Cowichan Tribes
LULUMEXUN – Lands & Governance
5760 Allenby Road
Duncan, BC V9L 5J1
Phone: 236.800.4023

June 13, 2018

Kevin Jardine
Associate Deputy Minister
BC Environmental Assessment Office
VIA ELECTRONIC MAIL: eaoinfo@gov.bc.ca

Cory Waters
Executive Director, First Nations Engagement
BC Environmental Assessment Office
VIA ELECTRONIC MAIL: cory.waters@gov.bc.ca

Re: Discussion Paper – BC Environmental Assessment Revitalization

Cowichan Tribes has had an opportunity to review the draft discussion paper distributed at the BC Environmental Assessment ("EA") Revitalization Province-Wide Forum in Vancouver May 29-31, 2018. Our high-level comments on the discussion paper are summarized below in alignment with the sections of the discussion paper itself.

Reconciliation

1. A key question to consider under this heading is what implementation of UNDRIP will look like in the larger legislative context. How will UNDRIP be implemented in the context of existing section 35 jurisprudence? Is the goal to replace the doctrine of Aboriginal rights based on 'culture' with the Indigenous human rights framework in UNDRIP? Or will BC attempt to fit UNDRIP within or under the existing body of Aboriginal law (e.g., duty to consult; asserted vs. proven rights, etc.)? Depending on the larger objective, we could end up with two very different legal frameworks in the new BC environmental assessment legislation.

2. The standard of "free, prior, and informed consent" ("FPIC") is tempered by UNDRIP's article 46, which puts a powerful tool in the hands of the colonial governments in Canada to use for 'balancing interests' when necessary. The interaction of FPIC and article 46 in the context of environmental assessment legislation needs to be made clear to Indigenous peoples and proponents to ensure certainty of process. These details need to be worked out between BC and First Nations on a government-to-government basis.

3. The discussion paper correctly summarizes the highlights of the TRC Calls to Action Nos. 45-47; namely, that these sections call for the integration of Indigenous laws into government policies

and laws and also that they repudiate the very concepts used to assert Crown sovereignty over Indigenous peoples. What would these actions look like in the context of an environmental assessment? In the absence of a justification for asserted Crown sovereignty over Indigenous lands and resources, how could BC draft an EA law that gives them a legitimate final decision on whether a project should be approved in an Indigenous territory?

4. Under the heading "focus on reconciliation", the idea of Indigenous-led EAs are introduced. What needs to be made clear in the EA legislation and regulations is that an Indigenous-led EA cannot be simply a process by which an Indigenous group acts as an administrative body leading a colonial EA process. Indigenous-led EAs will necessarily be conducted quite differently than an EAO-led EA process, and the legislation needs to be flexible in this regard.

5. The discussion paper quite rightly points out that Indigenous groups need to be able to identify their own information needs. We would add to this that Indigenous groups need to be able to identify their own information *formats* as well. The average Indian Act band is not staffed by technical experts; yet we receive multiple volumes of highly technical material and are expected to respond to this information in a meaningful way. We clearly lack the capacity to do so, and to hire a team of experts on an extremely broad range of topics to explain the material to us would cost hundreds of thousands of dollars. Information needs to be presented to Indigenous groups in a way that is comprehensible to them.

6. The discussion paper also proposes that EAs be based on both scientific and Indigenous knowledge. This does not go far enough; Indigenous knowledge needs to be <u>weighted equally</u> with western empirical science. Where there is not consensus between the two, uncertainty must be resolved in favour of Indigenous knowledge.

7. In this section there is also a bullet point regarding "the opportunity for" Indigenous participation in monitoring and effectiveness evaluations. There needs to be more than just an opportunity; there needs also to be funding dedicated to training Indigenous peoples in order for them to be able to take advantage of the opportunities. Cowichan Tribes would like to see a dedicated fund, paid into by proponents, for such training.

<u>Consensus-Based Decision Making</u>

8. Regarding dispute resolution mechanisms, the discussion paper proposed that consensus-based decision making between the EAO and Indigenous nations be a requirement at certain stages throughout the EA process, including on the recommendation whether to issue an EA certificate and proposed conditions. The ultimate decision would still be left to a provincial minister. This clearly poses a jurisdictional problem, especially in the face of the government's commitment to recognize Indigenous decision-making jurisdiction over their territories.

9. Consensus-based decision making processes between the EAO and Indigenous nations at various stages of an EA will clearly require a longer overall timeline than is provided for in current policies and regulations. These timelines must be accommodated in the legislation.

10. Consensus-based decision making also needs to occur at a point in the EA process where Indigenous nations can confirm whether the information supplied by the proponent is sufficient; even where technical information may be sufficient for the purposes of scientific assessment, they may not be sufficient for Indigenous groups.

Focus on the Environment and Sustainable Development

11. The discussion paper proposes to review project across the "five pillars" (environmental, economic, social, cultural, and health). For Indigenous peoples, these five pillars are in reality only one pillar. To properly respect Indigenous worldviews and assessment methodologies, the EA legislation and regulations need to recognize these differences. These sections of the legislation must be developed and drafted in collaboration with Indigenous nations.

12. Project EAs must be informed not only by regional and strategic assessments and the province's cumulative effects framework, but also by First Nations' own land use plans.

13. B.C. proposes to include consideration of risk and uncertainty in assessments. An appropriately weighted risk assessment matrix tailored to the area in which the project is proposed to occur will need to be developed in full consultation with Indigenous nations.

14. Indigenous nations are very distrustful of "mitigation measures"; for us, it tends to be a phrase used to somehow, without exception, nullify projects' adverse impacts in order to get them approved. This is so even when the mitigation measures are not guaranteed to be effective in that particular area or for that particular project. They are employed as a blanket solution, and tend not to take into account local conditions and the interconnectedness of ecosystems. The proponents (and the EAO) tend to approve many projects based on the assumption that mitigation measures will always work. When it is discovered that they didn't work, the project has already been constructed and it is too late. If standard mitigation measures actually did ensure that all Crown-approved activities and projects did not have an adverse impact on the receiving environment, then we would not be in the environmental situation that we are in (e.g., disappearing fish stocks and wildlife, dismal water quality, etc.).

15. Sustainable development objectives need to include not only B.C.'s climate obligations, but also Indigenous nations' obligations to future generations, as understood through their own legal traditions.

16. In the context of an EA, the precautionary principle needs to be fully applied whenever and wherever there are gaps in knowledge or a lack of consensus not just among the scientific community, but also a lack of consensus between Indigenous nations/traditional knowledge and western scientific conclusions.

17. Regional and strategic assessments need to consider setting a 'carrying capacity' threshold for a given region. Indigenous nations have been asking for this for years.

Process Certainty and Predictability

18. The proposed concept of one project, one assessment between provincial, federal, and Indigenous jurisdictions should not mirror the flawed conception of the same as described in the proposed federal Impact Assessment Act. In the federal act, the definition of Indigenous jurisdiction is deeply problematic. We expect that B.C. will not make the same mistake. Indigenous jurisdictions are not those Indigenous nations that happen to have signed modern treaties or other agreements with the crown – Indigenous jurisdictions are inherent jurisdictions, separate and apart from Crown recognition, and tied to territory.

19. In instances of shared territories between Indigenous nations, there may be a need for more than a tri-partite agreement or assessment plan to ensure that every Indigenous jurisdiction is included and respected.

Determining Projects and Activities that Require an Assessment

20. Cowichan Tribes agrees that there needs to be a move away from production capacity-based project lists. We propose that an Indigenous-led place-based assessment trigger be included in the legislation, in addition to whatever revised criteria are established by the Province. We also agree that there should be an option for Indigenous nations to request a designation for a particular project.

Improved Information and Data

21. While the discussion paper acknowledges the widely-held concern that scientific information collected and analyzed in the EA process is not truly independent, the paper does not propose an effective solution. The idea of regional "sustainability offices" to house local information does nothing to address the conflict of interest problems inherent in the process of project proponents hiring their own consulting companies to produce analyses and conclusions.

22. BC has recognized this conflict of interest problem by launching a province-wide review of the professional reliance model in natural resource decision-making – why can it not do the same for the EA regime? The only solution to the problem is to have the consulting companies hired by someone other than the proponent (e.g., Indigenous nations). Unless and until truly independent information production becomes part of the legislated process, Indigenous nations will continue to distrust the information presented to them by the proponent.

Relationship between EA and Permitting

23. Cowichan Tribes believes that concurrent permitting in the context of an EA should be abolished entirely. There a few reasons for this: (1) information gaps cannot be addressed properly; (2) there is increased workload pushed onto Indigenous nations with no additional capacity funding; and (3) it leads Indigenous nations to believe that the project is already a done deal.

Conclusion

The proposals for new BC EA legislation are headed in the right direction, but the ultimate decision-making authority still appears to be left with a single provincial minister. This clearly does not align with the government of B.C.'s commitments to the implementation of UNDRIP so far as it recognizes the inherent decision-making authority of Indigenous nations within their own territory. We expect our suggestions will be echoed by many other Indigenous nations across B.C., and we look forward to continuing to work with the EAO on the new legislation.

Sincerely,

Melissa Tokarek
Associate Manager, Lands & Governance