

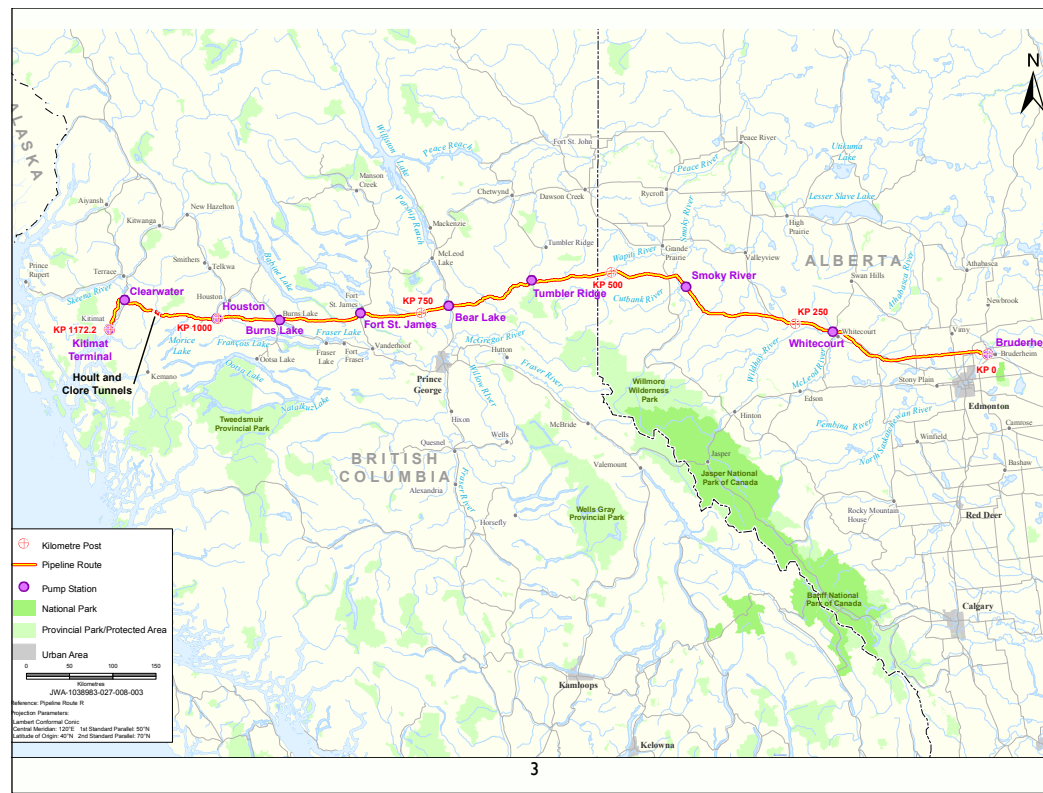
Northern Gateway Project

# Preparing for the Panel

Smithers Workshop  
27 June 2010  
Tony Pearce

# Outline of Presentation

- Panel ToR & Process
- Consultation Framework
- Strategies for Intervention

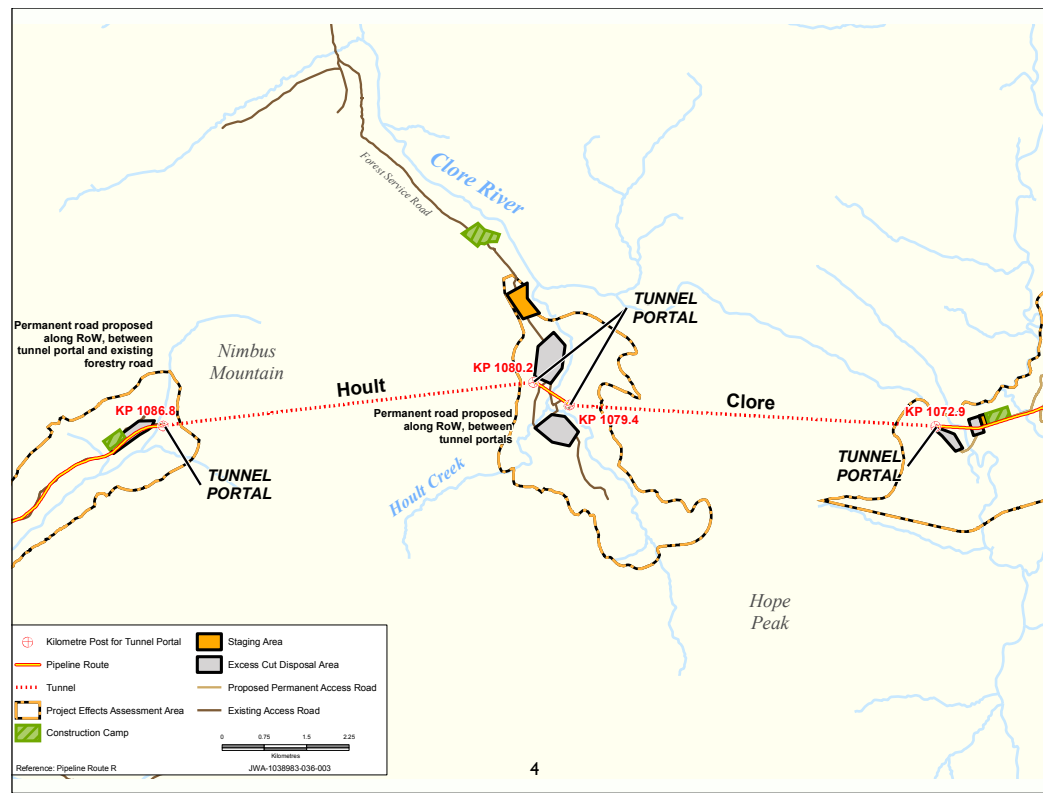


two 1170 km pipelines + rights-of-way (crude oil West; condensate East)

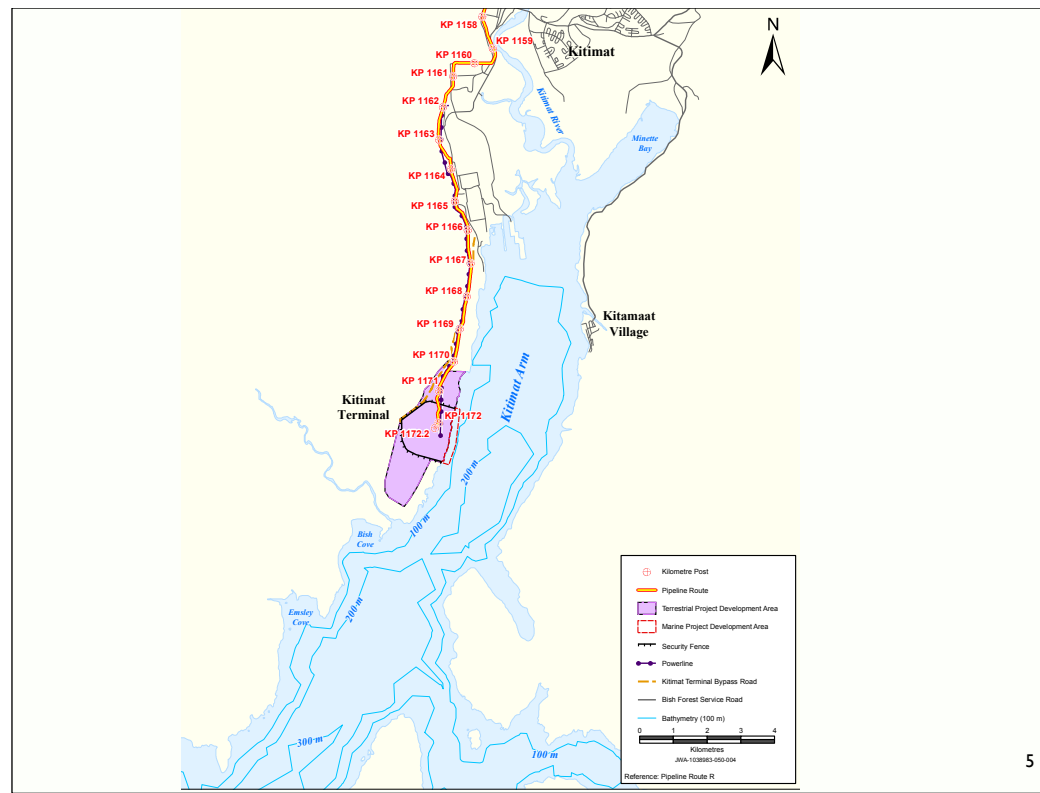
Associated pump stations, a pressure letdown station (oil) and a pressure initiation station (condensate)

All-weather road access and electrical power requirements for all facilities

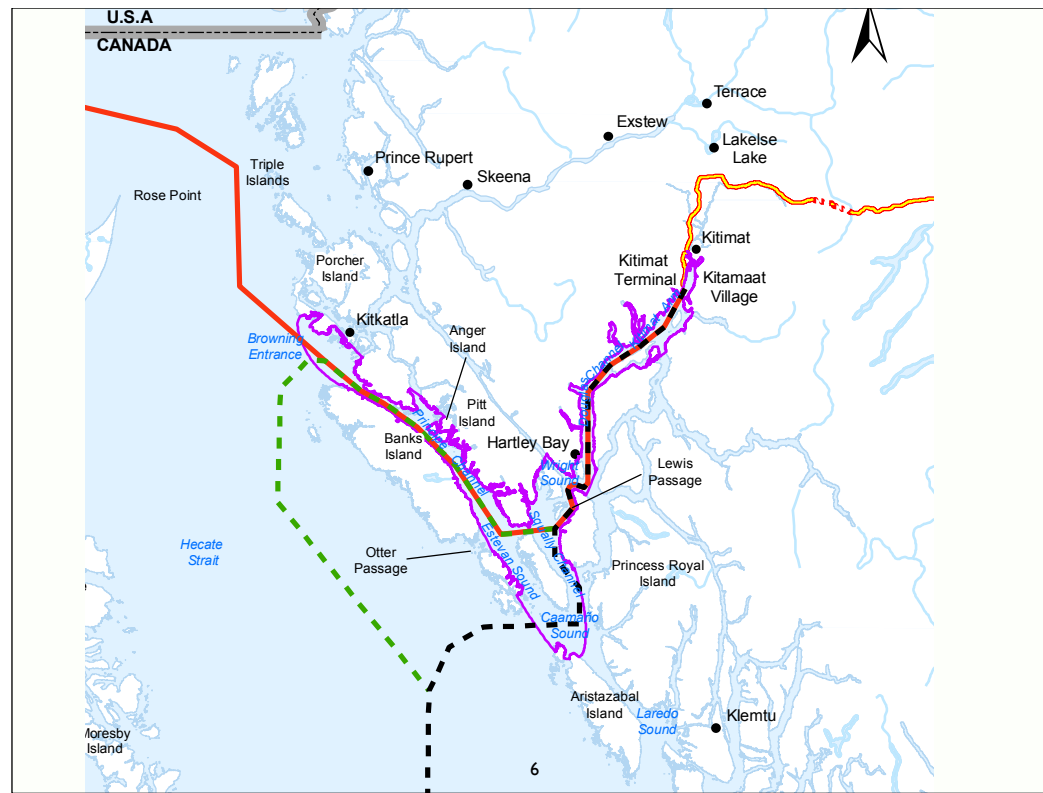
Block valves located at pump stations, watercourse crossings and other locations along route; pigging facilities at either end of the pipeline system and in selected intermediate locations; cathodic protection system for the pipelines and tanks along pipeline route



Tunnels through North Hope Peak and Mount Nimbus



2-berth marine terminal at Kitimat with hydrocarbon tanks, pump facilities and other land facilities, adjacent to the terminal  
Tanker traffic in Confined Channel Assessment Area, Hecate Strait, + proposed routes w/i 12 nautical mile limit



## Joint Review Panel

# Terms of Reference

- 3 NEB members (Kenneth Bateman, Sheila Leggett, Hans Mathews)
- Panel conducts duties of both CEAA & NEB
- Panel is to review project in “a careful and precautionary manner”.
- Panel is to facilitate participation of public and Aboriginal peoples, and enable them to convey their views on the project to the Panel by various means, such as oral statements, letters of comment or participation as intervenors
- Panel is to:
  - be fully informed about potential impacts of project on Aboriginal rights and interests:
  - require proponent to provide evidence regarding the concerns of Aboriginal groups;
  - carefully consider all evidence provided in this regard by all parties.

## Joint Review Panel

### **Mandate**

1. examine environmental effects of proposed project and their significance
2. consider measures that are technically and economically feasible to mitigate any adverse environmental effects + the need for and the requirements of any follow-up programs
3. consider comments from public and Aboriginal peoples
4. conduct public hearings to receive relevant information about project;
5. provide ways in which interested organizations and people including members of the public and Aboriginal groups may participate the hearing process;
6. submit to the federal government an environmental assessment report with recommendations about the project; and
7. issue Reasons for Decision on the application for a certificate of public convenience and necessity pursuant to the *National Energy Board Act*.



## Joint Review Panel

# Factors to be Considered

- environmental effects, including accidents
- significance of effects
- comments from Aboriginal peoples & public
- technically & economically viable measures to mitigate impacts
- purpose & need for the project
- alternative means of carrying out the project and alternatives to the project
- need for, and requirements of, any follow-up programs
- effects of the project on renewable resources to meet needs of present and future
- community and TK
- measures to enhance beneficial environmental effects
- env protection plans, monitoring & contingency plans

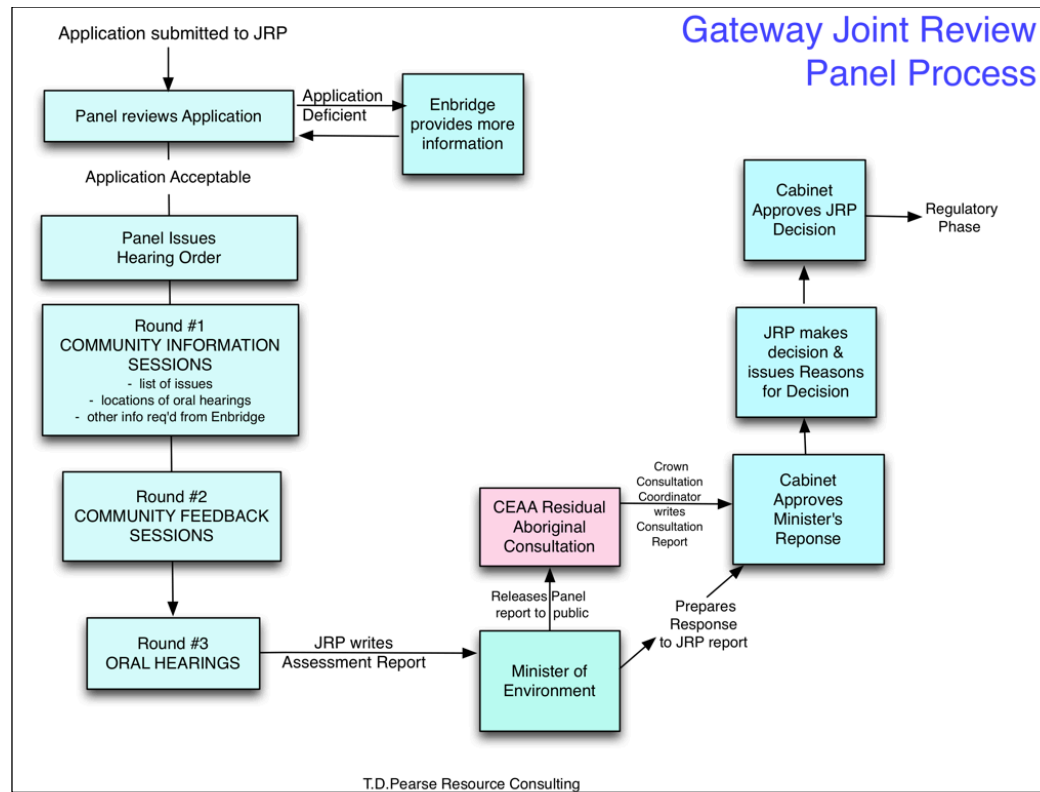
## Joint Review Panel

# Environmental Assessment Report

Panel's *Environmental Assessment Report* is to:

- describe rationale, conclusions and recommendations relating to the environmental assessment of the project
- any mitigation measures and follow-up programs
- summarize comments received from public and Aboriginal peoples
- “reference” information provided by Aboriginal peoples regarding [a] the manner in which the Project may affect potential or established Aboriginal and treaty rights; and [b] the Aboriginal groups’ strength of claim respecting Aboriginal rights
- be submitted to the Minister of the Environment who will make it available to the public and Aboriginal peoples

## Gateway Joint Review Panel Process



## Joint Review Panel Process

# Hearing Order

- a description of the methods for public and Aboriginal peoples' participation
- draft list of issues for review
- how and when intervenors can issue information requests
- distribution of and access to information, including public registry;
- timetable of events for the joint review, including the deadlines for filing evidence and information requests as well as the date when the oral hearings will commence
- how motions or questions of procedure or substance can be raised

## Joint Review Panel Process

# Aboriginal Participation

### 3 Ways to Participate

1. **filing a letter of comment**
2. **Providing an oral statement**
3. **Intervention in Oral Hearings**  
(90 days between deadline for requesting intervenor status and Oral Hearings)

## Joint Review Panel

# Aboriginal Consultation

Panel is to:

- receive information from Aboriginal peoples related to:
  - nature and scope of potential or established Aboriginal and treaty rights that may be affected by the project ; and,
  - impacts or infringements that the project may have on such rights.
- recommend appropriate measures to avoid or mitigate potential adverse impacts or infringements on Aboriginal and treaty rights and interests.

## Aboriginal Consultation

### **CEAA's View**

- Federal Crown has duty to consult Aboriginal Peoples
- Crown will rely on JRP & Enbridge to fulfill as much of the Crown's duty as possible
- JRP to consider information from FNs on how project may affect potential or established Aboriginal and treaty rights
- CEAA to conduct consultation on issues not addressed or resolved by JRP & Enbridge

## Aboriginal Consultation Framework

- “overall goal is to ensure that the requirements for environmental assessment and regulatory review under the *CEAA* and the *NEBA* are met”
- also “seeks” to address the Crown’s obligation to consult about potential adverse impacts on potential or established Aboriginal and treaty rights
- JRP process to be the “primary mechanism” for Aboriginal groups to learn about the project and present their views to government
- consultation issues outside JRP mandate to be handled by government directly with potentially affected Aboriginal groups at any time
- **Crown Consultation Coordinator** to ensure that consultation activities are carried out and Aboriginal groups are well informed

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### CROWN CONSULTATION COORDINATOR

provides information on CEAA, NEB and the JRP processes and mandates  
answers questions about integration of the consultation and JRP processes  
discusses importance of being involved in the JRP process and how Aboriginal groups can participate, including importance of providing relevant information on Aboriginal rights and interests and how these may be affected  
monitors or participates in public information sessions  
monitors Aboriginal engagement activities conducted by the proponent  
liaises with proponent to gain information on their Aboriginal engagement activities  
attends oral hearings to hear and understand rights issues raised in order to prepare for Phase IV consultations  
discusses consultation process re JRP’s Assessment Report  
coordinates federal departments consultation on Assessment Report  
discusses Aboriginal participation in consultation during regulatory phase  
describes funding available to in consultation activities as well as assist Aboriginal groups with the application for funding process; and  
prepares a report to Cabinet, in consultation with federal departments, on the adequacy of consultation



## Aboriginal Consultation Framework

### **Consultation Phases**

Phase I - Initial engagement and consultation on the draft JRP agreement **(COMPLETED)**

Phase II - JRP process leading to oral hearings

Phase III - Oral hearing and preparation of the JRP reports

Phase IV - Consultation on the JRP Environmental Assessment Report

Phase V - Regulatory permitting

## Aboriginal Consultation Framework

### Phase IV

Crown Consultation Coordinator, w/ fed departments, consults with Aboriginal groups to:

- establish whether concerns about project impacts on potential or established Aboriginal and treaty rights have been characterized accurately
- determine manner and extent to which any recommended mitigation measures might serve to accommodate these concerns, and
- determine whether there remain any outstanding issues.

3. CCC writes '*Adequacy of Consultation Report*' to Cabinet

## Aboriginal Consultation Framework

### **Phase IV**

“The JRP’s environmental assessment report and the record established through the JRP process will be the primary source of information to support the federal government’s assessment of the project’s potential impacts on potential or established Aboriginal and treaty rights.

It is therefore essential that Aboriginal groups provide all relevant information to the JRP in Phases II and III.

New or additional information about the nature and scope of potential or established Aboriginal and treaty rights that may be affected by the project or about the impacts of the project on these rights may not be considered during consultation on the JRP’s environmental assessment report.”

The CC’s Report is about “adequacy of consultation”...‘consultation’ not defined, and relationship to ‘accommodation’ is unknown.

## Aboriginal Consultation Framework

### Phase V

1. **RAs assume consultation duty**  
defined as "...will continue to be available to discuss regulatory matters directly with Aboriginal groups"
2. **RAs to consider:**
  - consultation record
  - mitigation, compensation, accommodation measures to address outstanding concerns not addressed through the EA
  - CCC's *Consultation Report*
  - MOE *Response to JRP Env Assessment Report*
  - Any direction provided by Cabinet.

# Responsible Authorities

- **National Energy Board**  
(certificate under section 52 of the *National Energy Board Act*)
- **Transport Canada**  
(grant leave under the *National Energy Board Act*; permit under the *Navigable Waters Protection Act*)
- **Fisheries and Oceans Canada**  
(authorization under the *Fisheries Act*)
- **Indian and Northern Affairs Canada**  
(access to federal lands for the purpose of project)
- **Canadian Transportation Agency**  
(permit under the *Transportation Safety Act*)
- **Environment Canada**  
(permit under the *Canadian Environmental Protection Act*)

## Aboriginal Consultation Framework

### **The Problems**

1. ACF states “JRP agreement has been developed following consultation with Aboriginal groups. Each proposal put forward by Aboriginal groups was carefully considered.”

No transparency as to how this was done; no Reasons issued Consultation Framework unilaterally developed

2. views ‘post-JRP’ consultation as ‘residual’; no new issues
3. no transparent or formal accommodation process
4. accommodation made unilaterally (JRP or regulators); no Aboriginal engagement process for regulatory stage

- 1] The courts have held that “the first step in the consultation process is to discuss the process itself.”
- 2] CEAA’s view is that consultation post-hearing will focus on the JRP report; no new or additional information can be considered. How will any ‘outstanding’ issues get resolved? This view is not consistent with the Court’s view.
- 3] Nothing is established for how accommodation gets done;
- 4] JRP process does not allow any negotiation of accommodation measures; don’t have to be acceptable to Aboriginal groups; no established process for post-JRP engagement in regulatory phase
- 5] CEA Act limits EA to impacts on current First Nations land uses and cultural heritage, not full scope of potentially affected Aboriginal rights & title, or future considerations; NEB similarly restrictive to economic considerations, not Aboriginal interests; court’s say the duty is to focus on ‘issues relevant to Aboriginal peoples
- 6] no consultation on this high level issue which Haida says duty to consult includes high level of strategic planning for utilization of resources

Aboriginal Consultation Framework  
**The Problems cont'd**

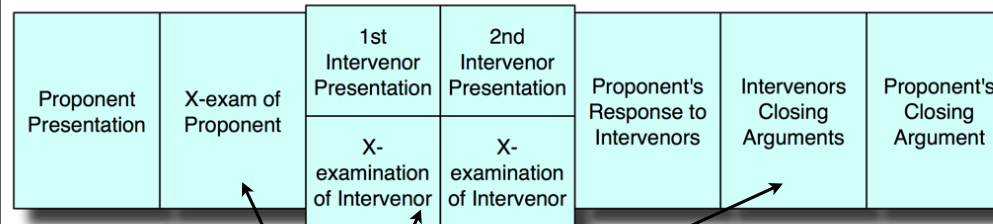
5. JRP has no mandate to conduct First Nations consultation or to fully assess potential impacts on Aboriginal Title and Rights; neither *CEA Act* or *NEB Act* are expansive enough
6. Strategic issue of whether project should proceed not addressed; Aboriginal decision-making authority ignored

# Strategic Thinking About Interventions



## ORAL HEARINGS

3 WEEKS



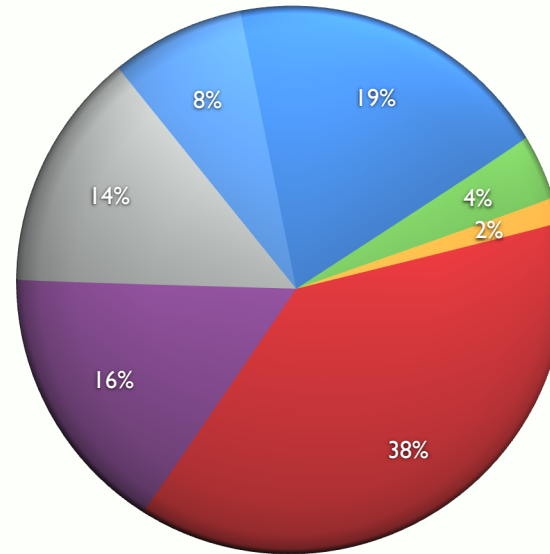
Priority Areas for Effectiveness

## Allocating Dollars **Functions**

- Developing/managing the workplan & team
- Organizing/attending internal community & leadership meetings
- Attending JRP community sessions
- Identifying/managing experts
- Preparing written submissions to JRP
- Attending Oral Hearings

## Allocating \$

- Management
- Community Mtgs
- JRP Publ Sessions
- Oral Hearings
- Written Submissions
- Experts
- Legal



# Tips & Tricks

- pick few key issues and focus; be strategic; focus on show-stoppers
- don't spend a lot of effort on IRs and preliminary skirmishes; Oral Hearing is key
- x-examination can be effective as written submissions; maintain resources (\$ + experts) for this
- x-examination of government officials also effective
- prepare good x-examination & follow through on answers
- minimize use of legal counsel; reserve legal counsel for Oral Hearings