecological risk assessments to be conducted, complying with requirements of Health Canada and Environment Canada.

The ability to obtain funding to remediate a contaminated site can be affected by the “scores” achieved under the National Classification System for Contaminated Sites (NCSCS) rating system. The NCSCS rating system rates the severity of contaminated site risks on reserve lands. Click on Link for: NCSCS Guidance Document <https://labrc.com/wp-content/uploads/2017/08/NCSCS-Guidance-Document.pdf> and Supplemental Guide <https://labrc.com/wp-content/uploads/2017/08/NCSCS-Supplemental-Guidance-Document June-3 FINAL-EN-Font.pdf>

9. When is an ESA REQUIRED?



Introduction

A LGD should be aware of when an ESA might be required based on kinds of activities that could result in contamination.



Storm Drain Discharging Contaminating Water

When is an ESA Required?



Because ESAs focus on identifying contaminants, areas free of human activity need not be subject to an ESA. Wilderness areas that have not been subject to resource extraction, road building, or other human occupancy do not require an ESA. Virtually all other kinds of land use (e.g. residential, industrial etc.), however, may have experienced contamination from intentional or inadvertent human actions.

Timing of When an ESA is required?



If there are land and resource activities that are occurring on a reserve, or may have occurred in the past, an ESA should be conducted to determine the likelihood, extent, and severity of contamination, for example:

- During the Developmental Phase ESAs should be completed before land is transferred
- During the Operational Phase before a change in use could expose people or ecosystems to contamination

In the above circumstances, ESAs can limit the liability for the FN, Canada, the property owner or manager.

10. Kinds of Activities that Result in Contamination



A LGD will need to know the kinds of activities that could result in contamination, and therefore be subject to an Environmental Site Assessment:

For Agricultural land – Activity: pesticide use, fuel spills, fertilizer use (particularly manure), waste from livestock or food processing operations



For Golf courses: Activity: pesticide use, fuel spills, runoff from structures, fertilizer use, import of contaminated fill



For Residential areas: Activity, contaminated fill, road runoff, domestic pesticide and fertilizer use, home businesses (particularly auto repair and service), fuel tank leaks and spills, smoke from wood stoves and fireplaces, unsafe disposal of paints and solvents



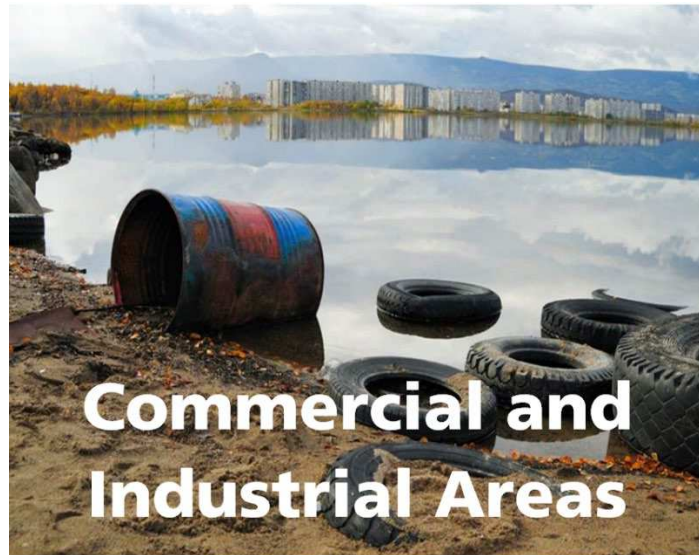
For Logging: Activity, fuel spills, herbicide use, contaminated fill for road base



For Mining: Activity, creation of acid rock drainage, increased metal concentration in runoff, leaks and spills from mineral processing areas, fuel spills



For Commercial and industrial areas: Activity disposal of chemicals, solvents, and metals on ground or in storm drains, fuel storage and spills (above ground and below ground), open storage of organic or inorganic wastes



For Railroads: Activity: metals in spillage from bulk carriers, contaminated rail ballast, creosote from railroad ties, fuel spills, air emissions from locomotives.



For Landfills and other sites: Air pollution from emissions into atmosphere, ground water pollution from chemicals or solvents, fires that release gases such as methane



11. Limits to use of ESA Information - Sampling

Introduction

Add pic – three guys in a creek

Almost all ESAs are based on sampling of soil, water, or air. Not only is sampling an economical way to assess the environment, but sampling is virtually the only way to understand contamination issues on reserve lands.

Limitations to ESAs



ESAs focus on contamination, and typically say little about the condition of habitat, erosion and sedimentation risk, or similar environmental topics. Because they are based on available information, ESAs may not identify all contaminated areas. Future studies may identify contamination problems.

Collect Samples

Collecting samples that accurately represent the real world can be complex. People who design site assessment work programs, collect and analyze samples, and report results typically have university degrees or college certificates in environmental science and technology or engineering. People with suitable education and experience are sometimes called QEA or Qualified Environmental Professionals.



Sampling and analysis can be expensive, so the designers of sampling programs need to balance the desire for a high level of confidence in results (often requiring large number of samples) with the cost of collecting and analyzing samples.

Challenges of Sampling

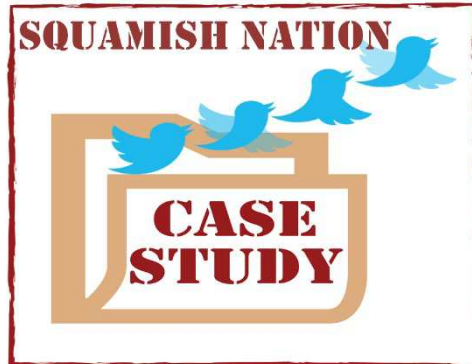
The following example might highlight the challenges of sampling and the care needed in using the results.

- Imagine a 1-ha parcel on which soil from several sources has been dumped to a depth of 4 m.
- Some of the fill came from a potentially contaminated source, and some did **not**.
- Hence, the contamination is not uniformly distributed throughout the fill, but is concentrated in scattered pockets.
- A robust sampling program might involve drilling 20 holes (of, say, 10 cm in diameter) and 4 m deep on the 1-ha site.
- Each drill core could extract 0.4 m³ of soil, from which “stratified” samples would be collected, totalling perhaps 1,000 cm³ for each hole.
- The total sample volume from the 20 drill holes would be 20,000 cm³, or 0.02 m³.
- The results of the sampling program would be based on laboratory analysis of this 0.02 m³ of soil.
- In this example, the ESA results and conclusions about the condition of the site would be based on testing less than 1/10,000th of 1% of the total soil volume on the parcel.
- The sampling program might miss areas of contamination, and underestimate the potential risk.

- Alternatively, one of the samples might include a “nugget” of contamination, which could overstate the risk.

This example is not intended to deter FNs from conducting ESAs, but rather to encourage caution in interpreting the findings and ensure that an expert in the field is consulted.

Case Study – Contaminated fill



The Squamish Nation undertook a Phase I ESA during their developmental phase.

Because of the historical industrial operations on some Squamish Nation reserves and potential contaminated sites identified in the Phase I ESA, the Squamish Nation and Canada did quite an extensive contaminated sites identification and remediation program during the negotiation of the Individual Agreement.

To see the full case study, click on: The Squamish Nation Experience – Challenges Regarding Off Site Contaminated Fill <https://labrc.com/wp-content/uploads/2017/08/squamishnationcontaminatedsitecasestudy.pdf>

Risk Assessment and NCSCS Scores



The risk assessments and NCSCS scores that determine the priority of sites for remediation are based on models and assumptions, and typically use information from ESAs and forecasts about future human use, which introduces considerable uncertainty in the results. The findings of these risk assessments and scoring systems should be considered as guidelines and estimates, not hard-and-fast facts.

12. What is the Purpose of a Phase I ESA in the Developmental Process?

Introduction

The objective of the Phase I ESA done during the developmental phase is to determine the environmental health/condition of the reserve lands of the FN prior to FNs taking back of:

- Jurisdiction over reserve lands
- Governance authority and law-making authority
- Land and resources management planning
- Administration

What is the purposes of the Phase I ESA?

A Phase I ESA conducted during the developmental phase is intended to:

- Identify and list known APECs (usually contamination) based on available information
- Recommend areas for further study (usually a Phase II ESA)
- Provide a FN with information supporting decisions about lands to be excluded from the LC or provisions to be included in the Individual Agreement

It is important that the ESA identify all the APECs on a reserve, because this information will establish the extent of environmental issues that occurred during Canada's management of reserve lands.

What Does a Phase I ESA Do?



A Phase I ESA identifies and reports on actual and potential site contaminants found on FN reserves and on any other environmental concerns, therefore, it does a:

- Records review: All environmental reports in possession of INAC and the FN are reviewed for previous use of land to identify potential sources of contamination,
- Site visits: Site inspection is conducted to enable identification of actual and potential site contamination
- Interviews: Conducts interviews of knowledgeable FNs members about land use and contamination
- Identifies any existing regulatory concerns/violations (i.e. Fisheries Act) <http://laws-lois.justice.gc.ca/eng/acts/f-14/>
- Information evaluation: Evaluation of information, reporting and recommend further investigations, as required
- Reporting: Progress reports, minutes of meetings, draft reports and final report
- Identifying areas for potential follow up under a Phase II and III ESA and recommends further investigations, as warranted
- Provide a Class C estimate of the cost associated for each APEC identified in the Phase II and/or remedial investigations recommended

There is no testing done in Phase I ESA.

How is the First Nation Community Involved?

Community involvement and education of community members and Councils is critical to an effective Phase I ESA and environmental program.

Community understanding of the environmental condition of a First Nation Lands, the need for environmental laws, and appropriate care of the land will help to build a constituency to support development and implementation of a FN's LC and Individual Agreement during the developmental phase, which leads to improved environmental quality of reserves.



What is contained in the Phase I ESA Report?

The contents of a Phase I ESA report can contain the following:

- The results of all interviews
- A copy of the Site visit record of observation for each reserve
- The draft report shall have a Conclusions section which can state that the Phase I ESA revealed:
 - No evidence of contamination in connection with the subject areas
 - Those subject areas or sites where evidence of actual and potential contamination exists
 - Other environmental issues
- It can describe and recommend methods to reduce the level of uncertainty (e.g. confirm, refute, or delineate the presence of contamination) and provide a rationale for proposing such methods.
- Provide documentation, including references and key exhibits, to support the findings and conclusions contained in the draft report
- It shall reference applicable federal, provincial/territorial, and local legislation and published guidelines used as a basis for findings or conclusions in Phase I ESA

13. Phase I ESA Design

Introduction

As part of the *Framework Agreement* process an ESA shall be completed by a QEA to determine the environmental condition of the FN reserve lands.

INAC has designed a Phase I ESA Terms of Reference (TOR) for developmental FNs.



Terms of Reference



The Phase I ESA TOR template document “Statement of Work Phase I ESA for First Nations”, is designed specifically for the purposes of the *Framework Agreement*. The TOR invites proposals to conduct a Phase I ESA using the CSA Standards Z-768-01 (R2016). <https://labrc.com/wp-content/uploads/2015/02/s9-template-statement-of-work-for-phase-1-environmental-site-assessment.pdf>

INAC’s ESA template should be considered a guideline, not a rigid requirement. A FN can propose changes to the template’s wording to better reflect conditions or concerns on their First Nation Land.

Main Characteristics

The main characteristics of this approach to ESAs are:

- Creation of a Joint Management Committee (JMC) to guide the process. Lands Advisory Board Resource Centre (LABRC) technicians provide support as requested/required to FNs in reviewing ESA TOR as well as draft and final reports
- A QEA firm conducts an ESA
- The JMC oversees the progress of ESAs
- INAC provides funding to the FN for the ESA, and the FN manages the funds or the FN requests that INAC contracts directly with a firm to conduct the ESA work
- Capacity building for FNs staff is often included in work programs, either “job shadowing” or other field assistance to the QEAs conducting the ESAs
- Elders or other staff may provide the QEAs with information on site history traditional use, cultural areas, etc.
- Protection of intellectual property

Funding of Phase I ESAs

Canada bears the cost of conducting Phase I ESAs for developmental FNs because the studies:

- Help fulfil Canada's commitment under the *Framework Agreement* to provide FN's with environmental information about their reserves
- Facilitate a FN's decisions that enable Canada to transfer land management authority to the FN through an Individual Agreement
- Identify Canada's ongoing environmental liabilities



14. Phase I ESA Responsibilities

Introduction



It is the FN and Canada, through the JMC, and QEA who conduct and have responsibilities under the Phase I ESA. The LABRC provides assistance as required/requested.

The JMC is crucial to the success of the Phase I ESA. It is comprised of a FN and INAC representative. The main objective of the JMC is project management of the Phase I ESA.

A QEA will have to be hired to carry out the work and maintains constant communication with the JMC. The QEA must have a familiarity and working knowledge of the CSA standards for undertaking a Phase I ESA.

Click on: Phase I ESA Responsibility Chart <https://labrc.com/wp-content/uploads/2017/08/Phase-I-ESA-Responsibility-Chart-2017.pdf>

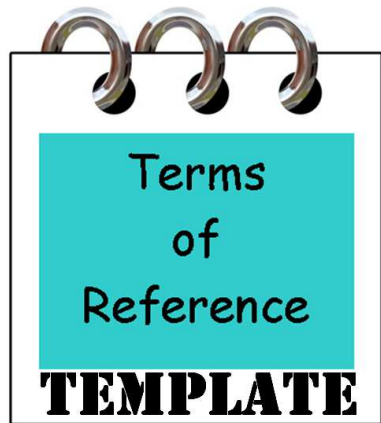
15. Steps of the Phase I ESA

Introduction

PHASE I ESA STEPS



Step 1 – TOR Provided



If there is a need to conduct an ESA, INAC provides the template TOR to the FN for review and comment. A FN's review and comment of the TOR is an important step as each FN may have unique requirements. Often there are special considerations such as remote sites, adjacent properties, recent development activity, traditional knowledge that should be included in the TOR.

There may be reasons why a FN does not require an ESA. Sometimes ESAs have been completed for other reasons that are already complete and not stale dated (more than 5 years). In this instance, ESAs under this process may not be required.

Step 2 – FN and INAC Meet to Discuss TOR

FN/INAC meet to discuss the TOR scope, timing, necessary changes and who will contract directly with a qualified firm. Depending on when the contract is awarded, seasonal weather can affect the completion of site visits due to flooding, erosion, or snow. It is important to consider these factors when planning the overall completion of the developmental phase. It is not usual that house to house visits/inspections are included.

Step 3 – TOR Finalized

TOR is finalized and forwarded to firms for estimate (max \$25K). No testing is required during this phase. A record review, interviews and a site visit should not exceed 25K. JMC will review and evaluate the QEA's project proposals according to the established criteria set out in the TOR and approve the successful bidder.

Step 4 – JMC Meet to Pick a Firm



Once all proposals have been submitted the JMC meets to discuss and pick a firm based on the TOR and the proposal evaluation criteria. Sometimes a FN may choose to sole source a contract with a firm of their choice, in this instance INAC will transfer the resources to the FN to complete the phase I ESA.

Step 5: JMC Meets with Firm

JMC meets with winning firm to discuss timing, payment, special considerations.

Sometimes a firm may require permission to enter FN lands and possibly even an escort or guide for navigating the reserves.

Often payment is provided at various stages as per the TOR and timing considerations are discussed at this point depending on the developmental completion goals/season of the FN.

**Step 6 – Firm Begins its Work**

Firm conducts records review, interviews and site visit. Often various federal, provincial and municipal government departments are consulted for historical data relevant to the ESA report, brief site visits are usually restricted to particular sites and public buildings to look for surficial stains, odours and other obvious evidence of contamination or the lack thereof.

Step 7 – Draft Report Prepared

Firm prepares draft report and forwards to JMC for comment. This is an opportunity to ensure the report is written to the satisfaction of the JMC. Often a priority of issues is requested to ensure that any follow up is highlighted for the sites that are in most need of attention.

**Step 8 – Final Report Review**

Once the JMC has reviewed the draft they will provide comments to the firm prior to the firm finalizing its Phase I ESA report. The firm will review JMC comments and the final report is prepared.



Step 9 – Firm Presents Final Report

The firm will present the final report of findings to the JMC for acceptance by the JMC.

Step 10 – Recommendations

Recommendations for Phase II prepared for inclusion into the Individual Agreement. The firm will have a one or two-page executive summary that outlines the findings and suspected/confirmed sites that are contaminated. These pages are appended to the Individual Agreement for follow-up at a future date.

Click on link for a printable chart of the Steps 1 to 10 for a Phase I ESA <https://labrc.com/wp-content/uploads/2017/08/Steps-1-to-10-in-Phase-I-ESA-2017.pdf>



16. Use of ESA Information after a Land Code in Effect

Introduction



After a LC is in effect, ESA reports provide a very important tool in a FN carrying out its environmental governance, EA and EP responsibilities.

Phase I ESA Information Collected

The information collected during the conduct of the Phase I ESAs, which is primarily used to determine whether human or ecological risks are present, is important even after a LC is in effect.

It is important for the LGD to know how best to use and respond to this information by knowing:

- When to use the information when dealing with lands instruments that grant interest in reserve lands
- That an ESA report's information becomes stale dated
- To follow up on the Environmental work plan's Phase II and III work attached to the Individual Agreement
- To preserve ESA information to support environmental management and planning tasks
- How to interpret ESA workplans

Land instruments

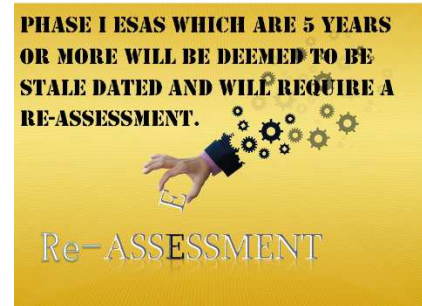


The LGD must ensure that the results and recommendations of ESAs and EAs are incorporated into the terms and conditions of land instruments granting interests in reserve land, (e.g., who is responsible for environmental clean-up, risk management and monitoring?).

Go to the Environmental Assessment series of courselets for more information on EAs.
<https://labrc.com/resources/courselets/>

Re-assessment

Re-assessment of an ESA may be undertaken at the recommendation of a qualified QEA if, based on listed criteria, it is determined that changes to land use or environmental law and policy are significant enough to render the report stale dated.



Phase II and III Work



Phase II and III work will be completed during the Operational Phase, which does not happen until the LC comes into effect. However, they are identified during the developmental phase and form part of the Individual Agreement work plan signed off by Canada and the FN. It is important that the LGD review the Individual Agreement and identify the work yet to be done.

ESA Management and Planning

A FN should preserve ESA information so that it can support operational environmental management work and environmental planning tasks, such as:

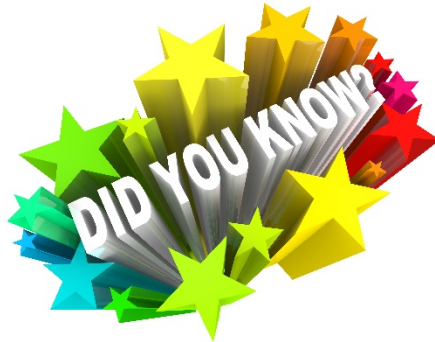
- Use in the Environmental Management Plan's (EMP) Step 1 description of the environmental issues faced by a FN
- Providing information to other FNs departments that may be seeking land for housing, administrative buildings, industrial areas, or commercial development so that the potential risks and costs of development on contaminated land can be considered

- Using the ESA information when seeking bank or other funding for land development
- Aiding the preparers of EAs as they describe the environmental condition of land proposed for development and to analyze potential environmental impacts

See the EMP Preparation courselet for more information on Step 1.

https://labrc.com/public/courselet/EMP_Preparation_Courselet_Final/player.html

ESA Report Work Programs



When reviewing the results of previous ESAs, the reader must pay close attention to the studies' actual work programs, because relying on a general description, such as "Phase II ESA," may be insufficient to explain the level of investigation that was conducted and how the results should be used. Similar attention to actual content is important when developing a scope of work for future ESAs.

EMP and ESA Information

The FN ESA reports, particularly the Phase I ESA reports, and the Individual Agreement are important documents that will aid a LGD in preparing for and completing an EMP. The LGD will need to consider the ways in which the FN can use the results of these documents and related studies in preparing and implementing the FN's EMP. The questions a LGD should be asking are:

- Were Phase II ESAs conducted?
- What were their findings?
- What other ESA-related documents are in your FN's files?
- What are the implications of their findings for risk to human health or ecosystems?
- If only Phase I ESAs were conducted for your reserve, were any APECs identified?
- Were additional studies conducted to verify the presence or absence of actual contamination?
- What kinds of land uses occur on your reserve that could result in contamination?
- Have these uses been included in ESAs?
- What gaps exist in your understanding of environmental condition of reserves? What steps should be followed to fill those gaps?
- What does it say about the preparation of ESAs?
- What does it say about Canada's responsibility for contamination on reserves?

17. Summary

The LGD should be familiar with the kinds of ESA studies, risk assessments, and scoring analyses that may be conducted. In interpreting and using the results of ESAs, in particular, Phase I ESAs, and related documents, it should be remembered that sampling and modelling do not guarantee certainty about environmental conditions or levels of risk.

Post-vote commitments to conduct necessary studies should be included in Individual Agreements or pursued through direct discussions with INAC following a successful LC vote.

Key Message

ESAs and related studies are important tools for the LGD in understanding the environmental condition of the reserve and potential management activities needed to remediate areas of contamination.

ATTACHMENT A - [Framework Agreement on First Nation Land Management](#)**FRAMEWORK AGREEMENT ON FIRST NATION LAND MANAGEMENT**

An Act providing for the ratification and bringing into effect of the Framework Agreement on First Nation Land Management

EXECUTIVE SUMMARY

For Full Version of the Framework Agreement please visit our website at:
<http://labrc.com/documents/Framework%20Agreement%20-%20Amendment%205.pdf>

INTRODUCTION

The *Framework Agreement on First Nation Land Management* was signed by the Minister of Indian Affairs and Northern Development and 13 First Nations on February 12, 1996. One other First Nation was added as of December 1997. The Agreement is an initiative by these 14 First Nations to take over the management and control of their lands and resources. It applies only to these 14 First Nations.

The *Framework Agreement* sets out the principal components of this new land management process, but it is not a treaty and does not affect treaty or other constitutional rights of the First Nations. The Agreement has been ratified and implemented by Canada in the *First Nations Land Management Act*, assented to June 17, 1999. Three First Nations have also taken the necessary steps to ratify the Agreement and proceed to reassume control over their lands and resources.

The *Framework Agreement* provides these 14 First Nations with the option to manage their reserve lands outside the *Indian Act*. The option to regain control of their land can only be taken with the consent of the community. Only when each of these First Nations takes control of its lands and resources under the Agreement, shall federal administration of its reserve lands cease under the *Indian Act*.

ATTACHMENT B – Glossary of Terms

DUE DILLIGENCE

The Framework Agreement requires a vote of membership for both the Land Code and Individual Agreement. A vote is not possible unless membership is making an informed decision. This involves an understanding of the implications of assuming management of the lands by becoming fully informed of their legal obligations, liabilities and responsibilities before making a final decision on whether or not to approve a Land Code and Individual Agreement and also making an informed decision as to which lands to include or exclude from the Land Code. First Nations, as part of carrying out due diligence will also:

1. make reasonable inquiries to confirm the facts on which the approval decision is to be based (e.g. that leases are valid or that an environmental site assessment is satisfactory); and,
2. assure itself of the ability of the other party (i.e. Canada) to carry out its responsibilities under the Framework Agreement and Individual Agreement, all for the purpose of evaluating the risks to the First Nation of approving a land code.

FIRST NATIONS LAND MANAGEMENT ACT

Is an Act providing for the ratification and bringing into effect of the Framework Agreement on First Nation Land Management. The Act was required under the Framework Agreement for two purposes: to ratify the Framework Agreement, and to implement those clauses of the Framework Agreement that affect third parties or other federal laws, or that are considered important enough to be repeated in the legislation. The First Nations Land Management Act is intended to be consistent with the Framework Agreement and to apply to the First Nations that are signatories to the Framework Agreement. The Act was enacted and given royal assent on June 7, 1999.

FRAMEWORK AGREEMENT ON FIRST NATION LAND MANAGEMENT

The Framework Agreement on First Nation Land Management is a government-to-government agreement. The Framework Agreement is an initiative for First Nations to opt out of the land management sections of the Indian Act and take over responsibility for the management and control of their reserve lands and resources. The Framework Agreement sets out the principal components of this new land management process. The Framework Agreement provides First Nations with the option to manage their reserve lands under their own Land Codes. Until a First Nation community develops and approves a Land Code to take control of its reserve lands and resources, federal administration of their reserve lands continues under the Indian Act. The Framework Agreement is not a treaty and does not affect treaty rights or other constitutional rights of the First Nations.

INDIAN ACT

The Indian Act is Canadian federal legislation, first passed in 1876, and amended several times since. It sets out certain federal government obligations and regulates the management of Indian reserve lands, Indian moneys and other resources. Among its many provisions, the Indian Act currently requires the Minister of Indian Affairs and Northern Development to manage certain moneys belonging to First Nations and Indian lands and to approve or disallow First Nations by-laws.

ATTACHMENT D –

TITLE - Attachments

- 1.

TITLE – Attachments

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