



**REVIEW OF THE BC
ENVIRONMENTAL ASSESSMENT PROCESSES**

WRITTEN SUBMISSIONS OF SAULTEAU FIRST NATIONS

23 July 2018

Proudly determined

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Written Submissions of Saulteau First Nations

I. Introduction

Saulteau First Nations (SFN) is the largest First Nation in Northeast British Columbia. The main SFN community is located at Moberly Lake, near Fort St. John, Hudson's Hope, Chetwynd and Dawson Creek, B.C.

SFN is an adherent to Treaty No. 8. SFN has a large number of traditional land users, and our members exercise their Treaty rights and continue to practice their traditional way of life throughout our territory. We continue to have a very strong connection with the land, and we rely on our lands for sustenance, cultural, spiritual, and socio-economic purposes.

At the same time, our territory is increasingly subject to large scale industrial activities, including extensive clearcut logging, open-pit coal mining, oil and natural gas fracking and pipelines, hydroelectric dams and reservoirs, windfarms, and agriculture and grazing. We are concerned that we are being excluded and pushed off the land, and the traditional and environmental values that we rely are being destroyed, in a way that goes against the solemn promises the Crown made to us in our Treaty.

Just for example, to the North, our stretch of the Peace River has already been flooded by the WAC Bennett and Peace Canyon Dams, and pretty much all of what remains will be flooded by the proposed Site C Dam. We are encircled to the North, East and South by upstream oil and natural gas drilling and processing facilities (including many abandoned and orphaned contaminated sites), and all of the major gas transmission pipelines intended to serve LNG projects cross through the heart of our territory. To the West and South we have to contend with multiple open-pit coal mines in endangered species critical habitat (e.g. mountain caribou), and with provincial agencies that do not enforce existing regulations limiting the release of selenium contaminated waste water into rivers and streams. And, all around us, mountain pine beetle salvage logging (a shortsighted response to problems caused by climate change) is badly fragmenting our forests.

Our elders and traditional land users know that the separate and cumulative impacts of these kinds of industrial activities have already had very serious and significant impacts on the environment in our territory. This has also been confirmed by Western science. A recent study by the David Suzuki Foundation concluded that about 70 percent of the landscape in our region has been negatively impacted by industrial activities. One of the consequences of this is that our members' Treaty rights, and our ability to continue

our way of life and maintain our culture and our languages, to sustain ourselves by hunting, trapping, fishing, and harvesting plants and medicines, and to camp and access areas of cultural significance and pass on traditional knowledge to younger generations – our rights, our traditional practices, and our cultural heritage, are being eroded every day.

In a given year, there are multiple large-scale EA processes underway in our region – new applications, active reviews, and implementation of conditions – these processes are conducted by provincial and federal agencies, including BC EAO, CEAA and the NEB. In addition, government agencies and proponents refer a high volume of other applications to us. We estimate that we are asked to respond to between 3,500 to 6,500 separate applications or other requests, per year, including the review of between 15,000 to 35,000 supporting documents.

This is a large amount of highly technical information for any government agency to process, and we face serious time constraints, as well as economic and human resources constraints, on our capacity to review and respond effectively. Each referral package requires SFN to review and apply technical expertise to the information provided. That expertise needs to be provided by our small in-house staff, or by retaining consultants. At the same time, there is little or no co-ordination between sectors, or between the multiple proponents and government agencies with which we must engage. Proponents and government agencies have project teams focused on particular projects, whereas SFN has only one team to engage with all of them at once.

In the submissions that follow, we identify some of the current weaknesses of the BCEA processes based on our experience participating in provincial reviews. We also highlight some recommendations on how to improve the existing processes.

II. Overarching Considerations

In this part, we discuss a model developed by SFN and other Treaty 8 First Nations that incorporates science and First Nations traditional knowledge in independent technical reviews of application materials. We also identify the type of information SFN would need in an EA to facilitate SFN's meaningful participation in the processes.

How is the need to address potential impacts to Treaty rights best incorporated into the BC EA process?

Participation in all phases

The best way to address potential impacts to SFN's Treaty 8 rights is by guaranteeing SFN a meaningful role in the entire life of the proposed project, from the project's

concept and design phase, to decommissioning and reclamation. Inclusive and transparent engagement at the front-end means SFN would be able to positively influence project design and implementation, including by the identification of EA scoping factors, preparation of baseline studies, development of effective mitigation and avoidance measures, and implementation of permit conditions. A meaningful role in short and long-term monitoring of environmental effects and compliance with conditions would be an effective way to protect First Nations values and ensure compliance with conditions.

Recommendation: Provide First Nations with a meaningful role in the entire life of proposed projects, from concept and design to decommissioning and reclamation, including long-term monitoring and compliance with conditions.

First Nations Independent Technical Review (FNITR)

SFN and other Treaty 8 Nations, working together with forward-thinking industrial proponents, have developed the First Nation Independent Technical Review (FNITR) process to facilitate a science-based review of major project proposals from a First Nations perspective.

The FNITR process involves retaining an expert third party to review technical issues associated with a proposed major development on behalf of one or more First Nations. The FNITR combines science and Indigenous traditional knowledge to assess the technical specifications of a proposed activity. The FNITR also evaluates the proponent's methodologies in reaching its conclusions on the extent of likely impacts and the effectiveness of contemplated mitigation measures and reclamation activities. This process enables Treaty 8 Nations to assess the potential project impacts to their Treaty rights, traditional land use and culture, and environmental values.

The FNITR serves as an opportunity to identify and resolve project issues and concerns, directly between the proponent and First Nations. Through good faith efforts, First Nations and industry engage in a constructive manner to identify First Nations issues and concerns relating to a proposed project.

SFN typically relies on a five step process to carry out an FNITR:

1. Process initiation and issues scoping between First Nations and consultants;
2. Evaluation of proponent's technical documents with support from First Nations retained experts;

3. Resolution of technical issues through proponent's adoption of mitigation measures and work plans;
4. Discussion of outstanding issues not resolved in Step 3; and
5. Community verification of the final report.

This approach enhances the ability of First Nations and proponents to collaboratively develop work plans to respond to First Nations' concerns, including undertaking measures that respond to anticipated impacts on traditional land use and Treaty rights-related Valued Eco-Components (VECs). For example, through a recent FNITR process, SFN and two other First Nations worked with the proponent to develop 45 work plans to address 342 issues. The work plans addressed ongoing engagement with First Nations affected by the proposed activities, mitigation measures for wildlife and wildlife habitat, water monitoring, human health and ecological risk assessments, pre-disturbance and baseline surveys, and regional cumulative effects management, among many others.

This approach is also consistent with the review of 'professional reliance' being undertaken by the provincial government.

Recommendation: Provide for a First Nations Independent Technical Review as part of the BC EA process.

FNITR Funding

To date, the funding for FNITRs has been provided by proponents. The funding requirements are not insignificant. For example, a recent FNITR undertaken in relation to a coal mine proposal meant retaining experts covering 12 environmental disciplines; a team of 26 subject experts dedicated 1500 hours of review time to the project.

Typical BC EA funding processes are not well-suited to facilitate FNITRs. The EAO provides a relatively small amount to each affected First Nation. But that funding is insufficient for any one First Nation to review and respond to a major EA application. This results in a kind of divide-and-conquer process whereby none of the concerns raised by under-resourced First Nations are addressed.

The BC EA process could be improved by implementing guaranteed FNITR capacity funding. Currently, each time a new EA application is filed, SFN together with two or three First Nations approach a proponent directly, without the policy or legislative support of government, to negotiate a funding arrangement. That negotiation process is inefficient and leads to delays.

The success of the FNITR process also requires early engagement. Late engagement with First Nations means that the FNITR will have less chance of success in identifying agreed-upon mitigation measures. If an FNITR proceeds as an afterthought, i.e. after the project proponent has already completed the EA application process, or worse has already obtained project approval, the chances of reaching agreement on shared recommendations and work plans is reduced and the chances of litigation are increased.

In sum, the FNITR process, including required funding for the FNITR, should be adopted as a regular part of BC EA processes. The FNITR process can make real and significant contributions towards a fair, transparent and trustworthy decision-making process.

Recommendation: Provide (or require proponents to provide) funding for First Nations Independent Technical Reviews at the earliest stages of the BC EA process.

First Nation Participation in Scoping

Potential impacts to Treaty rights can be better addressed by the BC EA process through early engagement with First Nations during the scoping phase of an EA. First Nations must be able to identify and define the VECs that are important from a First Nations perspective. The whole review process will be more effective and efficient if the BC EA process is amended to require that First Nations perspectives be taken into account, and to integrate Treaty-rights-related VECs into the project review.

EAs scoped without First Nations input generally fail to account for key VECs. By omitting relevant VECs, the EAs fail to adequately account for potential adverse project impacts on traditional land use and the exercise of Treaty and Aboriginal rights. In fact, SFN has participated in EA processes (post-scoping) in which *no* Treaty rights-related VECs have been included at all.

SFN has also participated in EA processes in which government representatives refused to integrate First Nation identified VECs – because, the officials said, those First Nation identified VECs were covered by other VECs. But, shouldn't the First Nations be the ones to define the VECs that are important to the rights and cultures of First Nations?

British Columbia's failure to include First Nations in the definition and selection of VECs has significant consequences. EAs conducted under such a framework fail to provide First Nations with the opportunity to participate meaningfully in the review process. Additionally, those kinds of EAs create incomplete records that then serve to misinform

government decision-making on whether or not to approve of a proposed activity or designated project.

Recommendation: Require that First Nations perspectives on the definition and selection of VECs be included in the scoping of EA processes.

What information does SFN need during an EA to effectively participate?

What capacity support should be provided and at what stage in the process would that support enable meaningful engagement?

To effectively participate in an EA, SFN needs information concerning and related to traditional land use. In terms of capacity support, SFN requires increased financial support that is accessible at the pre-application stage of the BC EA process to meaningfully engage with proponents and government regarding SFN's traditional land use.

Traditional land use

In our view, an EA process must consider the potential effects of a physical activity or designated project on First Nations' historic, current and future use of lands and resources for traditional purposes. The EA process should be amended to make this a mandatory requirement. Currently, effects on First Nations' land use patterns are often excluded from EAs, either through a lack of capacity funding, late engagement or time constraints, or through geographic limits established by government or project applicants.

To evaluate the scope and extent of potential impacts on SFN's land use and Treaty rights, SFN must first collect traditional knowledge from its members. SFN collects this critically important information in a systematic way through traditional land use studies (TUSs). SFN, therefore, needs to conduct a TUS at an early stage in order to be able to effectively participate in an EA. Even though SFN needs the data obtained through a TUS to effectively participate in an EA, the BC EAO has never (or rarely and reluctantly) facilitated the preparation or incorporation of TUS work in the EA review processes. The provincial government's failure to recognize the importance of early TUS work is a barrier to SFN's participation in EA reviews.

A new project-specific TUS is usually necessary in part because Treaty and Aboriginal rights are held communally but exercised individually, and traditional use patterns can change over time. Specific information on SFN's traditional land use activities are

sourced from individual members. To collect this information SFN needs to interview its members, and describe and map their activities, cultural sites and their traditional resources. Once land use patterns have been obtained from community interviews, SFN relies on professionals with ethnographic training to compile the qualitative interview data into a report that can be submitted to and discussed with government decision-makers and project proponents.

In SFN's experience, the TUS may also serve to review, confirm or refute existing assumptions contained in studies prepared by proponents or government. Proponents and their experts are ill-equipped to evaluate impacts on First Nations land use. They don't have the necessary context or contacts in the community, and they are ignorant of or insensitive to First Nations' customs and protocols concerning the collection and use of traditional knowledge. Some proponents will try to identify and evaluate impacts on traditional land use by reviewing books, or by simply asking a few individual First Nations staff or employees. Proponents who try to use those kinds of approaches are highly likely to miss important traditional knowledge and mischaracterize the types and extent of traditional land use activities. Only First Nations can design and implement processes and programs to collect, synthesize and report on traditional land use information.

The BC EA process should be amended to require the taking into account of community and traditional knowledge. That means that the review process must include TUSs, FNITRs and the incorporation of Treaty rights-related VECs.

Recommendation: Provide for TUS work, adequately funded, at an early stage in the EA process.

Capacity Funding

The provincial government must increase the level of available capacity funding to support First Nation participation in EA processes. Current levels of capacity funding are inadequate. The low funding levels are further exacerbated by the uncertain and *ad hoc* character of funding awards. The provincial government must both increase funding levels, and aim for greater efficiency and transparency in how funding amounts are decided.

In SFN's experience, adequate levels of capacity funding are necessary if First Nations are to be able to effectively access relevant information, navigate the review processes, and prepare independent technical reviews of the materials filed in support of a proposed activity. Adequate capacity funds have allowed SFN to work with nearby First

Nations to allocate funding to experts, consultants, ground-truthing activities, land use studies, site visits, and community engagement. For each EA, a lump sum of funding in the amount of \$400,000 to \$500,000 must be provided to those First Nations that are willing to work together on EA reviews.

We offer the following table comparing the funding received from the federal government against the actual costs of an FNITR process:

Proposed Project	CEAA Funding	FNITR Cost
North Montney Mainline	\$46,000	\$370,000
Murray River Mine	\$50,000	\$333,000 ¹
Sukunka Mine	\$0	\$398,920 ²

There is a massive funding deficit under BC EA review processes compared to the levels needed to carry out an FNITR. Note also that the above FNITR costs do not include the cost of TUS work. In SFN’s experience, a comprehensive project specific TUS cover SFN traditional land use typically costs up to \$200,000.

Current BC EA funding levels do not enable First Nations to perform independent reviews of project proposals or to provide community members and decision-makers with a fulsome understanding of how a project may impact a Nation’s rights and way of life.

Under the current system, SFN must initiate discussions with proponents directly for each EA, to try to negotiate an agreed funding arrangement. However, not all industry proponents view FNITRs as desirable or necessary, or understand the efficiencies and other advantages of working together with First Nations on FNITR processes. SFN recommends that BC should ensure through policies or standing funding agreements that whenever a designated project requires an EA, the government or proponents are required to meet First Nation capacity funding requirements to support potentially impacted First Nations to review and assess the project proposals. These policies or standing agreements should designate fixed funding levels, such as \$400,000 to \$500,000 towards each FNITR for First Nations or groups of First Nations whose traditional territories are likely to host the project or project’s anticipated effects.

¹ FNITR was undertaken on behalf of three First Nations, including SFN.

² FNITR was undertaken on behalf of three First Nations, including SFN.

Recommendation: Provide (or require proponents to provide) adequate capacity funding for TUS and FNITR processes – this will lead to process efficiencies, better review processes, and improved outcomes.

Ability to request information

SFN needs the ability to make enforceable requests for additional information to proponents and government. Requests for additional information should include the ability to require further studies, assessments, or site visits that SFN's engagement team deems necessary to adequately understand the extent, scope and likelihood of adverse impacts on SFN's Treaty rights, VECs and traditional land use.

SFN has a *Land and Resource Engagement Policy (LREP)* in which SFN transparently sets out its minimum expectations of proponents. According to SFN's *LREP*, proponents must be prepared to provide information to SFN in a timely manner and at no cost to SFN. Proponents seeking to engage with SFN must also be willing to fund the engagement process. Under *LREP*, once a proponent makes certain commitments to SFN, SFN will supply work plans and budgets to them regarding the necessary engagement activities and costs.

The integration of an LREP-style process into EA reviews would improve the efficiency and effectiveness of EA reviews, produce better outcomes, and fulfill Canada's duties to First Nations and the provincial government's desire for enduring relationships on a government-to-government basis.

Recommendation: Require proponents to respond fully to requests for additional information, studies and other engagement activities, in a timely manner and at no cost to participating First Nations.

III. Planning Environmental Assessments

In this part we address when a provincial EA should be required, when cumulative effects should be studied, and what is missing from the current scope and factors considered in project-level EAs.

Under what circumstances should a provincial EA be required?

SFN proposes that the following activities must be subject a provincial EA review:

- (i) activities with the potential to impact traditional land use or the exercise of treaty rights;
- (ii) activities that are proposed within sensitive or culturally significant wildlife habitat areas;
- (iii) activities that have the potential to impact on First Nations spiritual and cultural sites;
- (iv) activities that relate to upstream oil and gas development or the construction or expansion of upstream or midstream oil and gas processing facilities; and
- (v) quarries greater than 4ha in extent.

For obvious reasons, the triggers for an EA review must include potential impacts to traditional land use and the exercise of treaty rights (as determined by the potentially affected First Nations.) The same logic applies for activities that are proposed within sensitive or culturally significant wildlife habitat areas.

The right to maintain indigenous spiritual sites and continue indigenous religious practices is critically important for the survival of First Nations' cultures. That right has already been incorporated in the UN Declaration on the Rights of Indigenous Peoples. In that regard, we also note that the Biodiversity Secretariat has published the Akwé: Kon Guidelines for the conduct of cultural, environmental and social impact assessments regarding developments proposed to take place on, or which are likely to impact on, sacred sites and on lands and waters traditionally occupied or used by indigenous and local communities. The BC EA process should adopt and incorporate the principles and processes set out in that document.

With respect to upstream oil and gas activities, SFN submits that provincial environmental regulators need to increase their involvement in this area. Currently, upstream drilling and processing activities are not subject to provincial EA processes – even though those activities are highly planned, highly capitalized, extensive undertakings, with significant potential effects on land, water, atmosphere, climate, and socio-economic values. In addition, provincial regulators have a discretion to apply EA processes to oil and gas facilities (i.e. gas plants) – but that discretion has never been exercised.

With respect to quarries, the current EA process is only triggered by the amount of rock or sand to be extracted for sale from a quarry site. This means that a quarry proponent can avoid EA scrutiny by setting its production and sale targets beneath the EA threshold. It also means that a quarry that disturbs an enormous area can avoid EA

scrutiny provided that most of the disturbance is in the form of waste rock and other waste materials. In virtually every other province in Canada, the EA trigger for a quarry project is based on the area to be disturbed, which is a better measure of potential environmental impacts than recovered rock or sand.

Recommendation: Amend the EA process to provide First Nations with a role in determining whether an EA is required due to potential impacts on treaty and aboriginal rights, and on sensitive or culturally significant wildlife habitat.

Recommendation: Adopt and incorporate the principles and processes set out in the Akwé: Kon Guidelines.

Recommendation: Include upstream oil and gas activities within the purview of EA processes.

Recommendation: Remove the discretion to exempt gas plants from EA review.

Recommendation: Apply a disturbed area threshold to determine whether quarry projects merit EA reviews.

Under which circumstances should EA be undertaken at the regional level?

The provincial government should undertake a comprehensive and regularly updated regional EA for Northeast British Columbia. The regional EA should include deep consideration of Treaty rights related VECs. This is necessary given the high level of cumulative impacts already present in Northeast BC, and the many proposals for additional major industrial projects and activities in the area.

In addition, project-specific EAs should be required to include regional cumulative effects assessments, so that the contributions of each project to regional cumulative impacts can be properly identified, measured and mitigated. A project-based, piecemeal approach to EAs will fail to capture the real extent of project impacts in this region. Narrowly tailored EAs with circumscribed geographical limits result in incomplete and unreliable conclusions.

Government cannot credibly claim to manage cumulative effects if it fails to account for regional cumulative effects in EAs. Instead, by undertaking these assessments from a in a multi-sector and multi-project perspective the government will be able to better plan for and manage the environmental pressures caused by the overlapping natural resource sectors in Northeastern BC.

This is consistent with the Auditor General's call for more and better management of cumulative effects.

Recommendation: Require comprehensive and regularly updated regional EAs for Northeast BC (and other key regions).

Recommendation: Require project-specific EAs include an assessment of regional cumulative effects.

SFN's Proposed Framework

SFN proposes that the right way to manage regional cumulative effects is through a Cumulative Effects Assessment Framework (CEF) which relies on studies of cumulative effects for specific development regions, through specialized working groups, and a management working group.

SFN has worked with a mining proponent to undertake a regional cumulative effects management approach through a CEF and working group for the Northeastern BC development region. The objectives of that CEF were to consider the biophysical effects of a project combined with other projects or activities located in the same geographic region. The study combines the environmental effects of past, proposed, and foreseeable future projects, recognizing that the combined effects of multiple projects on water, air, land, and wildlife may have significant adverse cumulative effects.

The CEF working group provided a formal structure in which to meet the following needs:

1. Collaboratively develop a process to ensure that VECs are clearly communicated and considered in a meaningful and effective way;
2. Establish a consistent and effective methodology for assessing and managing project effects;
3. Establish a consistent and effective methodology for assessing and managing cumulative effects based on ecologically relevant boundaries based on VECs; and
4. Establish a data bank where data collected for research, monitoring and environmental assessment can be used to guide baseline assessments, effects assessments, cumulative effects assessments, community outreach and environmental monitoring.

With regards to the fourth point noted above, proper baseline studies are critically important. The correct baseline should be a pre-industrial development baseline that reflects the environmental conditions as they were before Treaty adhesion. This can

help to identify goals and objectives that are consistent with restored levels of caribou populations, abundant wildlife and birds, and uncontaminated waterways and reservoirs.

In most EAs, industry does the baseline work without consultation with First Nations, and the application materials fail to provide baseline data or methodologies, making it impossible to identify how conclusions on the extent and likelihood of adverse impacts were reached. In such cases, SFN is brought in far too late in the process to provide meaningful input on project impacts or cumulative effects.

We submit that a successful EA review process that respects the concerns of First Nations and restores the public's confidence in the process should require the best possible cumulative effects studies. Proponents, government or both should bear the cost of funding the necessary work to manage adverse cumulative effects.

Recommendation: Provide for the initiation and funding of collaborative cumulative effects assessments on a regional and sub-regional basis, as described above.

Recommendation: Provide for the establishment of regional and sub-regional baseline studies that reflect pre-industrial conditions for comparison and assessment of cumulative effects.

Recommendation: Require project proponents to engage with First Nations early in the design of baseline studies, and to collect and disclose baseline data and the methods used to collect and analyse that data.

***For project EAs, are the current scope and factors considered adequate?
Are there other things that should be scoped into an EA?***

The current scope of factors considered in an EA is inadequate. EA impact assessment methodology is deficient when it fails to account for valued ecosystem components (VECs) that are important to First Nations. VECs are needed to ensure the well-being of First Nation communities, individuals, economies, culture and reliance on ecological systems. If First Nation defined VECs are not included, EA results will fail to accurately identify and interpret potential adverse effects on First Nations' culture, land use and Treaty rights.

The accurate selection of VECs at the scoping stage requires First Nations' participation in the selection of VECs. Most EAs are deficient because decisions on VECs are made

by government representatives who omit Treaty rights-related VECs because they do not understand them or why they are important.

In addition, a multi-sector, multi-project approach to cumulative effects must be scoped into all EAs.

Recommendation: Provide for First Nations participation in the definition and selection of VECs.

Recommendation: Require that cumulative effects analyses be undertaken using a multi-sector, multi-project approach.

Lack of First Nations input on VECs

First Nations must be able to define some of the VECs that are to be incorporated into EAs and the geographic scope of those VECs. Impacts on traditional land use values can only be properly assessed if First Nations are able to define appropriate VECs. First Nations are excluded when the BC EAO (or a proponent) selects the VECs according to its own views. Furthermore, it is impossible to assess the impacts on First Nations land use patterns if those land use patterns are misunderstood, or cut-off or excluded, for example by the application of geographical constraints on EA processes.

The results of the failure to include First Nations in the selection of VECs in the scoping phase of environmental assessments include:

- incomplete technical assessments of potential project impacts due to omission of key factors;
- the lack of meaningful discussions with First Nations because from the outset the proponent refuses to engage on key issues of concern;
- lost opportunities to adopt adequate mitigation and avoidance measures for project impacts; and
- an incomplete record before federal decision-makers.

In addition, failing to engage with First Nations on the selection of appropriate VECs means that First Nations and other participants have to spend time and resources arguing about VECs. This causes conflicts between parties during the review process, increased risk of litigation, and economic inefficiencies. It would be far better if CEAA included VECs that should have been included from the outset.

Recommendation: Provide for First Nations participation in the definition, selection and geographic scope of VECs.

Need for Treaty Rights-Related VECs

In SFN's experience, the BC EAO and project proponents give no (or only minimal) consideration to SFN's views on the incorporation of Treaty rights-related VECs. They have consistently refused to add Treaty rights-related VECs and ignored SFN's recommendations.

Proponents and the EAO often exclude Treaty rights-related VECs on the premise that impacts to Treaty rights are *already* referentially incorporated via other VECs. For example, in response to SFN's concerns that its Treaty right to fish have been excluded from the selected VECs, a proponent will insist that SFN's right is referentially accounted for in the aquatics biophysical VEC. This position is incorrect and reveals a fundamental misunderstanding of the nature of Treaty and Aboriginal rights.

In many cases, proponent-led EAs assume that biophysical effects on the environment are the same thing as impacts on Treaty rights. Although there may be overlap between a project's environmental effects and impacts on Treaty rights, they are distinctly different. Consider, for example, a mining proponent's plan to erect a fence enclosing a large area that has plants or mushrooms that SFN's members harvest for cultural and medicinal purposes. This fence may have a negligible adverse environmental effect, but a significant adverse impact on the exercise of Treaty rights by completely prohibiting SFN members from accessing important places and resources. Notwithstanding this potential to infringe a Treaty right, the EA may fail to even consider this impact because of the decision to omit Treaty-related VECs.

Recommendation: Provide for First Nations participation in the definition, selection and geographic scope of treaty and aboriginal-rights related VECs.

IV. Conduct of an Environmental Assessment

In this part we answer the Panel's questions regarding First Nations participation in the conduct of an EA and the effectiveness of substitution arrangements with provincial reviewing bodies.

Who should contribute to the decision of whether a provincial EA is required?

First Nations should participate in the decision of whether a provincial EA is required. The provincial government should adopt a framework based on joint decision-making on matters of central importance to First Nations.

Government can get First Nations involved earlier in EA review process by initiating engagement prior to the EAO's acceptance of a project description and prior to the Draft Application Information Requirements (DAIR) phase administered by the BC Environmental Assessment Office.

Recommendation: Provide for First Nations participation in decision-making about whether an EA is required.

Recommendation: Provide capacity funding and engage with First Nations prior to the EAO's acceptance of a project description or DAIR.

What should be the role(s) of the proponent, Indigenous Peoples, the public, environmental organizations, experts, the government and others in the planning of, collection, analysis and review of EA-related science including community and Indigenous traditional knowledge?

EA-related science

Regarding EA-related science, currently there is a lack of independent scrutiny or verification of the EA applications prepared by proponents. Proponents and their consultants are not unbiased, impartial scientific experts. EA applications and supporting materials are scoped, designed and edited by proponents and for proponents. The resulting assessments are not comprised of neutral, impartial facts. Rather, the assessments are one-sided, unchallenged and, consequently, incomplete. Decision-makers are then left to rely on an incomplete record, prepared by a deeply invested party, to determine whether a project is in the public interest.

In SFN's experience, the proponent-driven nature of the BC EA processes has entrenched project-approval bias throughout the assessment and decision-making process. This apparent project-approval bias should be balanced by increasing First Nations' roles in the review process, including through participation in early phase decision-making, as well as TUS and FNITR processes.

In addition, project-approval bias makes it appear that the requirement that feasible project alternatives be considered is not taken seriously. Project alternatives should be seriously considered in every EA, and the EA process should also require a meaningful review of alternative project sites.

Recommendation: Recognize and eliminate project-approval bias inherent in the current proponent-driven application process by reducing ‘professional reliance’ and increasing First Nations participation in early phase decision-making.

Recommendation: Provide for a more robust and serious consideration of project alternatives and alternative project sites and project methods.

Community and Indigenous Traditional Knowledge

SFN submits that one of the most effective tools to collect Indigenous traditional knowledge with respect to land use is the community-driven traditional land use study or TUS.

Recommendation: Require and adequately fund TUS work during the early stages of every EA review process.

Proper roles of proponents, government and Indigenous peoples

First Nations should be in charge of all matters pertaining to the collection of community and indigenous traditional knowledge. In many cases proponents are ill-equipped and lack basic competency to perform this work. At times, SFN has worked with proponents whose “collection of traditional knowledge” was limited to checking First Nations’ websites. Such experiences cause offense and damage working relationships between First Nations and proponents, and attempts to collect data in this manner (without even engaging with First Nations) can never provide decision-makers with reliable information.

For proponents seeking approval to develop the lands and resources within First Nations’ territories, their proper role with respect to the collection of Indigenous traditional knowledge is to adequately resource and support First Nations-led studies. As for government, its proper role is to respect traditional protocols and customary laws, develop government-to-government process and funding agreements, and implement secured funding arrangements to help ensure that First Nations can participate in decision-making that might affect their interests.

Standing agreements or protocols that provide reliable capacity funding would create a more time and cost efficient means of incorporating traditional knowledge within EAs than the current EA framework. Currently, First Nations must negotiate project-specific funding arrangements with each individual proponent, which causes delay and uncertainty.

Recommendation: Establish and require adherence to protocols and best practices for the collection of traditional knowledge.

Recommendation: Require and establish a system of standing agreements for the provision of capacity funding for First Nations participation in EA reviews.

How can EA processes be improved to ensure a timely, yet thorough process has been conducted?

Some of the recommendations discussed above include:

- revise the triggers for EA reviews
- early engagement with First Nations during scoping stage;
- ensure First Nations can define and incorporate VECs into EA process;
- require, and provide funding for, FNITR processes and TUS studies as part of the EA process;
- ensure First Nations have an enforceable ability to require additional information or studies;
- standing agreements or protocols to ensure reliable and adequate funding is available; and
- where multiple EAs are occurring at the same time, co-ordinate processes and schedules to manage work flow;
- conduct a regional cumulative effects assessment for Northeast BC; and
- incorporate cumulative and regional cumulative effects assessments in every EA.

Who should be responsible for conducting provincial EAs?

First Nations should be among the parties responsible for conducting provincial EAs. The Act and Regs should be amended to allow the Minister to approve substitution arrangements that provide and recognize First Nations with jurisdiction to assess environmental effects of designated projects in appropriate circumstances.

The Minister's discretionary power should include the power to substitute, or co-manage the EA process with, First Nation review bodies. SFN is a Treaty First Nation with lands, resources and constitutional rights that are subject to existing, on-going and new impacts caused by rapid development in Northeastern BC. Accordingly, SFN submits that it and other Treaty 8 First Nations should also serve as the responsible authorities to conduct provincial EAs within Treaty 8 territory.

Another way to provide for co-management of the process would be to establish joint review panels with provincial and First Nations representation, with recommendation powers and decision-making authority over process.

Recommendation: Provide the Minister with the discretion to approve substitution or co-management of EA processes, with First Nations governments or organizations.

To what extent can British Columbia coordinate with the federal and Indigenous governments while maintaining process integrity in the conduct of provincial EAs?

First Nation Joint Review Panels

The EA process should be amended so that the Minister can establish joint review panels with Aboriginal groups that have the capacity to assess the environmental effects of a designated project. First Nations should have the ability to request the creation of joint review panels and have the opportunity to assign their own representatives to serve as panel members.

A joint Treaty 8 First Nation and provincial review process should include the following features:

1. Independent cumulative effects data collection;
2. Appropriate staffing levels and capacity funding to support the responsible authorities' abilities to subject the project application to the regulatory framework;
3. Acceptance of First Nations perspectives on EA scoping and data collection methods;
4. Appropriate timelines; and
5. Conditions that protect Treaty 8 rights.

Having First Nations views represented among the panel members would strengthen the quality and legitimacy of the decisions made by government institutions.

Recommendation: Provide for the establishment of joint review panels with recommendation powers and decision-making authority over EA review processes.

V. Decision and Follow-up

First Nations should have a meaningful role and participation in the implementation of follow-up and monitoring programs. EA conditions should provide for Aboriginal monitoring programs, to ensure that engagement with First Nations continues for the life of the project. SFN also submits that EA conditions must be drafted so that they are specific, clear and measurable.

Who should participate in the implementation of follow-up and monitoring programs and how should that participation be encouraged or mandated?

First Nations Monitoring

First Nations should be involved in implementation and follow-up programs. Provincial regulators can mandate a meaningful role for First Nations through requirements in environmental protection plans and mandatory monitoring programs. These plans and programs must provide First Nations with the opportunity to decide, once the EA is complete, if they want to participate in monitoring activities during construction and post-construction. Opportunities for First Nations involvement in monitoring activities must be both short and long-term. Currently, there is a lack of long-term First Nation monitoring following EA review processes.

All protection plans and monitoring programs that contain monitoring requirements should include First Nations' values and relevant VECs selected by First Nations. With respect to activities occurring in Treaty 8 territory, the scope of monitoring and enforcement measures should extend to the Treaty 8 boundaries and not a lesser, circumscribed boundary defined by regulators that fails to capture the project's impacts on Treaty 8 Nations.

Further, environmental protection plans and monitoring programs must include measurable targets and criteria that First Nations monitors can enforce. The goal should be to achieve a net-zero impact on Treaty protected activities and lands and resources within SFN's traditional territory. Finally, proponents should be willing to periodically review and amend mitigation and monitoring measures to respond to new cultural, technical and scientific information as it becomes available.

Recommendation: Provide for First Nations participation in the design and implementation of long-term monitoring programs.

Recommendation: Ensure that First Nations' values and VECs selected by First Nations are including in monitoring requirements.

Recommendation: Provide for First Nations participation in the geographic scoping of monitoring programs.

Recommendation: Ensure that environmental protection plans and monitoring programs include measurable targets, and are aimed at achieving a net-zero or net-positive impact on lands and resources within First Nations' territories.

Recommendation: Provide for the periodic review and amendment of mitigation and monitoring requirements to respond to new cultural, technical and scientific information, as it becomes available.

Are enforceable conditions the right tool to ensure that British Columbia is meeting its EA objectives? Who should have a role in compliance and enforcement?

Enforceable conditions

Enforceable EA conditions are a necessary tool to achieve the objectives of an EA process. To effectively manage environmental and cultural impacts, EA conditions must be specific, clear and measurable. Measurable conditions should clearly define monitoring responsibilities and compliance requirements, in addition to setting out consequences for non-compliance. Condition language should articulate serious consequences for breaching an EA condition, such as the revocation of project approval due to non-compliance.

In the Northeast BC Treaty 8 region, conditions pertaining to impacts mitigation and avoidance currently fail to protect First Nations rights from interference and infringement by industry activities. To ensure effective protections for Treaty rights, EA conditions must contain more and tougher project-specific mitigation measures. (It is not mitigation to tell First Nations that they can exercise Treaty rights somewhere else within the Treaty boundaries.)

Recommendation: Require the inclusion of specific, clear, measurable, effective and enforceable EA conditions, that clearly define the compliance requirements and the consequences for breaches of EA conditions.

The Province Does Not Enforce Conditions

In SFN's experience, Provincial authorities often fail to enforce any conditions that resulted from an EA (and related permits). This has been confirmed in a series of Auditor General reports.

In 2016, the BC Auditor General reported that BC's Ministry of Energy and Mines and Ministry of the Environment had limited and weak compliance and enforcement programs due to too few resources, infrequent inspections and a lack of effort.³ In previous years, the Auditor General has found that the BC EAO's enforcement measures are also inadequate and did not protect the environment from significant adverse effects.⁴

Further, the BC Auditor General found that the Province does not manage cumulative effects. In BC, government ministries and agencies are not required to manage cumulative effects when approving the exploitation of natural resources⁵ and lack the tools to effectively manage cumulative effects (such as legislation and policies).⁶

In addition, it has been SFN's experience that when it approaches government regarding an environmental contaminant or pollutant, or a water licence or other permit that a proponent has failed to comply with, government staff will respond that they are powerless to remedy the situation because it is "not in our legislation". In some cases, staff require better training and support to know the extent of their jurisdiction and authority to enforce permit and certificate conditions, and in other cases, they need more clear and prescriptive legislation and policy mandates that empower them to be responsive to non-compliance events.

The provincial government should consider working together with First Nations on a government-to-government basis, to combine and augment local resources, and to develop co-inspection and enforcement teams.

Recommendation: Provide provincial officials (and First Nations) with the resources, the authority, and the mandate to work together to inspect projects and enforce compliance with EA conditions.

³ Auditor General of British Columbia (May 2016) *An Audit of Compliance and Enforcement of the Mining Sector* at 6.

⁴ Auditor General of British Columbia (May 2015) *Follow-up Report: Environmental Assessment Office*.

⁵ Auditor General of British Columbia (May 2015) *Managing the Cumulative Effects of Natural Resource Development in BC* at 5.

⁶ *Ibid* at 6 and 8.

Compliance and Enforcement

Engagement with First Nations cannot end once a project is approved or construction commences. EA conditions should set out the expectation for ongoing engagement with, and project monitoring by First Nations. Ongoing First Nations engagement post-approval can be achieved through joint First Nations environmental monitoring and conditions enforcement.

Moreover, provincial regulators should be transparent concerning compliance monitoring and appropriate enforcement measures to ensure that both government and proponents are accountable to First Nations and the broader public.

Recommendation: Require ongoing engagement with, and project monitoring by, First Nations post-approval through joint monitoring and enforcement programs.

First Nation Permits

SFN wishes to explore with British Columbia the potential for agreement on mechanisms whereby First Nations can be authorized and responsible for issuing their own environmental certificates and permits. Such mechanisms would reduce the administrative burden on provincial agencies, alleviate the staffing problems experienced by government in the Northeast, increase process efficiency, and ensure respect for Aboriginal values. The provincial government should support the development of First Nations regulatory, compliance, and enforcement mechanisms. The recent EA process undertaken by the Squamish Nation with respect to Woodfibre LNG can serve as an example and a model for more efficient process and better decision-making outcomes. This can be piloted by allowing forward-thinking proponents to opt-in to a First Nations led process.

Recommendation: Provide for the development of mechanisms and pilot projects whereby First Nations are authorized and responsible for issuing their own environmental certificates and permits.

VI. Conclusion

First Nations face many barriers to meaningful participation in EAs. In these submissions we have focused on the problems associated with insufficient levels of capacity funding and the lack of independent scrutiny of proponents' application

materials. We have also identified how First Nations are effectively excluded from key decision-making stages in the EA process. The meaningful and inclusive participation of First Nations in the provincial EA process requires engaging with First Nations at all stages - from before the decision to subject a project to an EA is made, to long term monitoring and enforcement activities.

The recommendations made in this submission aimed at improving the provincial EA review processes are set out in the Appendix. We thank the BCEAO for the opportunity to make these written submissions, and we invite your offices to contact us for more information.

APPENDIX

RECOMMENDATIONS

1. Provide First Nations with a meaningful role in the entire life of proposed projects, from concept and design to decommissioning and reclamation, including long-term monitoring and compliance with conditions.
2. Provide for a First Nations Independent Technical Review as part of the BC EA process.
3. Provide (or require proponents to provide) funding for First Nations Independent Technical Reviews at the earliest stages of the BC EA process.
4. Require that First Nations perspectives on the definition and selection of VECs be included in the scoping of EA processes.
5. Provide for TUS work, adequately funded, at an early stage in the EA process.
6. Provide (or require proponents to provide) adequate capacity funding for TUS and FNITR processes – this will lead to process efficiencies, better review processes, and improved outcomes.
7. Require proponents to respond fully to requests for additional information, studies and other engagement activities, in a timely manner and at no cost to participating First Nations.
8. Amend the EA process to provide First Nations with a role in determining whether an EA is required due to potential impacts on treaty and aboriginal rights, and on sensitive or culturally significant wildlife habitat.
9. Adopt and incorporate the principles and processes set out in the Akwé: Kon Guidelines.
10. Include upstream oil and gas activities within the purview of EA processes.
11. Remove the discretion to exempt gas plants from EA review.
12. Apply a disturbed area threshold to determine whether quarry projects merit EA reviews.

13. Require comprehensive and regularly updated regional EAs for Northeast BC (and other key regions).
14. Require project-specific EAs include an assessment of regional cumulative effects.
15. Provide for the initiation and funding of collaborative cumulative effects assessments on a regional and sub-regional basis, as described above.
16. Provide for the establishment of regional and sub-regional baseline studies that reflect pre-industrial conditions for comparison and assessment of cumulative effects.
17. Require project proponents to engage with First Nations early in the design of baseline studies, and to collect and disclose baseline data and the methods used to collect and analyse that data.
18. Provide for First Nations participation in the definition and selection of VECs.
19. Require that cumulative effects analyses be undertaken using a multi-sector, multi-project approach.
20. Provide for First Nations participation in the definition, selection and geographic scope of VECs.
21. Provide for First Nations participation in the definition, selection and geographic scope of treaty and aboriginal-rights related VECs.
22. Provide for First Nations participation in decision-making about whether an EA is required.
23. Provide capacity funding and engage with First Nations prior to the EAO's acceptance of a project description or DAIR.
24. Recognize and eliminate project-approval bias inherent in the current proponent-driven application process by reducing 'professional reliance' and increasing First Nations participation in early phase decision-making.
25. Provide for a more robust and serious consideration of project alternatives and alternative project sites and project methods.
26. Require and adequately fund TUS work during the early stages of every EA review process.

27. Establish and require adherence to protocols and best practices for the collection of traditional knowledge.
28. Require and establish a system of standing agreements for the provision of capacity funding for First Nations participation in EA reviews.
29. Provide the Minister with the discretion to approve substitution or co-management of EA processes, with First Nations governments or organizations.
30. Provide for the establishment of joint review panels with recommendation powers and decision-making authority over EA review processes.
31. Provide for First Nations participation in the design and implementation of long-term monitoring programs.
32. Ensure that First Nations' values and VECs selected by First Nations are including in monitoring requirements.
33. Provide for First Nations participation in the geographic scoping of monitoring programs.
34. Ensure that environmental protection plans and monitoring programs include measurable targets, and are aimed at achieving a net-zero or net-positive impact on lands and resources within First Nations' territories.
35. Provide for the periodic review and amendment of mitigation and monitoring requirements to respond to new cultural, technical and scientific information, as it becomes available.
36. Require the inclusion of specific, clear, measurable, effective and enforceable EA conditions, that clearly define the compliance requirements and the consequences for breaches of EA conditions.
37. Provide provincial officials (and First Nations) with the resources, the authority, and the mandate to work together to inspect projects and enforce compliance with EA conditions.
38. Require ongoing engagement with, and project monitoring by, First Nations post-approval through joint monitoring and enforcement programs.
39. Provide for the development of mechanisms and pilot projects whereby First Nations are authorized and responsible for issuing their own environmental certificates and permits.

