

Cumulative Effects FAQ Materials for the Website of the Confederacy of Mainland Mi'kmaq

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How Law Shapes Cumulative Effects Assessments in Nova Scotia

What are “cumulative effects” and “cumulative effects assessments”?

In environmental assessment processes, the phrase “cumulative effects” refers to changes that are caused by the interactions between multiple human activities or natural processes.

Cumulative effects assessments are assessment processes that are built into some environmental decision-making regimes in Canada. Their purpose is to help environmental decision-makers understand how the effects of one or more proposed activities (like a new dam, landfill, mine, pulp mill, or wind farm) could interact with the effects of past, present, or future human activities or natural processes to cause changes that would not be caused by one activity or process on its own.

What kinds of changes are considered in cumulative effects assessments?

In environmental assessment processes in Canada, cumulative effects assessments consider changes to the environment and may also consider social and economic changes and human health impacts as well. When environmental changes could impact Indigenous communities, cumulative effects assessments should also consider potential effects on Indigenous rights that are protected by law.

In 2014, the Canadian Council of Ministers of the Environment developed [Canada-wide definitions and principles for cumulative effects](#) and defined a cumulative effect as “a change in the environment caused by multiple interactions among human activities and natural processes that accumulate across space and time”. Although this definition focuses on changes to “the environment”, cumulative effects assessments carried out under the *Canadian Environmental Assessment Act* and Canada’s new *Impact Assessment Act* must also consider how changes to the environment could affect Indigenous peoples’ health, social and economic conditions, physical and cultural heritage, and current use of lands and resources for traditional purposes, along with structures, sites, or things that are of historical, archeological, paleontological, or architectural significance to Indigenous peoples.

The phrases “cumulative effects” and “cumulative effects assessment” can also be defined differently to highlight changes beyond environmental changes that must be considered as part of assessment processes. For example, the [Province of British Columbia’s cumulative effects framework](#) defines cumulative effects as “changes to environmental, social and economic values caused by the combined effect of past, present and potential future human activities and natural



processes”. This definition does not focus on environmental changes alone, as it also includes changes to “social and economic values”. By including changes to “social and economic values” as part of the definition of “cumulative effects”, the Province of British Columbia recognizes that environmental, social, and economic changes are interconnected.

[As the Indigenous Centre for Cumulative Effects has noted](#), some Indigenous communities in Canada have developed their own definitions of “cumulative effects” to reflect their own perspectives on the kinds of changes that should be taken into account.

When environmental changes could impact Indigenous communities, cumulative effects assessments should also consider potential effects on Indigenous rights that are protected by law. This requirement comes from Canada’s constitutional common law, which is law that has emerged (and continues to evolve) through generations of court decisions interpreting how Indigenous peoples in Canada are protected under Canada’s Constitution.

Where can I learn more about cumulative effects and cumulative effects assessments?

Because cumulative effects assessments were required in federal environmental assessment processes for more than two decades before Canada’s new *Impact Assessment Act* was created, there are several resources available online that discuss how cumulative effects are characterized and assessed by practitioners and decision-makers at the federal level.

These resources can help you to learn more about cumulative effects and cumulative effects assessments generally; however, it is important to keep in mind that these resources were developed in the context of Canada’s old environmental assessment regimes and new impact assessment regime, and some of their details are not relevant to cumulative effects assessments in Nova Scotia.

- Government of Canada, [“Learn about cumulative effects”](#) (January 2022).
- Government of Canada, [“Cumulative Effects Assessment, Management and Monitoring”](#) (September 2021).
- G. Hegmann, C. Cocklin, R. Creasey, S. Dupuis, A. Kennedy, L. Kingsley, W. Ross, H. Spaling, D. Stalker, [Cumulative Effects Assessment Practitioner’s Guide](#) (February 1999). This detailed document was prepared for the Canadian Environmental Assessment Agency (now the Impact Assessment Agency of Canada) by the members of a Cumulative Effects Assessment Working Group; it was designed to guide practitioners conducting cumulative effects assessments under the original *Canadian Environmental Assessment Act*.
- Canadian Environmental Assessment Agency, [Assessing Cumulative Environmental Effects under the Canadian Environmental Assessment Act, 2012 – Interim Technical Guidance](#) (March 2018). This detailed document was prepared by the Canadian Environmental Assessment Agency (now the Impact Assessment Agency of Canada) to

guide practitioners conducting cumulative effects assessments under the *Canadian Environmental Assessment Act, 2012*.

Do Nova Scotia’s *Environment Act* and *Environmental Assessment Regulations* require cumulative effects assessment?

Nova Scotia’s *Environment Act* and *Environmental Assessment Regulations* do not currently require cumulative effects assessment as a component of Nova Scotia’s environmental assessment process.

Can Nova Scotia’s *Environment Act* and *Environmental Assessment Regulations* support cumulative effects assessment?

Nova Scotia’s *Environment Act* and *Environmental Assessment Regulations* can support cumulative effects assessments even though they do not currently require cumulative effects assessment as a component of Nova Scotia’s environmental assessment process.

Section 12 of Nova Scotia’s *Environmental Assessment Regulations* lists factors that are relevant to environmental assessment decisions made by Nova Scotia’s Minister of Environment and Climate Change. The section requires the Minister to take the following information into account when deciding whether or not to approve a proposed “undertaking” (that is, a proposed new project or proposed modification to an existing project):

- “the location of the proposed undertaking and the nature and sensitivity of the surrounding area”;
- “whether environmental baseline information submitted [...] for the undertaking is sufficient for predicting adverse effects or environmental effects related to the undertaking”;
- “planned or existing land use in the area of the undertaking”; and,
- “other undertakings in the area”.

Information like this is relevant to cumulative effects assessments, and it could be said that these requirements implicitly acknowledge the importance of considering the possible interactions between a proposed project and other past, present, and future human activities and natural processes in a study area.

Additionally, section 12 of the *Environmental Assessment Regulations* also recognizes that the Minister may require other kinds of information in order to make an informed decision. This suggests that the Minister has the power to impose requirements for cumulative effects assessments on a case-by-case basis even though the *Environmental Assessment Regulations* do not require them generally.

A recent example of cumulative effects assessment being required as part of an individual environmental assessment in Nova Scotia comes from the Terms of Reference for the provincial environmental assessment of Northern Pulp Nova Scotia's proposed new "Mill Transformation and Effluent Treatment Facility Project". [The Terms of Reference for the environmental assessment](#) require cumulative effects assessment as part of the assessment of "environmental effects" and "adverse effects" that the proposed project may cause.

What do "environment", "environmental effect", "adverse effect", and "cumulative effect" mean within the context of Nova Scotia's environmental assessment regime?

Nova Scotia's *Environment Act* defines the word "environment" as meaning "the components of the earth", including "air, land and water", "the layers of the atmosphere", "organic and inorganic matter and living organisms", and "the interacting natural systems" that include those components. Within the context of Nova Scotia's environmental assessment regime, the meaning of the word "environment" also includes the "socio-economic", "environmental health", "cultural", and "other items" that are referenced in the definition of "environmental effect".

Nova Scotia's *Environment Act* defines "environmental effect" as meaning any positive or negative change that a proposed project "may cause in the environment", including "any effect on socio-economic conditions", "environmental health", "physical and cultural heritage", or "any structure site or thing", "including those of historical, archaeological, paleontological or architectural significance". The definition also includes any change to the proposed project itself that may be caused by the environment, and it refers to changes that occur inside or outside the province.

Nova Scotia's *Environment Act* defines the phrase "adverse effect" as meaning "an effect that impairs or damages the environment in a manner that negatively affects aspects of human health".

Nova Scotia's *Environment Act* and *Environmental Assessment Regulations* do not currently require cumulative effects assessment as a component of Nova Scotia's environmental assessment process, and the phrase "cumulative effect" has not been defined specifically in Nova Scotian law.

In an environmental assessment conducted under Nova Scotia's *Environment Act* and *Environmental Assessment Regulations*, Nova Scotia's Minister of Environment and Climate Change must consider whether a proposed project is likely to cause an "environmental effect" or "adverse effect" that cannot be prevented or mitigated. Cumulative effects assessments within Nova Scotia's environmental assessment regime should be tied to the *Environment Act*'s definitions of "environmental effect" and "adverse effect" and, for that reason, should not take a restrictive approach to assessing possible changes to "the environment". Socioeconomic considerations, environmental health considerations, human health considerations, and various cultural considerations should all be taken into account.

For example: the Terms of Reference for the provincial environmental assessment of Northern Pulp Nova Scotia's proposed new "Mill Transformation and Effluent Treatment Facility Project" require cumulative effects assessment as part of process of determining if the proposed project may cause "environmental effects" or "adverse effects" that cannot be prevented or mitigated. The phrase "environmental effect" includes socioeconomic, environmental health, and various cultural considerations, and the phrase "adverse effect" includes human health considerations, which means that cumulative effects assessments carried out as part of the process should take all of those factors into account.

Could Nova Scotia's *Environment Act* and *Environmental Assessment Regulations* be amended to require cumulative effects assessment?

Nova Scotia's *Environment Act* and *Environmental Assessment Regulations* could be amended to require cumulative effects assessment as a component of Nova Scotia's environmental assessment process. In fact, it seems likely that amendments along these lines will be considered soon.

In November 2021, the Government of Nova Scotia enacted the *Environmental Goals and Climate Change Reduction Act*. That statute identifies several goals that the provincial government has set for itself as part of its plan to achieve "sustainable prosperity" in Nova Scotia. One of the goals established in the statute is "to modernize the environmental assessment process by 2024" while taking "cumulative impacts" and a number of other factors into consideration. This indicates that the provincial government will seriously consider adding cumulative effects assessment as a required component of Nova Scotia's environmental assessment process.

Is cumulative effects assessment required as part of the duty to consult?

In its 2017 decision in *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, the Supreme Court of Canada recognized that cumulative effects assessment may be required for the Crown to fulfil its duty to consult.

In its 2004 decision in *Haida Nation v British Columbia (Minister of Forests)*, the Supreme Court of Canada held that the Crown's duty to consult is triggered when the Crown has real or constructive knowledge of an Aboriginal claim or right and contemplates conduct that could affect that claim or right adversely. In simpler language, this means that the Crown has a duty to consult an Indigenous people when the Crown knows about an asserted or established Aboriginal or treaty right and the Crown is thinking of doing something that could impact that right negatively. In *Chippewas of the Thames First Nation v Enbridge Pipelines Inc*, the Supreme Court of Canada recognized that "it may be impossible to understand the seriousness" of how a proposed activity could impact an asserted or established Aboriginal or treaty right "without considering the larger context" and taking cumulative effects into account.

Importantly, the duty to consult is lodged in Canada's constitutional common law, which is law that has emerged (and continues to evolve) through generations of court decisions interpreting how Indigenous peoples in Canada are protected under Canada's Constitution. Under Canada's constitutional common law, the duty to consult has been recognized as a "constitutional imperative". The Crown's obligation to fulfill the duty to consult runs deeper than any procedural requirements that are set out in statutes or regulations like Nova Scotia's *Environment Act* and *Environmental Assessment Regulations*.

How does Canadian law define "Aboriginal rights" and "treaty rights"?

Section 35 of Canada's *Constitution Act, 1982* recognizes and affirms the existing Aboriginal and treaty rights of the Indigenous peoples of Canada, but the Constitution itself does not explain how the phrases "Aboriginal right" and "treaty right" should be understood. As a result, Canada's courts established definitions for "Aboriginal rights" and "treaty rights" over the course of years of litigation between Indigenous peoples and Canadian governments.

The Supreme Court of Canada has defined "Aboriginal rights" as rights that flow from the distinctive cultural practices that First Nation and Inuit peoples engaged in before contact with Europeans and that Métis peoples engaged in before Europeans gained effective legal and political control in the areas where Métis peoples lived.

The Supreme Court of Canada has defined "treaty rights" as rights that flow from solemn treaty promises made to Indigenous nations by the British Crown or, more recently, the Crown in right of Canada.

How does Canadian law address cumulative effects on Aboriginal or treaty rights?

The Supreme Court of Canada has recognized that cumulative effects assessment may be required for the Crown to fulfil its duty to consult. This means that cumulative effects assessment may be constitutionally required as a component of Indigenous engagement and consultation in environmental decision-making even if applicable statutes and regulations like Nova Scotia's *Environment Act* and *Environmental Assessment Regulations* do not require cumulative effects assessment as a component of the decision-making process.

Although the Supreme Court of Canada has recognized that cumulative effects assessment may be required for the Crown to fulfil its duty to consult, the Court has also held that the duty to consult is triggered by the possibility of "novel" (new) impacts to Indigenous rights that are protected by law, and it has said that consultation is not the place to address "historical grievances" if no new impacts are predicted. This means that although Crown consultation and accommodation may address cumulative effects to some extent, Canada's courts do not necessarily expect accommodation to right or reverse past wrongs.

For example, in a 2011 decision of the British Columbia Court of Appeal known as *West Moberly First Nations v British Columbia (Chief Inspector of Mines)*, two of the three justices



hearing the case agreed that cumulative effects on a dwindling caribou herd should be taken into account when assessing potential impacts on West Moberly First Nation's treaty right to hunt; however, whereas one of the justices seemed willing to accept that appropriate accommodation could require the Crown to develop a plan to protect and recover the caribou herd, the other justice disagreed and said that the Crown was not obliged to correct the effects of past impacts on the herd.

Canadian law that addresses cumulative effects on Aboriginal and treaty rights continues to evolve as Canada's courts hear new cases and deliver new decisions. A recent decision of the British Columbia Supreme Court known as *Yahey v British Columbia* (delivered in June 2021) held that Blueberry River First Nation's treaty rights under Treaty No. 8 had been infringed (violated) through the cumulative effects of decades of developments authorized by the Government of British Columbia. The Court agreed with Blueberry River First Nation that the provincial government should not be approving new developments until it established a framework that would enable it to assess and prevent further cumulative effects on Blueberry River First Nation's treaty rights. The Court's decision—which the provincial government did not appeal—is an important new precedent that could change the way other courts in Canada interpret the Crown's responsibilities to prevent cumulative effects on Aboriginal and treaty rights.