**Southeast Alaska Indigenous Transboundary Commission**

**Protecting Tribal Lands and Waterways for Future Generations**

**Submitted via online** July 30, 2018

Director, Engagement & Digital Services
Environmental Assessment Offices
836 Yates Street
Victoria, BC

Re: Invitation to Comment on Discussion Paper on B.C. Environmental Assessment Revitalization

Dear Sir or Madam:

The Southeast Alaska Indigenous Transboundary Commission (SEITC), a coalition of fifteen federally recognized Tribes in Southeast Alaska, work to protect our ancestral lands and waters on matters related to development in the so-called transboundary watersheds. Each member Tribe elects its own representative to represent their individual Tribal government in our group. The area straddling the Alaska–Canada border has been our peoples' traditional territory for thousands of years.

Pursuant to Minister Heyward's invitation on June 18, 2018, for public comment on concepts under consideration by the British Columbia (BC) Provincial Government for revitalizing the Environmental Assessment (EA) process, SEITC respectfully submits the following comments.

SEITC has participated in good faith to represent our members' interests in the process applied by BC for approving resource development projects that threaten downstream resources, particularly the harvest of salmon and other aquatic resources for customary and traditional, commercial and recreational purposes. Although BC touts the EA process as representing an important strategic decision point for BC making informed and effective regulatory decisions relating to proposed resource development projects that threaten transboundary river resources, we have found BC's EA process inadequate for providing our members with a genuine, timely, and meaningful opportunity to protect the transboundary river resources on which they depend.

Consequently, the proposed EA revitalization offers the opportunity for BC to provide for the wellbeing and prosperity of the Province while securing robust protections from liabilities to current and future generations. Toward this end, we applaud proposed language reflecting a shift away from a strict cost-benefit approach to one that evaluates the effects of a proposed development on the sustainability of health, economic, social and heritage values on both sides of our shared border. As downstream beings affected by existing and proposed major developments in northwest British Columbia, we hope these comments will assist in assuring a revitalized process that ensures protection for the community interests that share these incredible resources and natural environments upon which they depend.

This revitalization offers an opportunity to create a new resilient process providing for timely review of large projects while protecting government and citizenry from loss to health, financial, or cultural values. Many

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suggested fixes are necessary to address the findings of the 2016 auditor general report,[1] which documented serious failures in compliance and enforcement at Ministry of Environment and Ministry of Energy and Mine. Additionally, the Mt. Polley disaster in British Columbia revealed flaws in enforcement and gaps in adequate financial assurances to cover damages. Subsequent investigation recommended many changes to waste storage structures, maintenance and Best Management Practices.[2] Finally, the ratification of the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP) sets a new standard for obtaining free, prior and informed consent from affected Indigenous Peoples rather than token consultation.

The landscape in Canada itself has also changed since 1996. Throughout the boreal forest comprising 60 percent of Canada's land cover wildfires, bark beetle, ecosystem migration, and glacial retreat have rendered even recent baseline information irrelevant in the face of rapid change. The fish species dependent on a healthy marine environment are stressed and diminishing due to adverse ocean conditions. Surviving global downturns in productivity resulting from climate change requires an emphasis be given to protect and maintain the genetic diversity within species. Genetic diversity is the only guarantee known to stave off extinction. In practice, genetic diversity is indistinguishable from habitat diversity. This legislation must provide that habitat be protected to serve as a refuge to marine dependent species when things go bad in the oceans.

Once revitalized, this legislation must also reflect Canada's responsibility to protect its citizens' human rights. This includes preventing private parties within its control from taking actions that violate those rights. This revitalized legislation and its implementation must include a realistic "no build" option when environmental degradation is expected to diminish species or ecosystems that are important to the cultural and physical survival of indigenous peoples on both sides of our shared borders, including the rights to cultural practice, means of subsistence, and food.

Finally, this revitalized legislation must recognize the international nature of the shared watersheds between Canada and the United States and incorporate measures that reflect the rights of both upstream and downstream countries and guarantee the right of reasonable use by the upstream country in the framework of equitable use and benefit sharing with downstream nations and peoples. This legislation must recognize that sovereignty over shared water is relative and qualified. Each State has reciprocal rights and duties in the utilization of the waters of an international watercourse and each is entitled to an equitable share of its benefits.

Environmental legislation must recognize that shared waters are essential to the livelihoods and cultures of the local indigenous peoples on both sides of the border and international human rights law requires Canada to prevent their degradation. UNDRIP must also apply to the Sovereign Indigenous Nations on the U.S. side of the transboundary watersheds. Failing to apply UNDRIP across the border will only inflame controversy and precipitate challenges in one or more international institutions.

**Cost Benefit versus Sustainability Analysis**

We are encouraged that the proposed legislation shifts its analytical approach from the current cost benefit analysis towards a broader risk assessment relating to sustainability across a broad spectrum of environmental, social, economic, health and cultural spheres (the five spheres). At no point should a benefit to one sphere come at a significant or consequential cost to another. Any legislation based on a sustainability framework is less one of deliberation about the pros and cons of a project and more about a collective review, weighing and evaluation of impacts, including tradeoffs between environmental, social, economic, health, and cultural benefits and protections. To be successfully implemented, legislation must provide that the five spheres of

[1] Available at: http://www.bcauditor.com/pubs/2016/audit-compliance-and-enforcement-mining-sector
[2] Available at: https://www.mountpolleyreviewpanel.ca/

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sustainability are represented adequately and equally. This can only be accomplished if each sphere ultimately has right to veto the project.
Legislation should define what level of consequential or significant cost is too high a burden for each sphere and recognize that the term consequential also has different meanings to different people and contexts. The legislation should require denial of a project if any sphere would suffer a consequential impact from the viewpoint of that sphere alone. In the review of net benefits and negative environmental and social effects, the legislation must provide a mechanism to reach a "no build" decision if evidence warrants.
Sustainability must also describe British Columbia's role within a sustainable world. All environmental assessments must advance British Columbia's responsibilities to meet the Paris Agreement commitment to limit global temperature rise to well below 2 degrees Celsius above pre-industrial levels and to pursue efforts to limit the temperature increase even further to 1.5 degrees Celsius.

Consistent with its purpose to mitigate the effects of climate change, environmental assessment legislation must recognize the benefits of existing wetlands, carbon storage capacity, habitat connectivity and diversity and seek to protect those values. All assessments must include a consideration of the predicted effects of global climate and ocean changes. This includes accounting for the cumulative impacts of past, present and probable future actions in relation to an uncertain global environment.

## Closing Gaps in Financial Assurances

Existing Gaps
This legislation needs a mechanism to identify gaps in liability coverage for individual projects and develop a financial mechanism to fill them. These should include accurate independent estimates of water treatment and site maintenance for the duration of expected maintenance. A requirement for accurate estimates means that a permit based on the need for perpetual maintenance or water treatment is impermissible because no accurate estimate can be made for conditions spanning an infinite amount of time.[3] No development can be predicated on the need to mitigate impacts forever.
The legislation needs to fill liability gaps for downstream sovereigns in transboundary watersheds. To implement this, legislation should recognize that Federal, provincial, state and tribal governments enjoy a limited jurisdiction of the territory they share with downstream nations. Legislation should provide mechanism to compensate downstream users in case of a loss suffered by an action created by the upstream user.
The legislation should also include a mechanism by which responsible parties will have to prove that they are capable of fulfilling the required financial liability obligations for the entirety of time site maintenance is required before obtaining the required permits. These funds for reclamation costs must be posted at the time of permit approval.
The legislative mechanism for liability must be transparent in the preparation of reclamation cost estimates and include an opportunity for public review and comment of the proposed plan and costs.

## Creation of an Industry Funded Bond Pool

Beyond planned reclamation and maintenance costs, financial assurances for unexpected catastrophic failures should be collected and costs spread over the entire industry. Catastrophic failures are by their very nature are often beyond the means of any company to mitigate based on the estimated costs of reclamation. Polluter-pays principle can be implemented based on an independent risk assessment for each project. This industry funded pool would protect the public from the reclamation and liability costs due to unintended environmental

[3] A Position Paper On Perpetual Water Treatment for Mines David M. Chambers, Ph.D. June 2007. Available at: https://www.csp2.org/files/reports/Perpetual%20Treatment%20Paper.pdf

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accidents or consequences in the event the other required financial assurances are insufficient. The legislation can establish such an Industry-Funded Pool Levy from all industries that pose risk. These funds would be available if actual reclamation costs exceed estimated costs or the responsible party is unable to pay and/or if an unexpected event, such as a tailings pond breach, exceeds the financial assurances required for such a loss (exceeds the limits of liability), or where no party is found at fault. With an industry-funded pool to draw on, taxpayers are not left on the hook and the required work can be undertaken in a timely manner.
The Industry funded pool must also address extra-lateral claims across national boundaries and jurisdictions. British Columbia shares many watersheds with other nations and states. Legislation must address the treaties and agreements transboundary benefit sharing and the protection of downstream users.

## Incorporation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

The Revitalized Legislation should recognize that First Nations and Tribal Nations in shared watersheds are clearly recognized as jurisdictions with decision-making authority regarding assessment processes, outcomes and follow-up consistent with the UN Declaration on the Rights of Indigenous Peoples.
Legislation must include clear implementation measures for government-to-government dialogue with First Nations and other Tribal Nations in shared watersheds; measures that recognize the role of Indigenous people as decision-makers regarding assessment process and outcomes. Legislation should also recognize that the purpose of assessment is to ensure a decision that contributes to the protection of human rights and environmental justice consistent with the UNDRIP. Legislation must provide appropriate, mutually-agreed mechanisms for dispute resolution between the federal and provincial governments and indigenous peoples and to incorporate Indigenous-led assessment and studies. Indigenous peoples must have the authority to modify or prevent any project that may have consequential impact to the culture or landscape critical to the continuation of cultural practices.
Free, Prior and Informed Consent
Legislation must fully incorporate and codify free, prior and informed consent (FPIC) as established by the United Nations and ratified by Canada in May of 2016. FPIC is an established feature of international human rights norms for development policies pertaining to indigenous peoples. Legislation must formally provide a clear definition of terminologies such as Free, Prior, Informed, and Consent and make these definitions legally enforceable through the courts.
In relation to development projects affecting indigenous peoples, FPIC must be codified to ensure that Indigenous peoples are not coerced, pressured or intimidated in their choices of development. Indigenous Peoples must be provided with full information about the scope and impacts of the proposed development activities on their lands, resources and wellbeing. Their consent must be sought and freely given prior to the start of development activities and they retain the right to withhold consent over developments affecting them and this right is respected and upheld. FPIC must also apply to indigenous peoples outside of Canada that utilize shared watersheds and have the same rights as First Nations under law.
Finally, contesting claims between States and other stakeholders including Indigenous peoples should be resolved though clear institutional arrangements (mechanisms) for monitoring compliance and the redress of grievances. Indigenous peoples have the right to say no to the project throughout the process.

## Assessment Triggers

Legislation must ensure that all projects are assessed that may cause impacts outside of their immediate foot print. That would include discharge or potential to discharge to surface or ground water and projects that span jurisdictional areas such as provincial or international borders. Assessments should be conducted upon request

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from the public and/or Indigenous peoples if the proposed development may impact cultural, social or ecological sensitive areas.

**Conclusion**

Canada must use this process as an opportunity to be the world-leader in assuring that the public and citizenry enjoy the benefits of large projects without burdening society or future generations with the costs or impacts. This can only be accomplished if legislation requires that projects that do not meet criteria including Indigenous consent are rejected.

Sincerely,
Tis Peterman
Coordinator

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