

October 10, 2018



Province-Wide Indigenous Forum Proceedings

Environmental Assessment Revitalization

ENVIRONMENTAL ASSESSMENT REVITALIZATION PROVINCE-WIDE INDIGENOUS FORUM

INTRODUCTION

The Province of British Columbia is revitalizing the environmental assessment (EA) process “to ensure the legal rights of First Nations are respected, and the public’s expectation of a strong transparent process is met.”¹ EA revitalization is intended to result in changes to EA legislation, regulations, policies and practices that meet three objectives:

1. Enhance public confidence, transparency and meaningful participation;
2. Advance reconciliation with First Nations; and
3. Protect the environment while offering clear pathways to sustainable project approvals.

The EAO has engaged in substantial dialogue with EA participants throughout the EA revitalization process. The EAO held direct engagements with Indigenous groups, industry and business associations, non-governmental organizations and EA practitioners to inform the development of the [Discussion Paper](#) – which first outlined proposed changes to the EA process. The EAO also received important input from the Minister’s Environmental Assessment Advisory Committee and a series of First Nations workshops led by the First Nations Energy and Mining Council.

The EAO continued its direct engagement with those groups through the summer during the comment period on the EA Revitalization Discussion Paper, which provided an opportunity for the public to provide input on the proposed changes. The [What We Heard Report](#) provides a summary of the over 2,500 comments we received during the public comment period, including over 60 submissions from Indigenous nations, Indigenous organizations, industry and businesses, non-governmental organizations, health authorities and others.

To date, the EAO has had direct engagements with 73 Indigenous nations, 7 industry and business associations (63 representatives), 33 non-governmental organizations and 44 EA practitioners. The input gained through the EAO’s direct engagements and comment period on the Discussion Paper have been carefully considered in the development of new EA legislation.

The [Intentions Paper](#) outlines the direction of the new EA Act that is expected to be introduced to the Legislature in fall 2018. The EAO will continue to engage with Indigenous nations, industry and business associations, non-governmental organizations and EA practitioners in the development of regulations and key supporting policies and tools. New legislation will only fully come into force once the key supporting regulations and policies have been developed (late 2019).

¹ Mandate letter to Minister of Environment and Climate Change Strategy, George Heyman

OVERVIEW

The province-wide Indigenous forum took place on October 10, 2018 at the Musqueam Community Centre in Vancouver, BC. There were approximately 90 attendees representing 92 Indigenous nations, as well as six attendees from the First Nations Energy and Mining Council (FNEMC) and 11 from Environmental Assessment Office (EAO). The forum had the following intended outcomes:

- Significant and broad participation from Indigenous nations in BC including senior technical staff;
- Communicating the results of public review and comment period on the Environmental Assessment (EA) revitalization Discussion Paper, discuss Intentions Paper, and having a technical working session on important aspects of a proposed new EA process; and
- Launching detailed discussions on key regulations required to bring life to new EA Act (“the Act”).

This document provides the proceedings of the day, including a summary of the technical sessions, supported by graphic recording images created by Drawing Change.

OPENING REMARKS

The forum was opened with a traditional welcome by Larry Grant of the Musqueam Nation. Several speakers followed providing opening remarks that highlighted key aspects of the EA revitalization process. The following individuals provided opening remarks:

- The Honourable George Heyman, BC Minister of Environment and Climate Change Strategy;
- Robert Phillips, First Nations Summit;
- Kevin Jardine, Associate Deputy Minister, Environmental Assessment Office; and
- Dave Porter, Chief Executive Officer, First Nations Energy and Mining Council.

HOW WE GOT HERE

This portion of the forum provided an overview of EA chronology from the introduction of the current EA Act in 2002 until present including BC’s commitment to work on EA reform with FNEMC which led to work on EA revitalization. FNEMC delivered a PowerPoint presentation. The following speakers presented:

- Paul Blom, First Nations Energy and Mining Council; and
- Scott Bailey, Assistant Deputy Minister, Environmental Assessment Office.

INTENTIONS PAPER: DISCUSSION AND LINKAGES TO UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES (UNDRIP) AND THE TRUTH AND RECONCILIATION COMMISSION (TRC) CALLS TO ACTION

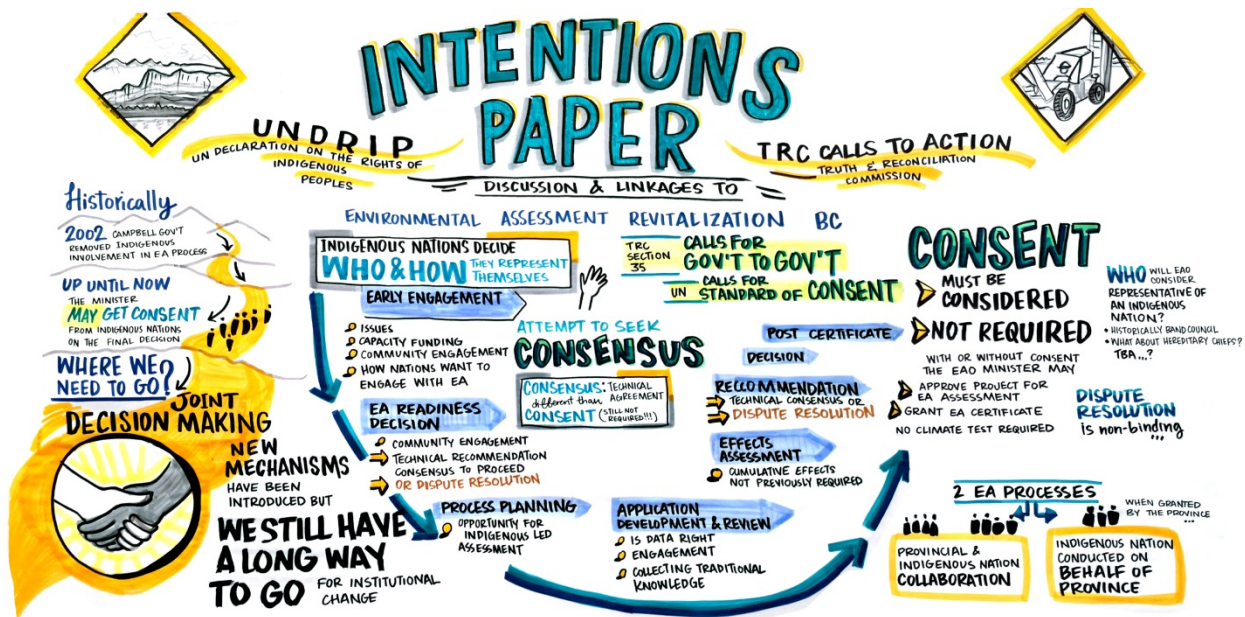
The EAO presented the new EA process, including what Indigenous participation in the new EA process could look like, reviewed key concepts presented in the Intentions Paper including the implementation of UNDRIP and how the new process supports free, prior and informed consent.

FNEMC delivered two presentations. The first was on FNEMC's significant issues analysis of the Intentions Paper outlining the key themes of FNLC's submission on the Discussion Paper. The second provided linkages back to the Commitments Document and concrete actions.

The presentations were delivered by:

- Paul Craven, Environmental Assessment Office;
- Jessica Clogg, First Nations Energy and Mining Council; and
- Stacey Edzerza Fox, First Nations Energy and Mining Council

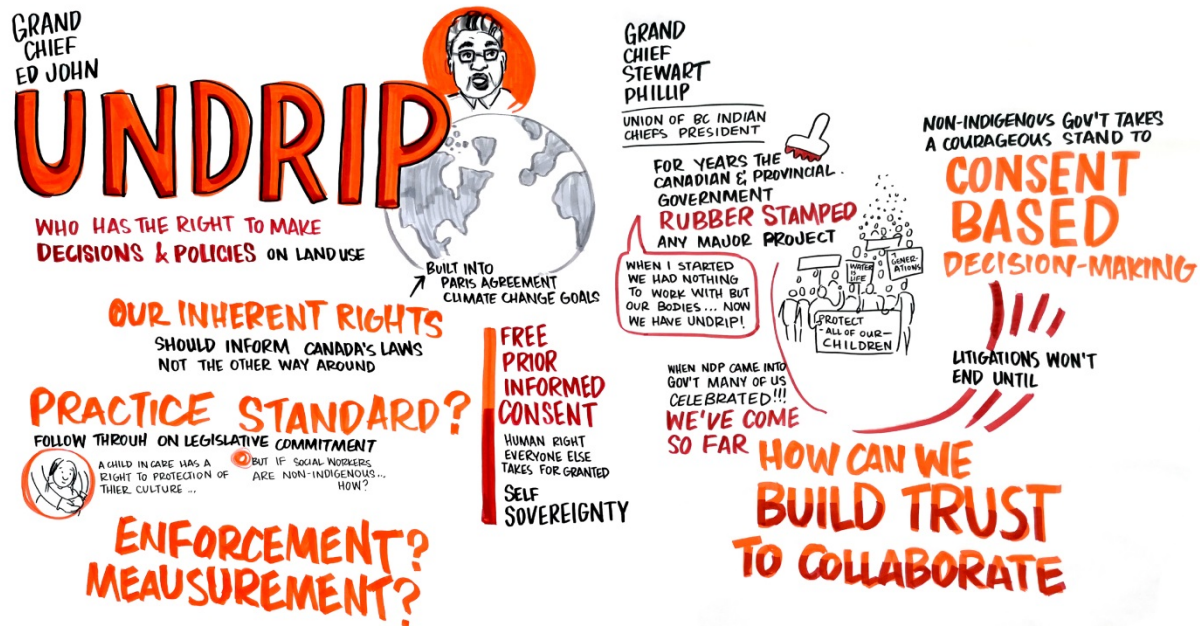
The following graphic recording image was created by Drawing Change during these presentations.



UNDRIP PRESENTATION

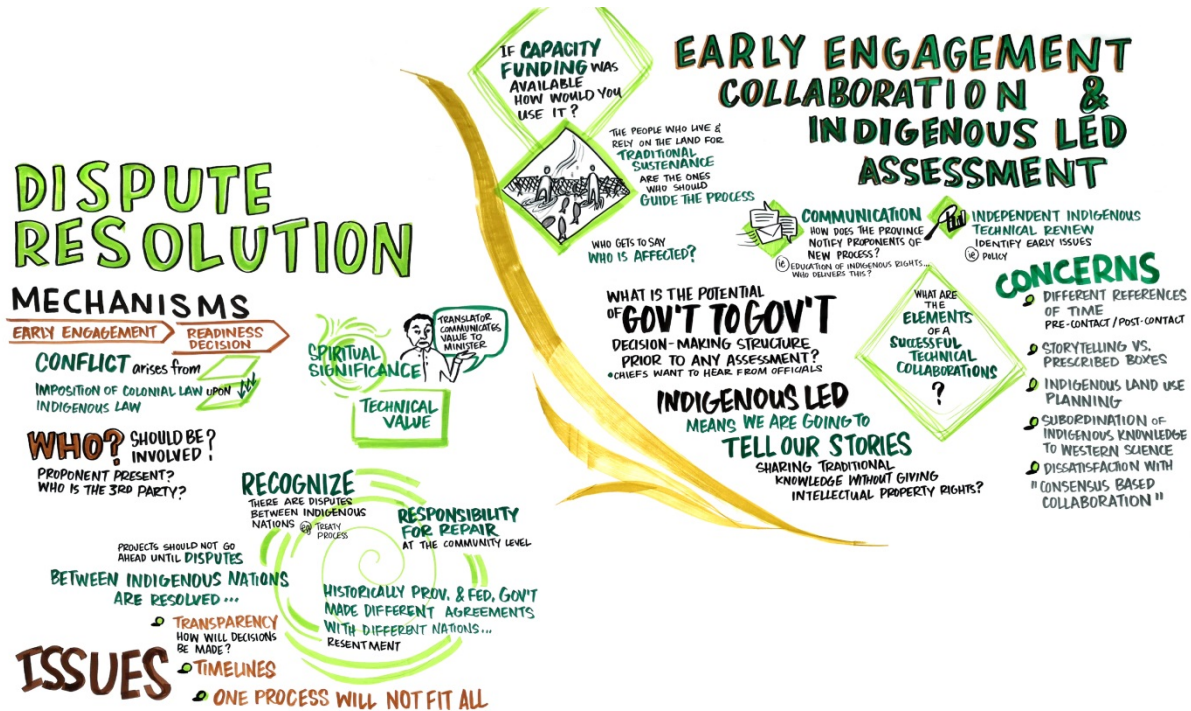
A presentation was provided by Grand Chief Ed John on the topic of UNDRIP.

The following graphic recording image was created by Drawing Change during Grand Chief Ed John's presentation and Grand Chief Stewart Phillip's presentation during the closing remarks.



TECHNICAL WORKING SESSION(S)

In the afternoon the attendees split into two groups and rotated between two 50-minute technical break-out sessions; one on Dispute Resolution Mechanisms and the other on Early Engagement, Collaboration and Indigenous-led EAs. The following graphic recording image was created by Drawing Change during these sessions.



Environmental Assessment Revitalization Province Wide Indigenous Forum, Oct 10, 2018, Musqueam

LIVE GRAPHIC RECORDING | Drawing
Tiaré Jung | Change

EARLY ENGAGEMENT, COLLABORATION AND INDIGENOUS-LED ASSESSMENTS

The following is a combined summary of the key themes that were raised by both groups of attendees during their discussion of Early Engagement, Collaboration and Indigenous-led EAs. The session began with an outline of the concepts of Early Engagement, Collaboration and Indigenous-led EAs that will be included in the new Act, and that there is still opportunity to provide input into the development of policies. The views of participants listed below were not necessarily shared by all participants.

EARLY ENGAGEMENT

During the breakout sessions, participants noted that Early Engagement will require adequate time for:

- Elders to tell stories because everything has life and seasons and Indigenous nations live by those stories;
- Proponents and government to listen to Indigenous nations;
- Indigenous nations to consider their customs, laws and institutions and to determine whether and how they are going to participate in consultation;

- Developing a better way of engaging that ensures information reaches the necessary people in communities (e.g., families responsible for management of specific areas) and not just Chief and Council;
- For Indigenous nations to consider EA information, share it with the community and identify interests; and
- For Indigenous nations to determine how community decisions will be made and to reach a decision.

Participants expressed that Early Engagement will require respect for traditional governance and decision-making, including:

- The laws of the community;
- Community decision-making protocols;
- The rights of the lands and animals;
- Where needed, time and resources to rebuild the traditional governance systems; and
- Time to educate the Province and proponents about traditional governance.

Participants also noted that consideration of traditional governance is integral to consent.

Participants had concerns regarding how Indigenous nations would be notified of EAs including that:

- This needs to be done with respect and should include leaders from the proponent (Chief Executive Officer) and from the provincial government (elected officials);
- The onus should be shifted to the Province to plan around the interests Indigenous nations identify through traditional territory land use plans including sacred areas and areas of traditional land use;
- Managing notifications and EAs takes resources and capacity; and
- Over-reliance on digital means of information sharing could be a challenge for some communities.

One participant noted that Early Engagement needs to include discussions of whether a new project can be considered in a given area and that this will rely upon an understanding of past cumulative effects to rights and title.

Proponents will need to be prepared for Early Engagement, including having a full understanding of the following:

- The reasons and rationale for consulting with Indigenous nations;
- Aboriginal Rights and Title and the cultural context for a proposed project in BC;
- The importance of showing respect and having appropriate representatives (e.g. Chief Executive Officer) meet with leadership early and be prepared to take the time to listen; and
- The time it takes to navigate traditional governance systems.

Successful Early Engagement will require that Indigenous nations have the capacity to participate including:

- Access to adequate and well-timed funding to participate and to rebuild governance systems;
- Personnel and expertise; and
- Physical space.

Participants recommended that Indigenous communities take the necessary time to conduct their own community readiness assessment and consider what capacity (e.g., financial, human, cultural, knowledge, communications, etc.) they have in place for the EA.

It was noted that Early Engagement will require up-front sharing of science, planning and legislation information along with Indigenous Knowledge to avoid derailing collaborative and Indigenous-led EAs.

Participants noted that benefits agreements can impact Early Engagement in that, proponents try to get to benefits agreements before the assessment and then the need for the assessment seems to go away.

INDIGENOUS-LED ENVIRONMENTAL ASSESSMENTS

Participants shared a number of observations regarding Indigenous-led EAs and the contents of the Intentions Paper including the following:

- All communities are unique and their individual values and beliefs should be included in the process;
- Indigenous nations want more than consultation; they want to be part of the process from the outset and they want equal shares and equal resources;
- The consensus process in the Intentions Paper is a “getting to yes” process, noting there is never a chance for Indigenous nations to say “no”, thus undermining the overall value of this approach;
- The process in the Intentions Paper is business as usual, whereas it should be restitution;
- The EAO should not be asking how to put Indigenous-led EAs into EAs because it should be the other way around, how do you put EAs into Indigenous-led EAs;
- Indigenous-led EA is misleading, EAO doesn’t do EAs, proponents do; and
- EA’s must have a holistic or Indigenous perspective (culture, traditional use, economics, spirituality) that is very different from the way that EAs are currently done with Western science.
- The rights to the land and Aboriginal Title need to be considered and potentially changed through methods such as return of land and adhering to decisions made in the Indigenous-led portions of the EA.

Many participants identified challenges regarding the use of Indigenous knowledge, stating that EAs will require consideration of the following:

- Protection and consideration of Indigenous knowledge;
- You cannot have the elders share information with people they do not know or trust;
- Apprehension to share knowledge because people have been told that once stories are shared, they belong to the world;
- The lack of interest in the criteria, the scope, analysis and the legally binding outcomes of the use of that knowledge; and
- Not treating Indigenous knowledge as subordinate to Western science or using Western science to assess Indigenous knowledge unless this is agreed to by the Indigenous nations.

One participant advocated for financial support for Indigenous nations that have had success in Indigenous-led EAs to share their experiences with other nations.

Participants shared many observations regarding collaboration including that:

- It is not the right word when it comes to EA stating that Indigenous-led assessment should not be “under” a collaborative process;
- It requires having the community identify the potential impacts and mitigations;
- It cannot include scientists deciding for the community what an impact is; and
- It should be defined as listen, hear, adjust, accommodate.

It was also noted that Indigenous nations need to be asked if they want to be part of a collaborative process. Problems have arisen recently when multiple groups were involved in establishing a collaboration agreement for a specific project. This same process will now be imposed on a large collective of Indigenous nations despite not all having participated in the development of the new Act.

OTHER THEMES

There were comments about thresholds and flagging projects for EAs including:

- Concerns regarding the process by which projects will be deemed reviewable (i.e., Reviewable Projects Regulation)
- Questions regarding how Indigenous nations can identify projects as reviewable based on the potential impacts to Indigenous nations.

DISPUTE RESOLUTION MECHANISMS

The following is a combined summary of the key themes that were raised by both groups of attendees during their discussion of Dispute Resolution Mechanisms. The session began with an outline of the concept of Dispute Resolution that will be included in the new Act, and that there is still opportunity to provide input into the development of regulations and policies. The views of participants listed below were not necessarily shared by all participants.

ADDRESSING ISSUES OUTSIDE OF THE EA PROCESS

An overall observation from the session was that Dispute Resolution is bigger than EAs and there is a need to address larger issues first. Quite often issues like reconciliation are not brought into EA as EAs are siloed, which is opposite of Indigenous views which are very holistic.

ONE TYPE OF DISPUTE RESOLUTION WILL NOT FIT ALL DISPUTES

One of the key themes of the discussion was the need for flexibility and recognizing that one solution is not going to fit all. There will be many different types of disputes that may all require a different style of Dispute Resolution. There will be a need to customize the process in the moment, and it was suggested that those with the conflict should make the decision on how to resolve rather than participating in a set process. Participants raised that government to nation disputes vs. internal, or nation to nation disputes would require a different approach to Dispute Resolution. There was a suggestion to create a tool box of Dispute Resolution techniques/options.

RECOGNIZE EXISTING INDIGENOUS LAW IN DISPUTE RESOLUTION

It was raised that before colonial governments Indigenous nations had their own agreements including Dispute Resolutions processes and that many of these continue as living agreements. Indigenous laws need to be considered and included in any Dispute Resolution process that is developed today.

NEED FOR TRANSPARENCY

Another key theme was the need for transparency by the EAO. Participants feel that in order to have effective Dispute Resolution they need to understand what is in dispute and how decisions are being made, including what scope is being taken into account. Early information can allow communities to use their own mechanisms to solve their own disputes.

WHAT IS A NEUTRAL THIRD PARTY?

How to choose a neutral third party was one of the key discussions during the session. Some questions that were asked were:

- What is a neutral third party?
- Who would be the ideal third party, who would be neutral, and at same time understand the issues facing Indigenous nations?
- Will the neutral third party be appointed, or from a roster that is pre-approved?

Participants feel it is important for communities to have a role in choosing the third party and that both parties involved in the dispute would need to be in agreement. Concern was raised over bringing in a third party as this puts the decision in someone else's hands. It was also noted that it is important that the third party understand Indigenous issues, for many nations it may be better to have the facilitator or mediator come from their community.

SAFE ENVIRONMENT FOR VOICING DISAGREEMENT

Another suggestion was to create a safe environment to allow the opposing parties to express themselves and be acknowledged and create a win-win situation. Work to find ways to accommodate opposing Indigenous nations as a means of problem solving. One participant raised that when there is a dispute between government and an Indigenous nation they would like to see government listen to the nation and to have them side with the nation and consider their perspective to resolve issues, rather than ending up in court.

DISPUTE RESOLUTION WITHIN AND BETWEEN NATIONS

Participants feel it is important to recognize that individual nations need to first address internal disputes before they can start to work with outside governments. Participants suggested that capacity funding is needed to address the disputes within nations so that the nations can define themselves, and not depend on traditional *Indian Act* definitions. Participants also noted that Dispute Resolution processes needs to be developed at the community level in order to take back authority as a nation. A comment was also raised that rights and title need to be seen as legitimate and be at the forefront of disputes. A suggestion was made to provide training and development at local level, so that expertise is within communities.

Participants raised jurisdictional issues as a challenge and source of conflict due to the following reasons:

- Issue of correctly determining who are the impacted peoples.
- In some nations there are internal disputes, or there are disputes between nations.
- When government chooses to deal with one nation/organization, it is not recognizing that others may not be aligned with them.
- An issue when government makes a unilateral decision to consult only one nation, when many are affected.

- Government should not have an agreement with one band and not another as this causes conflict with nations, needs to be inclusive.

TIMELINES AND CAPACITY FUNDING

Timelines and capacity were also discussed during the session. Participants feel that timelines put pressure on nations and only those with capacity are going to be able to respond to requests for Indigenous knowledge etc., in timely fashion. There are many nations with populations of under 300 and they are not able to manage all the requests that come with engagement and consultation. There is a need to build strategies and tools to allow the streamlining of responses to the many requests coming in. Some of the suggestions to address capacity were:

- Recognize that not all Indigenous nations have the same understanding of EA and there should be support from decision makers at provincial levels.
- Build a toolbox outlining process and timelines so that Indigenous nations have something to choose from.
- Provide facilitators to help small communities with EAs.

Participants felt that if there is better capacity and understanding of the process this may result in less internal disputes arising from the work load. A concern raised by participants was that if nations cannot respond in a timely manner the EAO will use Strength of Claim to determine who to consult with.

DISPUTE RESOLUTION SHOULD NOT BE LIMITED ONLY TO CERTAIN STAGES OF THE EA

Participants also raised that Dispute Resolution should be an option at all stages of the EA, and that it should be decided early in the process whether the Dispute Resolution belongs in the EA. It was also suggested that DR should be available for administrative and policy decisions with the EA, such as what EA methodology is applied.

EMBED DISPUTE INTO EXISTING AGREEMENTS

It was also suggested that if you have a broader agreement with government (e.g., Strategic Engagement Agreements) use that agreement rather than creating something new in the EA.

GOVERNMENT TO GOVERNMENT AGREEMENTS

The importance of Government to Government Relationships was also raised. There is a history of mistrust not only between Indigenous nations and the provincial and federal governments, but between nations themselves, dating back to 1846. Dispute resolution cannot begin to happen until there are true Government to Government relationships between nations, and between Indigenous nations and the Province and Canada.

NEXT STEPS AND CLOSING COMMENTS

Summaries of the technical working sessions, the next steps on key regulations and closing comments were provided during the last section of the forum. Paul Craven provided a PowerPoint presentation on next steps in EA revitalization. Graphic recording images were created by Drawing Change during these presentations.

The individuals that spoke on these topics included:

- Dan George, Facilitator;
- Cheryl Brooks, Facilitator;
- Aaron Bruce, Partner at Ratcliff & Company LLP;
- Paul Craven, Environmental Assessment Office;
- Scott Bailey, Environmental Assessment Office;
- Grand Chief Stewart Phillip, Union of BC Indian Chiefs; and
- The Honourable George Heyman, BC Minister of Environment and Climate Change Strategy.

Legislation is anticipated to be introduced in fall 2018, consistent with the direction set out in the Intentions Paper. If passed, legislation will be brought into force through regulation in late 2019.

The EAO will be engaging directly with Indigenous nations, industry, non-governmental organizations and broadly with the public on regulations and policy. The EAO will continue to inform Indigenous nations of these opportunities through spring 2019.