

SKEENA FISHERIES COMMISSION

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Skeena Fisheries Commission (SFC) Response to the British Columbia Environmental Assessment Office (BCEAO) Environmental Assessment (EA) Revitalization Discussion Paper

Who we are

Skeena Fisheries Commission (SFC) is a Skeena Watershed aboriginal organization that focuses on fisheries management, science, and conservation. The SFC signatories are First Nations with traditional territory in the Skeena drainage and adjacent areas of British Columbia, including the Tsimshian, Gitksan, Gitanyow, Wet'suwet'en, and Lake Babine Nations. The current SFC Member Nations are the Gitksan, the Gitanyow, and the Wet'suwet'en. The Commission, as directed by its Member Nations, responds to management and access priorities relating to the broad aboriginal interest in the fisheries resource.

SFC supports many of the objectives put forth in the Environmental Assessment Revitalization Discussion Paper (the Discussion Paper). The proposed changes with the goal of advancing reconciliation, sustainability, transparency, scientific rigour and early engagement are in line with our values and our concerns with the current Environmental Assessment (EA) process. We are happy to work with the province and provide feedback to help improve the process to better meet these objectives.

SFC staff have engaged in EA processes at both the federal and provincial (BC) levels for many years. We believe that our experience and observations can provide valuable input to BC's EA revitalization process. Our submission will focus on three subject areas:

- (i) The proposed Reconciliation Commission and dispute resolution processes to help strengthen the position of Indigenous peoples in EAs.
- (ii) Measures and processes to ensure that all EA decisions are based on a solid scientific foundation thereby helping to restore public trust in those decisions.
- (iii) The need to address big picture issues, such as regional and strategic assessments and cumulative effects, prior to EA.

The proposed Reconciliation Commission and dispute resolution processes to help strengthen the position of Indigenous peoples in EAs:

SFC is supportive of the concept of the Reconciliation Commission or Reconciliation Office, and also of the proposed alternate dispute resolution processes. In the current EA process, disagreements between the Environmental Assessment Office (EAO) and Indigenous participants delay the process and are too often resolved in favour of the proponent and provincial jurisdiction. Ensuring that Indigenous participants can have their concerns objectively listened to and addressed in a fulsome manner will assist in building trust in the EA process.

To be effective SFC believes that the Commission and dispute resolution processes must:

- Be completely independent from the EAO. While the results of the dispute resolution process will feed back into the EA process, the dispute resolution framework should be separate from the EAO so there is no real or perceived influence on it.
- Emphasize the importance of government to government agreements and protocols being arranged before an EA begins in earnest with the ultimate goal of collaborative Indigenous/government EAs as the default process. Having such agreements and protocols in place will help to ensure a process that all parties have agreed upon prior to its commencement.
- Be developed in collaboration with First Nations and be adaptable and responsive to the traditions, laws, and circumstances of individual First Nations groups. While a provincial framework is appropriate, a one-size-fits-all approach is not.
- Provide opportunity and funding for First Nations to collect and interpret their own traditional knowledge. Traditional Knowledge is more than a collection of facts, but rather a broad, interconnected network of values, traditions, laws, and facts. Even the most well-meaning outsider cannot hope to accurately interpret the facts without the cultural framework that supports them. Without that framework, any EA process that attempts to incorporate Traditional Knowledge will fail to do so meaningfully. The most effective solution is to allow the community already in possession of the framework to interpret the facts appropriately.
- Recognize the importance of ending the current practice in which only First Nations who have signed support agreements with project proponents as being able to be fully involved in EA mitigation and monitoring processes: This course of action essentially sidelines First Nations who may bear project impacts. Legitimate concerns about a project may have led a community to reject a project support agreement, but this should not mean that the community is completely left out of EA mitigation and monitoring processes. Proponent-organized monitoring groups that do not allow First Nations who have not signed a support agreement to participate should not be recognized or supported by the EAO.
- Be responsible solely for First Nation and Indigenous issues. The body charged with this work should not also be tasked with engaging with non-Indigenous communities or with stakeholders. Doing so would promote an approach in which First Nations are treated as stakeholders, which is inappropriate due to the unique status of First Nations in British Columbia and the Discussion Paper's stated commitment to implement the United Nations Declaration on the Rights of Indigenous Peoples.

Additionally SFC strongly supports the idea of a consent-based EA "readiness gate" and encourages BC to move quickly on building this idea.

Measures and processes to ensure that all EA decisions are based on a solid scientific foundation thereby helping to restore public trust in those decisions.

SFC would like to acknowledge the contributions of West Coast Environmental Law (WCEL) and its publication, **ACHIEVING THE VISION FOR NEXT GENERATION ENVIRONMENTAL ASSESSMENT IN BC: How Does BC's Discussion Paper on Environmental Assessment Revitalization Measure Up?**, June 2018 (WCEL Paper). The WCEL Paper contains many recommendations and criticisms that are well-founded. SFC recommends that the WCEL Paper be read and carefully considered during the development of BC's new EA regime.

As noted in the WCEL Paper, the Discussion Paper describes some potential positive improvements to the EA process:

- *There are commitments to ensuring that Indigenous knowledge, collected in a manner led by Indigenous peoples, informs assessments.*
- *The proposed process would support a direct role for First Nations in determining how evidence is generated, reviewing evidence and drawing conclusions based on the evidence.*
- *The proposed Regional "Sustainability" or "Reconciliation" Offices, discussed above, hold potential to engage and provide technical assistance to the public on matters of evidence in assessment (although this is not specifically proposed in the Discussion Paper).*

SFC also supports the statements in the WCEL Paper as to what still remains to be strengthened:

- *The current approach to project assessment in BC – whereby the proponent generates virtually all the evidence, which is reviewed by an informal technical advisory group – is inadequate and needs to end. BC's Discussion Paper does not go far enough in this regard.*
- *Although the Discussion Paper proposes that review of all proponent evidence by "independent" experts would be provided for in the Assessment Plan, it also suggests these experts could be provincial line ministry staff and that review could occur through a technical advisory group (which is the current process for technical review in BC's assessment regime). Requirements for involvement of independent experts and peer review of proponent evidence should be set out in legislation, and reflect the recommendation for mechanisms to involve the public as discussed below.*
- *The new legislated framework should clarify that public involvement at the early engagement phase should address not just issues of concern but also the question of how evidence will be generated and reviewed if an assessment is to proceed, and that the "EA participants" involved in shaping the Assessment Plan will include non-governmental organizations and engaged citizens.*
- *The Discussion Paper contemplates largely proponent-led evidence, as well as some Indigenous-led evidence, in a manner determined through the Assessment Plan. While the Discussion Paper states that independent studies and peer review are important tools "in some circumstances", there is no proposal for how to ensure they are integrated into assessments, nor is there a clear indication that the public would play a role. This is contrary to the Vision recommendation, as well as the EA Advisory Committee recommendation that: "...public trust in technical studies commissioned by proponents can be aided if there are opportunities and necessary funding support for independent analyses that are conducted by local government or key non-governmental organizations."*
- *Legislated and funding mechanisms should enable public participants to engage independent experts to peer review evidence, identify potential information gaps and conduct studies where appropriate. A new*

assessment law should also include other requirements to strengthen the information base and ensure evidence-based decision-making, such as legal requirements that:

- *assessment decisions be based on best available scientific and Indigenous knowledge;*
- *provincial scientists with specialist or expert information or knowledge related to assessment of a project make this available; and,*
- *All scientific and other information related to an assessment is made available to the public through a registry accessible via the internet.*

SFC has participated in a variety of both provincial (British Columbia) and federal EAs and the issue of using the best available science has been a problematic one in both processes. The Discussion Paper proposes peer-review as a potential fix: *“Mechanisms for independent studies and peer review are important tools to increase confidence in EA information in some circumstances.”* SFC is of the firm view that truly independent, unbiased, and reliable scientific studies are essential components of meaningful and scientifically robust EA processes and the subsequent decisions that flow from them. Peer review is an important part of this as it is the gold standard for scientific quality assurance. Peer review should be undertaken for scientific studies whenever possible. However, it is important to note that peer review is a long process and some of the data collected to support the EA process may not be of interest to academic journals and their reviewers. The EA process must include additional mechanisms for evaluating the quality of studies when peer review is not undertaken. Third party review, either by experts chosen by the Working Group or by experts employed by the BCEAO, is an appropriate compromise. It is imperative that all scientific information used to inform EAs is formally and transparently evaluated for quality and reliability and that information is weighted according to this evaluation when it is used in the decision making process. If this principle is watered down to any extent in BC’s new EA legislation, SFC believes the province’s EA process will fail to gain the public trust that is one of the primary goals of this whole exercise. It is not enough that the new legislation provide the possibility of independent studies and reviews, it must ensure that they occur.

SFC supports the vision in the WCEL Paper of an expanded role for regional Sustainability Offices. While much of the EAO, its staff, and its technical experts will likely continue to be based out of Victoria, we recommend the EAO establish smaller Sustainability Offices located throughout the province tasked with engaging with local communities, housing locally-relevant experts if needed, being involved in local EAs, and spearheading regional EAs. This approach would foster having geographically local staff working on local EAs who would bring an awareness of local issues and potential environmental sensitivities to given project proposals and associated EAs and provide a regional voice and contact person for local communities. Additionally, regionally specific EAO staff would likely to be able to identify local technical experts within and outside of BC Government agencies that can provide important technical input into an EA. It should be noted that while WCEL and the Discussion Paper envision Sustainability Offices as an alternate name for Reconciliation Offices, SFC believes that they should be separate entities, as promoting sustainability and advancing reconciliation are both necessary but are very different objectives requiring different approaches.

In reference to WCEL’s point: *The current approach to project assessment in BC – whereby the proponent generates virtually all the evidence, which is reviewed by an informal technical advisory group – is inadequate and needs to end* – SFC agrees but with caveats. The technical advisory Working Group in and of itself should not be abolished. We have found that bringing together technical representatives of First Nations groups, government, and stakeholders allows for much-needed in-depth technical discussion and problem solving. In

EAs where the provincial process is substituted for the federal process, these technical advisors are vital in providing expertise in matters for which the province is lacking capacity (such as the marine environment or air quality). We recommend that the technical Working Group be formalized, better supported, and their technical advice and recommendation be given much more credence. We recommend that the Working Group take part in the drafting of the Assessment Report, rather than their opinions and input being summarized by EAO representatives. There should be a legal requirement in the new legislation for reasons to be provided if the Working Group's advice and recommendations are not followed.

Directly related to establishing Sustainability Offices and how technical EA working groups operate: Technical EA Working Groups and provincial and federal government regulators should be afforded the opportunity to propose modifications to the design or methodology for consideration during the formal alternatives assessment, such as a different location for a project component, reduced size, or alternate tailings management approaches. These types of details should not just be left up to project proponents alone, but at present only proponents can propose alternatives. Proponents unilaterally developing the alternatives to be considered reduces the ability of regulators and Working Groups to pursue compromises and prevents proponents from having access to local knowledge that may help identify the optimal project design. To support this, regulators should have the ability to approve some of the proposed alternate designs but not others. These changes would move away from the current adversarial process to a more iterative and collaborative approach in which all parties have the goal of designing the best possible project.

A good example of this phenomenon is the Kerr Sulphurets Mitchell (KSM) mine project proposal. Seabridge Gold Incorporated (the project proponent) insisted that the project had to process 130,000 tons of ore a day for 60 years, limiting the location of the tailings management facility to one environmentally sensitive location. Eight additional, less sensitive sites were identified, but because these other sites could not hold the full volume of tailings these other sites were not meaningfully considered as alternatives. When Working Group members requested that a smaller project that could use these sites be considered as an alternative, the BCEAO's response was that they do not recommend project changes or tell project proponents what they can or cannot do on their projects, but will only assess what the proponent proposes. This policy prevented having any kind of meaningful discussions on better options for developing tailings management facilities (TMFs) for the proposed mine.

Regarding proponents (and their associated environmental consultants) generating virtually all the evidence submitted as part of an application, SFC wholeheartedly agrees with WCEL that this approach must end. Proponents and environmental consultants creating and controlling most of the key technical information and evidence used to evaluate their proposal in an EA creates a huge conflict of interest that fundamentally undermines having a truly transparent and scientifically objective EA. SFC agrees with WCEL's approach to overcoming this issue but would go further. Even if a proponent must pay for the baseline environmental studies that support their project, the proponent should not directly control how technical EA information is collected, evaluated and distributed.

Under the current EA scheme, proponents hire and pay their environmental consultants directly to conduct baseline environmental studies and collect data to support their EA application. Technical information is only provided to the Working Group after it is reviewed and filtered by the proponents, allowing the proponents to determine which results of which studies are seen by regulators and the Working Group. This decreases transparency and creates an opportunity for conflict of interest.

Since proponents pay their environmental consultants directly and often work with the same consultant throughout the entire length of the project or on multiple projects, it is in the environmental consultants' best economic interests to meet their clients' wishes to ensure repeat business into the future. In the case of an EA, proponents will wish to see results that lead to a project's approval. Studies that flag potential issues with the project can be quietly shelved without regulators or the Working Group ever knowing they existed.

In a variety of EAs in which SFC has participated, we have seen cases in which proponents have responded to the release of unfavourable studies by switching to a new environmental consultant, raising concerns that consultants are punished for true but unfavourable results. When these types of situations arise in EAs, scientific objectivity, transparency, and credibility are lost. Many of the submissions to the BC Government's recent consultation on Professional Reliance raised these same concerns and they must be dealt with to restore public trust in the EA process. A revitalized EA process must have mechanisms in place to prevent these ethical conundrums if scientific objectivity, transparency, objectivity, and public faith and trust in this process are to be restored.

We recommend:

- That these issues be addressed through removing the gatekeeping role of the proponent in the EA process.
- Regulators, First Nations, and stakeholders must be involved in not just reviewing but also in planning the studies that will inform the assessment. Study methodology must be developed using best practices as decided by the Working Group. Independent studies must be commissioned and incorporated as appropriate.
- That project Working Groups or the BCEAO hire environmental consultants directly having them working for the Working Group and/or the BCEAO (with meaningful First Nations consultation).
- That project environmental consultants submit both draft and final technical reports to Working Groups directly and not project proponents. This would allow project proponents to still be part of technical Working Groups but not have the final say as to what gets delivered as final technical EA reports, thus preventing the opportunity to steer report findings and conclusions to support a project proponent's position and desired outcomes.
- Proponent-provided evidence and independent studies must both be considered, with the weighting given to each being determined by the scientific rigour of the studies rather than the source.
- Regulators and Working Groups must take a more active role in interpreting the findings of studies and the potential risks of proposed projects, rather than the current role of a passive evaluator.
- Consensus-based decision-making on the technical level is an important goal for both advancing reconciliation and improving technical rigour.

The need to address big picture issues, such as regional and strategic assessments and cumulative effects, prior to EA:

On this point, SFC agrees with the key positives in the Discussion Paper identified in the WCEL Paper, including:

- *The commitment to a legal framework and resourcing for regional and strategic assessments to address "big picture" issues, in a manner that will guide project-level assessments, is a major step forward.*

- *While the Discussion Paper does not directly propose a structure for what body or bodies will support and lead regional and strategic assessments, it does note that the EA Advisory Committee makes a relevant recommendation that: “Regional ‘Reconciliation’ or ‘Sustainability’ Offices should be put in place to ‘house’ Government-to-Government agreements, the multi-agency regional and strategic assessments and related initiatives and to enable local curators of information to be acknowledged and engaged.” This important recommendation is worth expanding upon and pursuing.*

SFC also supports the statements in the WCEL Paper as to what still remains to be strengthened:

- *Legislated triggers and process requirements for regional and strategic assessments are important to ensure that they actually occur, and so that they establish a legally binding floor for environmental protection that applies to project assessments and regulatory decision-making. The Discussion Paper does not directly address these issues.*
- *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 evidence in project and regional assessments, in balance with Indigenous knowledge.*

SFC agrees with WCEL that the Discussion Paper’s plan for dealing with ‘big picture’ regional and strategic EA issues does not go far enough. After conflicts of interest issues with proponents and their environmental consultants, SFC would flag a distinct lack of big picture thinking and planning as the next most problematic issue. With the current push by the EAO to further harmonize EAs with their federal counterparts; comprehensively addressing ecosystem-level impacts through regional and strategic EAs in the Discussion Paper is very important.

Regional and strategic assessments provide much-needed opportunities for planning development and identifying current and potential stressors on communities and the environment. It is important that they are carried out, and that they follow best practices if they are to be effective. They should be proactive, ecologically-based, and include all parties including federal, provincial, and First Nations governments.

Most importantly, strategic and regional EAs should not become a theoretical and seldom-used option. It is not enough that the new EA legislation provide the framework for strategic and regional EAs, it must provide impetus for them to be carried out. We second WCEL’s call for “*Legislated triggers and process requirements for regional and strategic assessments are important to ensure that they actually occur, and so that they establish a legally binding floor for environmental protection that applies to project assessments and regulatory decision-making*”. We additionally call on the BCEAO to create a Regional Environmental Assessment Plan that lays out methodology, priorities, and a timeframe for completing regional EAs. Funding and resources provided for regional and strategic EAs, as suggested in the Discussion Paper, should be earmarked for that purpose and available on a use-it-or-lose-it basis. Additionally, sufficient resources should be made available to allow local First Nations and FLNRO expert staff alike to meaningfully participate in EAs for project proposals within their traditional territories and operational regions. The regional Sustainability Offices proposed above would be ideally placed to house regional EAs and take a lead in the process.

Regional and strategic EAs are the best tool for planning for climate change, addressing cumulative effects, and identifying current and potential stressors on communities and the environment. We urge the Government of BC to make them an important component of the new EA process, as well as any future cumulative effects or climate change management processes going forward.

Conclusion

We are supportive of BC's commitment to improving the EA process and the Discussion Paper raises important issues. We hope that the EAO carefully reads and considers the advice provided in responses to the Discussion Paper, including the submissions from SFC and WCEL. The EA process must work for all parties, not just government, and so input from external parties is extremely important.

We note that in the federal sphere, the public comment period for potential amendments to EA legislation was two years, as compared to the six months being provided for in BC. SFC encourages BC to meaningfully collaborate with BC First Nations going forward as the EA process is revitalized. We have some concerns that the timeline for preparation of new EA legislation may be ambitious, and SFC believes the commitment to developing a scientifically robust and transparent EA process needs to be fulfilled even if that requires adjustment to the timeline.

We look forward to engaging on this file going forward and working to develop a process that meets our shared objectives.

