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July 23, 2018

Hon. George Heyman
Minister of Environment and Climate Change Strategy
Province of British Columbia
Room 112 Parliament Buildings
Victoria, BC V8V 1X4

Dear Minister Heyman:

Re: Environmental Assessment Revitalization Discussion Paper

First Nations have long identified environmental assessment (EA) as a priority area for legislative and policy reform in British Columbia.

This was reflected most recently in the Commitment Document developed by the Province of British Columbia and the First Nations Leadership Council (BC Assembly of First Nations, the First Nations Summit, and the Union of BC Indian Chiefs), and supported by BC First Nations. In the Joint Agenda: Implementing the Commitment Document - Concrete Actions: Transforming Laws, Policies, Processes and Structures, the Province and the FNLC identify EA as an initial priority area for identifying legislative, policy and practice changes to advance reconciliation.

The Province has committed to revitalized EA legislation in a manner that:

- that brings into action the Province of British Columbia's commitment to the full implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UN Declaration), the Truth and Reconciliation Commission's Calls to Action, and the 2014 Supreme Court of Canada's decision in Tsilhqot'in v. British Columbia; and

- "ensure[s] the legal rights of First Nations are respected, and the public's expectation of a strong, transparent process is met."

On June 18, 2018, the Province released an Environmental Assessment Revitalization Discussion Paper (Discussion Paper) seeking feedback on what a reformed EA process could look like.

The FNLC, working with FNEMC, has been supporting First Nations across BC to ensure that their perspectives and interests are heard and protected. The overarching message has been clear: EA processes must recognize and respect First Nations' title, rights, treaty rights, including jurisdiction and decision-making authorities.

The FNLC is pleased to provide this response to the Province's Discussion Paper, setting out some of the key issues we must collaboratively address in moving forward.

New Environmental Assessment legislation must:

1. Align with the United Nations Declaration on the Rights of Indigenous Peoples, including embodying the minimum standard of free, prior, informed consent
    a. Implementation of the standards set out in the UN Declaration in the context of EA must go beyond technical collaboration to legally recognizing Indigenous decision-making regarding the process and outcomes of assessments.
    b. Government-to-government collaboratively develop agreements that establish an Assessment Plan must be in place before an assessment commences, which include: the scope, procedures and methods for EA; how provincial and Indigenous processes and decision-making will align; funding; timelines; and approaches to community/public participation. Such agreement may be informed by a new early engagement phase.
    c. A provincial EA certificate must not be granted in the absence of consent from all affected First Nations. As recognized in the Government of BC's Draft Principles that Guide the Province of British Columbia's Relationship with Indigenous Peoples, "the importance of free, prior, and informed consent, as identified in [the UN Declaration], extends beyond title lands" (Principle #6).

2. Advance self-determination through fully funded Indigenous-led assessments based on Indigenous law, knowledge and best available science
    a. The current approach to assessment in BC – whereby the proponent generates virtually all the evidence, which is reviewed by an ad hoc technical advisory group led by the BC Environmental Assessment Office (EAO) – is inadequate and must be changed to align with the UN Declaration and provincial commitments to Indigenous peoples.
    b. Unless otherwise agreed in government-to-government agreements, independent panels or Indigenous-led processes should be the first option for assessment, and these processes and Indigenous-led studies to inform EA decisions need to be fully funded.
    c. Regional "Reconciliation" or "Sustainability" offices proposed in the Discussion Paper should be implemented as independent

science centres to assist with generating, overseeing and/or peer reviewing scientific and technical evidence in project and regional assessments to enhance capacity and the quality and independence of evidence, in balance with Indigenous knowledge.

d. New EA legislation needs to legally recognize the role and authority of Indigenous governments (e.g. guardian programs) in monitoring and enforcement, and require that the results of monitoring be acted on and fully supported with adequate funding and resources.

3. Implement a clear legislated test for approval or rejection of projects to uphold the UN Declaration and advance ecological, cultural, health and socio-economic sustainability

   a. New EA legislation needs to require decision-makers to select the option from among reasonable alternatives that best protects Indigenous title and rights, and makes the greatest positive, lasting and equitably-distributed contribution to sustainability. This must include the option of not proceeding with the proposed project.

   b. New EA legislation must include defined legislative sustainability and reconciliation criteria – including requirements for Indigenous consent, a climate test and respecting ecological limits. Projects that fail to meet these defined criteria must not be approved under new EA legislation.

4. Address cumulative effects within a region, through a broader requirement for project assessments and mandatory regional assessments

   a. All projects that stand to impact Indigenous title or rights or sustainability must be assessed.

      - The legal criteria for which proposed projects get assessed must be broadened beyond current, narrow thresholds based on production-capacity (e.g. the amount of mineral ore that a mine plans to produce each year).
      - Legislation needs to provide a mechanism for Indigenous peoples and the public to trigger assessments for projects that fall outside the assessment threshold.

   b. The ability to exempt projects meeting the assessment threshold from assessment must be removed.

   c. New EA legislation needs to provide triggers and requirements for regional assessments, which would establish legally binding

standards for environmental protection that apply to project assessments and regulatory decisions in the region.

5. Ensure effective dispute resolution mechanisms are developed collaboratively with Indigenous nations
    a. With appropriate safeguards, dispute resolution mechanisms referenced in the Discussion Paper could be incorporated in new EA legislation. For example, the Discussion Paper references an EA Advisory Committee recommendation to create a "Reconciliation Commission," described in the Discussion Paper as:

        [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.
    b. Any "alternative" dispute resolution mechanisms cannot limit access to the courts to ensure the EA legislation is being followed and the standards of the UN Declaration and the Crown's constitutional duties are being upheld. Outcomes from key assessment stages, such as the assessment report and recommendations, and the Ministers' decision on whether to approve a project, must be subject to appeal and recourse to the courts.

6. Set aside the existing bilateral MOUs between federal agencies and the BCEAO that allow substitution of assessments and replace with tripartite arrangements between Canada, BC and First Nations
    a. New tripartite arrangements that enable substitution by Indigenous-led assessments must be negotiated.

As set out in the Commitment Document, revitalized provincial EA legislation is an important opportunity to advance reconciliation in a meaningful way across the province and to reduce conflict both on the ground and in the courts through a renewed Crown-Indigenous relationship based on recognition of rights and the legal pluralism that exists in British Columbia as a result of First Nations' right of self-government and self-determination. We are fully

committed to working with you to ensure that we make the most of this opportunity and to revitalize the provincial EA process.

In providing this response, we strongly emphasize, once again, that full and meaningful participation of Indigenous representatives in developing the instructions to the legislative drafting team is critical to the success of this revitalization initiative and the objective of reconciliation.

We would be pleased to meet with you to further discuss this submission and to confirm an effective approach for co-developing revitalized EA legislation and policy in BC.

Sincerely,
FIRST NATIONS LEADERSHIP COUNCIL

On behalf of the FIRST NATIONS SUMMIT

Grand Chief Edward John Robert Phillips Cheryl Casimer

On behalf of the UNION OF BC INDIAN CHIEFS

Grand Chief Stewart Phillip Chief Bob Chamberlin Kukpi7 Judy Wilson

On behalf of the BC ASSEMBLY OF FIRST NATIONS

Regional Chief Terry Teegee