



Environmental Assessment Office
2nd Floor 836 Yates St
PO Box 9426 Stn Prov Govt
Victoria BC V8W 9V1

Re: Public Comment on Environmental Assessment Revitalization Discussion Paper

July 27, 2018

Thank-you for the opportunity to make this written submission on the BC government’s recently released *Environmental Assessment Revitalization Discussion Paper* (the “Discussion Paper”), which sets out proposals for a new assessment process. Northern Confluence welcomes the provincial government’s commitment to reforming the environmental assessment process to help advance reconciliation and ensure sustainability for future generations.

Northern Confluence Initiative is a project of Tides Canada based out of Smithers that focuses on land-use decisions in northern British Columbia. We strive for the greater conservation and protection of wild salmon watersheds.

Our comments on the EA Discussion Paper fall into three main categories – adopting Free, Prior and Informed Consent (FPIC), supporting independent evidence, and improving public engagement.

1. Incorporating Free, Prior and Informed Consent (FPIC) into legislation

A renewed provincial EA is a great opportunity to align with court decisions and international law to seek consent of Indigenous peoples. In British Columbia, where most First Nations have unceded territory, court cases have repeatedly emphasized this need – from Delgamuukw to Haida to Tsilhqot’in decisions. The recent commitment to adopt the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) means that it should be a key part of all legislation affecting land-use or watershed decisions. It is also a part of, and imperative to, moving forward on the Truth and Reconciliation recommendations.

The EA Discussion Paper makes a number of positive commitments toward implementing UNDRIP into legislation, including as a purpose of the assessment law and in supporting indigenous-led assessments. A core principle of the UN Declaration is Free, Prior and Informed Consent. In that sense, the early engagement phase outlined in the Discussion Paper is critical and can offer an early off-ramp for proponents where proposals may be in conflict with land-use plans and management objectives. Government-to-government agreements on whether the project will go forward with an EA, scope, funding, type of assessment, etc. are further improvements to collaborative decision-making and respect for Indigenous governance.

In terms of “informed”, proponent led and controlled evidence limits the ability to make informed decisions based on the best available science and traditional knowledge. Suggestions about making evidence more independent are below which is also needed to implement FPIC.

Lastly, the EA Discussion Paper does not clearly establish consent from Indigenous governing bodies as a condition that must be met before an assessment certificate is granted. The EA Technical Committee report does a better job highlighting FPIC and outlining how consent is on-going and not at one point in time. While a dispute resolution mechanism is set out that respects Indigenous laws and can be triggered at various phases of the proposed EA process, the details are unclear and it is not explicit that consent is required to move forward with projects. Implementing FPIC should be clear in the new BC EA legislation.

2. Strengthening Independent Evidence

An environmental assessment, whether provincial or federal, is supposed to be an arm's-length process based on impartial science. Right now the science is proponent driven and controlled, with government reacting to it but not conducting its own science, and Indigenous governments and intervenors commissioning their own science that is not granted the same weight. A glaring example of this was with the Pacific Northwest LNG project. The proponent was able to control what science was released. Government science from forty years earlier was dismissed. Independent science was not given the same consideration by the reviewers. In the end, it is impossible to say that the approval was "science-based" and that no adverse environmental effects would result.

Proponent controlled science also results in industry becoming the main knowledge providers. It limits the public sector accumulation of baseline data and institutional knowledge. Ensuring adequate baseline information is undertaken is also challenging given that it often requires multiple years of data collection. However, baseline data is needed to support regulatory decisions and continued monitoring and enforcement, as well as to assess cumulative effects.

It is estimated that the BC government lost 25% staff capacity over the past 15 years and, with the government move to a professional reliance model, lost government staff qualified to rigorously and adequately review scientific methodologies, models and data submitted by proponents.

The EA Discussion Paper includes only minor changes to more independent evidence. While supporting Indigenous-led analysis of data and suggesting the potential for independent studies and peer review "in some circumstances" are positive, there needs to be more set out in the new BC EA legislation to limit proponent-controlled evidence and regain public confidence in the review process. Requirements for involvement of independent experts and peer review of proponent evidence should be set out in legislation.

Peer review is "a review of technical or scientific merit by individuals with sufficient technical competence and no unresolved conflict of interest"¹. Arms-length review can help identify gaps and weaknesses in the available evidence; the extent to which uncertainties are clearly acknowledged, identified, and characterized; the potential implications of such uncertainties for the conclusions; and whether more investigation is likely to help resolve these uncertainties. By formally integrating outside scientists (or independent experts), there is less possibility for inherent bias in proponent-led evidence and competing scientific evidence. A mechanism for peer review will help ensure that EA decisions are based on the best available evidence.

¹ For a more robust outline of peer review for EAs, refer to Justina Ray's (WCS Canada) section of the EPA CEN Caucus submission on the Federal Environmental and Regulatory Reviews Discussion Paper:
http://rcen.ca/sites/default/files/epa_caucus_submission_on_env_and_reg_reviews_discussion_paper_17-08-28.pdf

Elsewhere in the EA Discussion Paper it is suggested that peer review could happen by experts inside government. While government expertise and capacity are needed in EA reviews, it would be preferred that an EA science or technical advisory panel would coordinate peer review. There is potential that someone inside government be chosen but preferably someone un-associated with the review or the government's mandate to promote a certain industry, to qualify. A set of criteria for peer review would need to be created that includes transparency of expert associations, adequate timelines and funding.

Opportunities for local experts to submit evidence should also be supported. Legislated and funding mechanisms should enable public participants to engage independent experts to conduct studies where appropriate.

Lastly, all scientific and other information related to an assessment should be made available through an accessible public registry. The recommendation for some information to be housed in regional "reconciliation" or "sustainability" offices is a good step but needs to go further to on-line accessibility when it comes to baseline data and scientific reports. This will also help with assessing cumulative effects.

3. Improving Public Participation

Meaningful public engagement does not occur at open houses with government and proponents simultaneously promoting benefits of mega-projects. A lot of cynicism has developed across the northwest of BC given the lack of meaningful public engagement and what feels like the fox guarding the hen house.

It is not clear in the EA Discussion Paper who will be undertaking public engagement other than the proponent. While we would hope that the BC government in cooperation with Indigenous governments would lead other balanced engagement opportunities, it would be important to highlight this commitment.

It is encouraging to see in the EA Discussion Paper calls for more variety of types and means of engagement "beyond traditional comment periods, including more opportunities for dialogue, supported by plain language materials". And to ensure public engagement opportunities throughout the EA stages, including in early engagement where local communities and the public may request an EA for a project proposal. This needs to be supported in the legislation or reflected in the *Reviewable Projects Regulation*.

The EA Advisory Committee went further to recommend that "in certain circumstances a community advisory committee may be established". Under previous EA Acts, there was a provision to set up local advisory committees made up of municipal, Indigenous and public representation. A local advisory committee would be great as both a part of public engagement for more local knowledge of potential socio, economic and environmental impacts, and to assist with identifying meaningful public engagement methods in the region.

It is important to also outline how public engagement will be incorporated into decision-making. If the public doesn't see their participation reflected at various stages, public trust will not be regained in the process.

Lastly, there needs to be adequate funding for public engagement opportunities.

4. Other

The EA Discussion Paper also has positive recommendations around undertaking more regional and strategic assessments. We will be looking for some legislative mechanism or trigger to ensure these are enacted. These are an important tool and also have linkages to the government's mandate to modernize land-use plans.

It was great to see the EA Discussion Paper reflect our earlier input around what projects get assessed. With production-based outputs as triggers for assessments, many proponents could avoid EAs by staging development to come in under thresholds. Supporting Indigenous peoples and local communities calls for EAs for projects is a positive sign and needs to be formalized in legislation or regulations.

As highlighted in the EA Discussion Paper on page 16, we hope that EA decision criteria will be legislated to include clear linkages to land-use plans, the cumulative effects framework, climate action and targets, Species at Risk legislation, and other planning mechanisms and management goals. This has been a gap in previous EA Acts that we hope to see reflected in a revitalized Act.

We also strongly support including a review mechanism of the legislation every five years that includes a progress report on reconciliation as outlined on page 8.

Thank-you for considering the comments above in moving forward from the Discussion Paper on EA Revitalization toward an Intentions Paper and draft legislation. We look forward to on-going engagement toward a strengthened Environmental Assessment Act in British Columbia that supports reconciliation with Indigenous peoples, regains public trust and enhances sustainability.

Sincerely,

A handwritten signature in black ink, appearing to read 'Nikki Skuce', with a long horizontal flourish extending to the right.

Nikki Skuce, Director
Northern Confluence – An Initiative of Tides Canada
Box 3022, Smithers, BC V0J 2N4
nikki@northernconfluence.ca