TSLEIL-WAUTUTH NATION

People of the Inlet

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Mr. Nathan Braun
Executive Project Director; Oil and Gas Sector
PO Box 9426 Stn Prov Govt
Victoria, B.C. V8W 91V
Via email: Nathan.braun@gov.bc.ca

Re: Environmental Assessment Revitalization Process: A Review of the Discussion Paper

Introduction

Tsleil-Waututh Nation (TWN) is pleased to provide a third submission as part of the BC Environmental Assessment Revitalization (EAR) process. This submission analyzes the Discussion Paper against topics of concern and associated recommendations that TWN has shared in previous submissions (dated February 2017, and May 15, 2018).

Consultation to Date

TWN finds the current timeline for EAR too rapid to meaningfully engage with the EAO at a level that would allow greater partnerships with Indigenous groups in the creation of Intentions Paper, and joint-decision making in the legislative reform currently aimed for Fall 2018. Like the Discussion Paper, the Intentions Paper will be authored by the EAO and provided to the public without preliminary review by Indigenous groups. We hope to see greater changes in this process moving forwards in the spirit of creating an EA process that will include greater Indigenous partnership, including joint decision- making.

How well aligned are TWN concerns and the Discussion Paper?

Tsleil-Waututh presents the following comments in response to the Discussion Paper (released June 2018).

1) Co-Governance.

The Discussion paper is inadequate in its reliance on "consensus-building" rather than Indigenous consent. The new legislation must commit to implementing UNDRIP and its standard of free, prior, and informed consent into all EA projects in BC, while ensuring Indigenous decision-making is implemented both procedurally and substantively. It must recognize and require consent from all affected Indigenous groups, to ensure projects do not infringe upon Aboriginal rights as recognized and affirmed by section 35 of the Constitution Act, 1982, or Indigenous human rights as set out in UNDRIP. The right to free, prior, and informed Indigenous consent must be meaningfully obtained as outlined by the Court of Canada's ruling in *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 and in accordance with UNDRIP, supported by the Truth and Reconciliation Commission's Calls to Action, the last of which emphasizes the necessity of incorporating and upholding Indigenous law and legal systems. This can be achieved in part by:

(1) recognizing Indigenous groups in environmental assessment (EA) legislation as jurisdictions where they can self-define the level and nature of participation they intend to exercise;
(2) Recognizing the decision-making authority of Indigenous nations and the legitimacy of their laws, standards, and processes;
(3) allowing for TWN's participation in any EA within our Consultation Area without requiring a Strength of Claim (SOC) assessment. Case-by-case SOC assessments should not be a part of the EA process;
(4) begin joint decision-making during land use planning, and at the strategic and regional assessments;
(5) Implement joint decision-making throughout the EA process supported by an independently-facilitated dispute resolution process based on both Indigenous and provincial law (see section below on dispute resolution process).

Acknowledgment of implementing UNDRIP in the context of EA is a welcome addition; however, it is limited to the concept of 'building consensus', falling short of requiring achieving free, prior and informed consent. TWN, as with other Indigenous groups, must be recognized as legitimate decision-makers with the ability to use their discretion to provide consent or withhold consent from a project. Consent does not occur at a single point in time but must be continually sought. Further, consent is not achieved simply by adhering to procedural steps but through substantive evaluation of potential impacts and informed decision-making.

As affirmed by the Supreme Court of Canada in *Tsilhqot'in* (2014), title confers on Indigenous groups "the exclusive right to decide how the land is used and the right to benefit from those uses," including "the enjoyment of the land by future generations." It is imperative that BC's EA legislation is updated to ensure that Indigenous jurisdictions are able to uphold these rights and obligations to past, present, and future generations in accordance with their own Indigenous laws and legal systems.

Discussion Paper Proposals:

- "Purpose section of EA legislation includes implementation of the UN Declaration in the context of EA."[1]
- "New EA legislation recognizes various options to conduct EA including collaborative and Indigenous-led EAs in whole or part."[2]
- Enable consensus-based decision-making with Indigenous nations at a technical level throughout the EA process, as well as recognition of decisions made by Indigenous governing bodies at key junctures, supported by an alternative dispute resolution mechanism."[3]
- "Introduce a legal framework for regional and strategic assessments in B.C., including criteria for prioritizing regions for assessment."[4]
- "Make resources available for provincial government agencies and Indigenous nations to conduct regional and strategic level assessments to provide context for individual project assessments."[5]

[1] British Columbia, Environmental Assessment Revitalization Discussion Paper (June 2018) , page 10, Page 9.
[2] Ibid.
[3] Ibid.
[4] Discussion paper, page 10.

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2) Sustainability as Core Objective & Sustainability Criteria

The core objective of environmental assessment must center on sustainability, including a focus on combating climate change while meeting the commitments in the Federal Sustainable Development Strategy (FSDS). It is refreshing to see that the Discussion Paper makes a commitment to legislated sustainability criteria; however, greater articulation is required to know whether these criteria will actually be effective. Tsleil-Waututh wants to see measureable criteria rather than simply factors to consider. Moreover, Tsleil-Waututh expects to see the eventual criteria as legally binding, against which decision-makers can be held accountable, rather than guidelines for consideration.

To achieve this, EAR can incorporate:

(1) a climate test within the requirements of the EA application process (see section on climate change below);
(2) a Canada-wide Air Quality Management System (AQMS); and
(3) a mechanism to ensure the independence and transparency of assessments (see section below on independent and transparent assessment).
(4) A mechanism by which Regional impact assessments (RIAs), and strategic impact assessments (SIAs) as well as Indigenous land use plans are adhered to. RIAs and SIAs are critical tools that enable Indigenous groups to enact their jurisdictional responsibilities in coordination with the Crown. It is our belief that Regional and Strategic Assessments with strong sustainability provisions will improve both the process and outcomes of impact assessments, as decisions over appropriate land use and related considerations can be undertaken *in advance*, reducing the pressure of timelines, increasing opportunities for meaningful engagement between jurisdictions, and facilitating cooperation between Indigenous groups and the Crown. Ultimately, joint decision-making should start at the strategic and regional levels, and then carry through into project-level reviews.
(5) EA legislation must include specific measurable criteria by which projects will be measured against to determine whether a project will result in adverse impacts. Criteria must be jointly developed to establish a threshold by which projects will be deemed acceptable or unacceptable.
(6) To strengthen sustainability provisions and the development and implementation of regional/strategic impact assessments, we request a sustainability test, to enable options that would make the greatest positive contribution to sustainability by protecting, restoring, or enhancing each of the following to achieve among them mutually reinforcing, cumulative and lasting gains:

    i. ecological integrity, including the ecological basis for the meaningful exercise of Indigenous and treaty rights and community health,

    ii. Canada's ability to meet its international, national, and provincial environmental, climate change or biodiversity commitments or obligations,

    iii. the community and social well-being of potentially affected people,

    iv. the health of potentially affected people, especially vulnerable populations,

[5] Discussion paper, page 16.

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v. long-term economic well-being

vi. livelihood sufficiency and opportunity over the short and long-term,

vii. intra-generational equity,

viii. inter-generational equity, and

ix. resource maintenance and efficiency.

The sustainability criteria set out above would further be considered in light of Indigenous jurisdiction, law and rights in accordance with the United Nations Declaration on the Rights of Indigenous Peoples.

These sustainability provisions would ensure that Indigenous rights to "the enjoyment of the land by future generations" as affirmed by the Supreme Court in *Tsilhqot'in* (2014) is upheld as a legal obligation to past, present, and future generations in accordance with Indigenous laws and legal systems.

Discussion Paper proposals include:

- "Protecting the environment and fostering sustainability across the five pillars – environmental, economic, social, cultural and health – is a central purpose of EA."[6]
- Legislated decision criteria require consideration related to sustainable development objectives (e.g., consistency with BC's climate targets and strategies)."[7]

3) Cumulative Effects

The formula used to determine cumulative effects in EAs needs to be comprehensively revised. TWN has collaborated with Environment Canada and other First Nations to design a Cumulative Effects Monitoring Framework for the Burrard Inlet – Howe Sound area on British Columbia's West Coast. This framework can be used in all areas of BC to inform improved cumulative effects assessment strategies. Indigenous risk thresholds and ecological protection minimums must be incorporated.

TWN expects the Province to collaborate with Indigenous groups and the federal government on cumulative effects assessment frameworks. Cumulative effects assessments cannot be relegated to a specific level of government or jurisdiction. Tsleil-Waututh would like to see our Cumulative Effects Monitoring Framework be integrated into the provincial EA process. TWN requests further dialogue with the Province to work together on this matter.

The link between cumulative effects assessment and regional and strategic assessments is a welcome addition; however, it can be strengthened with the addition of legislated triggers and process requirements for regional and strategic assessments, ensuring that they actually occur in a manner that aligns with project-based assessments.

Discussion Paper Proposals:

[6] Discussion paper, page 11.
[7] Discussion paper, page 11.

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- "All project EAs include assessment of cumulative effects informed by the province's Cumulative Effects Framework, and guided by higher level plans and assessments, including regional and strategic assessments as they become available."[8]

4) Process

The current prescribed assessment timelines do not allow for enough detail to be collected in order to ensure effects are strictly considered, or enough time for Tsleil-Waututh to properly review and respond to the information presented in order to conduct our due diligence and achieve the *free, prior,* and *informed* conditions of consent. Timeframe of EAs should be re-established with timelines jointly agreed upon by all affected jurisdictions, including Indigenous groups and the Crown, during the process planning stages of each EA. The timeliness of assessments can therefore be balanced with the capacity and information expectations of Indigenous groups.

Support for Indigenous engagement in EAs should be re-structured away from project-based funding to longer-term programmatic-style funding.

The EA process could be an excellent avenue for collective learning beyond direct assessment of the project for the purposes of an EA certificate. The EA process needs to be revised to obligate contributions to continued learning while increasing transparency and accountability. For example, a system of due-diligence, assessing the quality of information used within the application, could be built in as an extension of the completeness review of the Environmental Impact Statement.

TWN in general encourages early engagement. However, early engagement must be coupled with a willingness to alter and address project-related concerns in this phase.

Discussion Paper Proposals:

- "Require an early engagement phase so that Indigenous nations, local communities and others find out about projects earlier and their concerns can be better heard and addressed."[9]
- "Prior to commencing an EA, an Assessment Plan is developed by the EAO and Indigenous nations (working with the proponent, government agencies and other EA participants) that sets out the scope, procedures and methods for EA, and how provincial and Indigenous processes and decision-making will align, including funding, timelines, and opportunities for public participation. Where applicable, Assessment Plans will be informed by standing government-to-government agreements regarding EA in a nation's territory and/or project-specific assessment agreements that are concluded before an assessment is commenced….Different types of assessment may be specified in an Assessment Plan including: EAO-led assessment, Indigenous-led assessment, in full or in part, panel process, other collaborative approaches with EAO and Indigenous nations, as identified through government-to-government agreements.[10]

[8] Discussion paper, page 11
[9] Discussion paper, page 17
[10] Discussion paper, page 19

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5) Consideration of alternatives including the *'no'*

EAs are an appropriate mechanism to evaluate alternative project types and designs including the option of 'no project'.

The Discussion Paper acknowledges the importance of assessing alternative project designs but it does not include the option of assessing conditions with no project. A project, after assessment, may not receive the EA certificate, but this does not replace assessing the value of a project against its absence as well as alternatives. One option is to explicitly extend the Reviewable Projects Regulation to include upper limits – projects that meet this threshold are subject to assessment, but projects that exceed other thresholds, are automatically eliminated from EA certificate consideration.

Discussion Paper Proposals:

- "Early engagement of Indigenous nations to identify interests, issues, and concerns that inform project design, siting and alternatives…"[11]
- "Formal opportunity for the public to identify interests, issues, and concerns with a project to inform project design, location, alternatives…"[12]
- "Ministers' decision options are: … do not issue certificate."[13]

6) Post-Certification Phase

The post-certificate approval process needs to be mapped out, inclusive of, but not limited to, general responsibilities, obligations to Indigenous groups, timelines, anticipated activities, compliance and enforcement processes including provision for capacity to carry out enforcement, and condition management. The post-certification phase must be designed in such a way to continually seek Indigenous consent.

Tsleil-Waututh sees potential for improvement to the post-certification phase of a project to a degree; TWN would like to see more specifics included in the legislation. This phase must be co-developed by Indigenous groups and the EAO to clearly identify who is responsible for what and how they intend to carry those responsibilities out. Compliance and enforcement capacity is essential. Our feedback is based on our experience in which the EAO has historically relied upon post-certificate activities to address and mitigate concerns over potential impacts to TWN's Aboriginal rights, title, and interests. In our experience, post-certificate activities fall short of providing sufficient mitigations despite being identified within the EA. The post-certification phase must therefore be designed in such a way that understands the free, prior, and informed consent of Indigenous groups as a continuous process, and not a single moment-in-time that occurs at the certification phase.

Discussion Paper Proposals:

- "Project EAs should have a clear linkage to requirements in subsequent permitting."[14]

[11] Discussion paper, page 9
[12] Discussion paper, page 8.
[13] Discussion paper, page 23.

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- "At the end of the EA process, there is a common understanding of what has been resolved during the EA, and what requires further consideration during the permitting process."[15]
- "Enhanced linkages with other agencies or groups that have a role in post-EA permitting or compliance and enforcement."[16]
- "Increased clarity of issues resolved during the EA and issues requiring further resolution at permitting."[17]

7) Climate Change

A climate test must be included both as a trigger for EAs within the Reviewable Projects Regulation, and as a value component. The amount of greenhouse gases (GHGs) that a project will emit is an easy metric to use as project assessment trigger. Projects should be assessed against the most recent Federal and Provincial climate targets and guidelines.

Mention of climate change and its interrelationship with project assessments is remarkably light. TWN is a part of many international (IPCC), federal and provincial conversations on how best to tackle climate change; there is considerable work being done at these levels as well as within the TWN community. Within BC, the EA legislation should reinforce the new legislation to update BC's greenhouse gas reduction targets and forthcoming update to the climate action strategy; a carbon budget that can be applied in assessments could be one mechanism to achieve this.

It would be prudent for the EAO to more explicitly draw linkages with climate change variables, project assessment triggers, and value components. Tsleil-Waututh would welcome the opportunity to work with the EAO in this regard.

TWN further expects to see clear methodologies within the EA process for determining issues such as residual effects, cumulative effects, mitigation, and so on to ensure that EAs align with climate mandates, as outlined on p 16 of the discussion paper.

Discussion Paper proposals include:

- "Legislated EA decision criteria will include clear linkages to other planning mechanisms and environmental goals such as consistency with climate targets and strategies."[18]

8) Federal Impact Assessment Act

Tsleil-Waututh agrees that, in general, a single process that supports separate decisions is preferable process-wise, so long as Indigenous groups are in agreement, with the ability for Indigenous groups to carry out their own assessment should they so choose. Although one process is preferable, should legislation between various jurisdictions vary, jurisdictions should uphold their

[14] Discussion paper, page 16.
[15] Ibid.
[16] Discussion paper, page 24.
[17] Ibid.
[18] Discussion paper, page 16.

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own obligations to the highest standard. Collaboration rather than substitution should be the aim; tri-partite agreements, assessment plans and revising the existing MOU between the federal and provincial governments may be effective ways to achieve this. In the event that an Indigenous group wishes to conduct their own assessment, points of alignment throughout the provincial and Indigenous assessment process should be built in.

Both the provincial and federal legislation must engage Indigenous groups as jurisdictions with decision-making authority, recognize the legitimacy of Indigenous laws and legal systems, and ensure the protection of Indigenous rights equally-- procedurally, and substantively.

There must be clear legislation in regards to assessments that include provincial and federal processes: harmonized, substituted, and coordinated assessments; this would also include assessments where another federal body may act on behalf of EA legislation, such as the Vancouver Fraser Port Authority who conduct their own EA processes on behalf of CEAA 2012.

Discussion Paper proposals:

- "Revised EA legislation should promote the concept of one project, one assessment between provincial, federal and Indigenous jurisdictions, which allows for a single assessment process to support separate provincial, federal and Indigenous decisions."[19]

9) Dispute Resolution

While the Discussion Paper offers an alternative dispute resolution process, it is silent on an appeals or judicial review processes. The proposed Reconciliation Commission is a welcome addition in its specific focus on dispute resolution related to reconciliation, but it does not provide for the ability to appeal assessment decisions. It is important that the decision-making process, and follow-up management of disagreements be spelled out with clear criteria and function – ultimately holding those conducting assessments and making decisions to account. Indigenous law must be incorporated into dispute resolution and appeals processes.

There must be a "safety valve" added to the EA process to facilitate dispute resolution. In addition, there should be an appeals process. The Crown must work collaboratively with Indigenous peoples to develop a dispute resolution process in the event of a disagreement over an outcome, process, or decision; in particular regarding the infringement of Aboriginal and treaty rights that arise in the context of an IAA.

An *independent body* must therefore be established, and facilitate dispute resolution in accordance with the following principles:

i) The dispute resolution body must remain independent from the Crown;
ii) The dispute resolution body must be able to address disputes to both process and decisions that arise within the context of an EA;
iii) The dispute resolution process must be carried out in accordance with provincial law and Indigenous laws;
iv) The dispute resolution process must respect any agreements between the Crown and the Indigenous group(s);

[19] Discussion paper, page 12

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v) The institutional capacity of dispute resolution body must be sufficiently resourced to be able to carry out its duties.

Establishing such a body supports our recommendations above regarding Indigenous jurisdictions and aligning the EA process with UNDRIP and the TRC calls to action. Ultimately, this will facilitate effective and productive collaboration between the Crown and Indigenous groups.

Discussion Paper proposals:

- "Enable consensus-based decision-making with Indigenous nations at a technical level throughout the EA process, as well as recognition of decisions made by Indigenous governing bodies at key junctures, supported by an alternative dispute resolution mechanism"

- With regards to the EA Advisory Committee:
  - "a time-bound alternative dispute resolution process to provide constructive direction and support for reconciliation initiatives within the EA process and to address disputes arising from implementation of the UN Declaration within the EA revitalization initiative – for example to provide support for reconciling the differing decisions of Indigenous nations and public governments with respect to EA – and to apply Indigenous laws and legal processes to address disputes among Indigenous nations in areas of shared territories in relation to EAs when requested to do so."[20]

10) Cultural Health

Indigenous cultural health should be mandated as an objective for the EAO as a component to ensure sustainability as required by each Nation, and as a Value Component and Chapter within the EA application.

The Discussion Paper is silent on Indigenous cultural health. While culture and health are both mentioned discretely, the connection between the two is not drawn. Tsleil-Waututh perceives this as a gap in the model and offers to educate the EAO on this important concept – what it means, why it is important, why it is relevant to the EA process, and how it can procedurally fit within the EA process.

11) Independence of Assessments and Professional Reliance

The EA must move away from proponent-led research to remove bias from the assessment process. As recommended in our February 2017 submission, one alternative is for the EAO to provide a funding pool specifically for EAs to fund consultants on a pre-approved list by both First Nations and other relevant jurisdictions. This assures that the outcomes of research is not biased or influenced by a proponent or regulator.

Further, TWN has been concerned that the adequacy of Indigenous consultation is often measured quantitatively by the proponent. The new EA legislation must provide opportunities for the

[20] Discussion paper, page 10.

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adequacy of consultation, mitigation, and engagements to be jointly evaluated by all relevant parties including Indigenous groups.

Discussion Paper Proposals:

TWN agrees with the Final Report of the Environmental Assessment Advisory Committee that the proponent-led "economy" of accumulated knowledge "needs to be matched by an economy of indigenous practitioners" in order to ensure "indigenous contributions to EA can be given equivalent levels of attention as that which is given to the means and information assembled by western environmental and social science."[21] We further agree that the EAR must provide more robust and transparent methodology of how the levels of adverse effects are determined.[22]

Conclusion

Tsleil-Waututh commends the progressive direction and careful consideration of improvements suggested thus far in the EAR process. The Discussion Paper is a welcome improvement to the current EA structure. This work clearly demonstrates that the EAO is listening, but we collectively have a significant amount of work to do in order to bring the new EA legislation up to a standard that accords with the UNDRIP and other world-class standards. Tsleil-Waututh is committed to this process and we look forward to continued dialogue. We also expect an increasingly higher level of participation available to Indigenous groups for joint decision-making on the legislation that is created and passed based on EAR.

Please feel free to contact myself (604-924-4150 or ehanson@twnation.ca) or Melanie Walker, Consultation and Accommodation Manager for EAs (604-924-4168 or mwalker@twnation.ca) to discuss further.

Respectfully,

Erin Hanson
Policy Advisor
Treaty, Lands and Resources Department
Tsleil-Waututh Nation

cc. Kevin Jardine, Associate Deputy Minister, BCEAO
Mark Haines, BCEAO
Ernie George, Director, Treaty, Lands and Resources Department
Melanie Walker, Consultation & Accommodation Manager, Environmental Assessments

[21] Final Report of the Environmental Assessment Advisory Committee, May 2, 2018. p. 23.
[22] Ibid. p. 24

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