CENTRAL COUNCIL OF TLINGIT AND HAIDA INDIAN TRIBES OF ALASKA
The Honorable Richard J. Peterson, President
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Environmental Assessment Revitalization Paper; CCTHITA Comments

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SUBMISSION

EXECUTIVE SUMMARY

CENTRAL COUNCIL OF TLINGIT AND HAIDA INDIAN TRIBES OF ALASKA [the Honorable Richard J. Peterson, President] herein submits comments to the Environmental Assessment Revitalization Paper. The Environmental Revitalization Paper does not adequately address the CCTHITA testimony to the Expert Panel to Review Federal Environmental Assessment Processes to the Indigenous Presentations forum on December 9, 2016, wherein our recommendations addressed the following: Strengthen the Weak Cumulative Effects Analysis for Multiple Projects; Enhance Indigenous Consultation; Specific Requirement for Transboundary Watersheds; Requirement to Conduct a Robust the Alternatives Analysis; Inclusion of an Evidence-based Approach based on Peer Reviewed Science. The Environmental Revitalization Paper does address, however inadequately, the principles of strict [commercial] liability, state responsibility, participation of indigenous governments, or free-prior-and-informed-consent [FPIC] as understood in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

The CCTHITA raises the following concerns that are not adequately addressed by the Paper:

- The Environmental Assessment Revitalization Paper does not adequately address the CCTHITA testimony to the Expert Panel to Review Federal Environmental Assessment Processes to the Indigenous Presentations forum on December 9, 2016. Please refer to the prior CCTHITA testimony submitted with these comments. The CEAA proposed legislation to change the cost-benefit approach of review in favor of a sustainability approach represents a move towards a science-based evaluation, however, the state retains the discretion to impose decisions based on the self-determined interests of the state.
- The Dominion of Canada's support for the United Nations Declaration of the Rights of Indigenous Peoples (UNDRIP) burdens the federal and provincial/territorial government with a requirement to implement FPIC, which needs definition with the Paper.
- British Columbia Province's proven and persistent violation of the Boundary Waters Treaty of 1909 that prohibits pollutants with transboundary affect needs to be addressed within the Paper.

- Indigenous governments, including First Nations of Canada and tribal nations of the United States, must participate in the environmental process, through FPIC, but also as peers within bi-lateral [multi-lateral] relations between the US and Canada.

Cost Benefit versus Sustainability Analysis
The proposed legislation should consider in its change from the current cost benefit project analysis to sustainability tests, which is defined as a spectrum of environmental, social, economic, health and cultural spheres (the five spheres), the interests of indigenous peoples governments. At no point can a benefit to one sphere come at a significant or consequential cost to another. Indigenous peoples governments may not share the same interests, perspectives, or cultural values as the federal/provincial/territorial government, and such distinctions must be both adequately considered within the analysis, and protected by the FPIC process.

Closing Gaps in Strict Liability and State Responsibility
Existing Gaps
Legislation must provide a mechanism to fulfill and enforce the duties of strict [commercial] liability and state responsibility when strict liability is inadequate. A financial mechanism is key.

Industry Funded Bond Pool
Planned reclamation costs, strict liability funds, and state responsibility commitments must be based on an independent risk assessment. An industry-funded pool by industry assessment, insurance policies, bond fund, or taxpayer assessment, are all potential mechanisms, but assurance of financial capacity adequate to planned and unplanned needs is necessary.

Incorporation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)
Legislation must 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 outlining government-to-government dialogue with First Nations and other Tribal Nations in shared watersheds recognizing the role of Indigenous people as decision-makers regarding assessment process and outcomes. Legislation must 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
CCTHITA is profoundly concerned about the concept of free, prior, informed consent and about the way it is typically treated in connection with the rights of indigenous peoples. It is likely to

result in serious harm to Indian nations and other indigenous peoples unless proposed legislation fundamentally changes how the UNDRIP and FPIC address these issues.

What does "free, prior, informed consent" mean? It is simply a noun with redundant intensifiers. It is an expression of agreement or willingness that an act take place that would otherwise be a violation of a right. It is not a substantive right like the right to land or the right of self-determination. It is not a legal rule creating legal duties or legal interests. It is at most a procedural right (the right to give or withhold consent) that is incidental to or a part of some substantive right. To say it another way, free, prior, informed consent is the act of giving up or compromising a legal right, a human right – usually only temporarily or in part, but sometimes completely.

When free, prior, informed consent refers to relinquishing or compromising fundamental rights – human rights -- it is likely to be a bad thing, even dangerous in the extreme. Free, prior, informed consent is usually treated as a good thing – supposedly beneficial. Instead, free, prior, informed consent has become the formula for getting around and overcoming the rights of indigenous peoples. It is deployed to open the gates for mining companies, oil companies, timber companies, and countries to get hold of Indigenous Peoples' lands and resources.

It is insensible to give primary attention to giving away, evading, waiving, by-passing, and overcoming Indian rights rather than to safeguarding, clarifying and promoting inherent Indigenous Peoples' rights. In most instances, free, prior, informed consent is not a right at all – merely a thing, a concept, rather than a rule or principle. As it is used in the UN Declaration, free, prior, informed consent is not a right at all. The term appears six times in the Declaration:

Article 10, forbidding forced relocation; the term is redundant and adds nothing to the article.

Article 11 on takings of cultural, religious and other property; the term merely helps to define a wrong for which redress must be provided.

Article 19, calling for consultation "in order to obtain" their free, prior, informed consent; in this article, it is clearly not a right – merely a desired objective.

Article 28 refers to redress for lands taken without free, prior, informed consent. In this article the term merely helps define the wrong for which redress must be provided.

Article 29 prohibits hazardous waste storage except where there is free, prior, informed consent. Such consent creates an exception to a general prohibition.

Article 32 requires consultation "in order to obtain" free, prior, informed consent. Free, prior, informed consent is not required but must be sought.

As can be seen, nothing in the Declaration creates a right of free, prior, informed consent in any meaningful sense. Whether it is a right or merely a concept, free, prior, informed consent is so poorly defined (or not defined at all) that it is practically useless because it is so uncertain and

treacherous. Who can give it? What constitutes consent? How is it to be expressed? How do we know it is free, not coerced, given under duress, or corrupted? When is it informed? All of these questions need answers. In practice, some form of monitoring is needed to guard against abuse, fraud, corruption and dishonorable dealings.

This concept has precipitated in the context of the absence of actual legal rights of indigenous peoples to their lands and resources. With good intentions, it appears that some advocates use the concept in two ways:

a. It appears that the term is used as a kind of euphemism to avoid alarming states with talk of actual, enforceable rights to land or resources; and

b. Where no actual legal right exists for a community or a people, the concept seeks to gain some opportunity for the community to have a say or to object to a project or activity affecting the community or people.

There is a proper place for free, prior, informed consent. It is not a concept that is bad *per se*. From what has been said above, we can observe that it has at least two proper uses and meanings:

- It refers to an incidental right (the right to grant or withhold consent) to rights to lands, resources, and self-determination, and to some other rights.

- It can sometimes be justifiably used as a makeshift argument in situations where no formal legal right exists, yet justice demands some level of control or a right to be heard for the community or people affected by some plan or activity.

It is seriously misguided and confusing to treat free, prior, informed consent as a substantive right and as something beneficial in itself. There is no other field of law where primary attention is given to the process of giving up rights rather than to the content of those rights and the protection of those rights. The right to own, use, control, benefit from, and dispose of lands and natural resources and the right of self-determination, the right to control or govern activities that seriously and directly affect indigenous peoples, communities, and resources.

Real rights do not focus on incidental or even *ersatz* "rights"? Accordingly, CCTHITA recommends that legislation must define:

1. Genuine, substantive legal rights that are clearly established;
2. Rights that are defined in straight-forward legal terms;
3. The Rule of Law; and
4. Effective judicial remedies when those rights are infringed.

We do not need illusory rights or "unique – rights." Such stuff results in just what we have right now: an unworkable, ineffective and harmful legal framework that benefits primarily those who oppose and prey upon Indian peoples. Appropriate legislation should discourage the use of ill-conceived and mistaken legal ideas in place of real law.

Cumulative Impact/Assessment Triggers
Legislation must ensure that all projects are assessed for cumulative impacts, including transboundary affects that implicate indigenous governments' interests, for potential 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. Assessment must be conducted upon request from the public and/or Indigenous peoples if found that development may impact cultural, social or ecological sensitive areas.

Conclusion
Canada is signatory to the Boundary Waters Treaty of 1909, the Biodiversity Convention, the UNDRIP, and other accords, in additional to domestic law of the CEAA and provincial/territorial law. The inherent rights of indigenous peoples' governments must be addressed in proposed legislation, policy, and regulations, but within their context and from their perspective.

PRIOR CCTHITA TESTIMONY:

Strengthen the Weak Cumulative Effects Analysis for Multiple Projects.

The *Canadian Environmental Assessment Act 2012* (CEAA2012 or the "Act") and its regulations establish the legislative basis for the federal practice of environmental assessment in most regions of Canada. The Act describes the Environmental Assessment (EA) process as "one project, one assessment." This is not protective of the overall values in a watershed or region. The assessment of the impacts of any one project needs to be coupled with all other development in the watershed or region. Infrastructure associated with these developments (including power lines, road access and water use and withdrawals), should be integrated and discussed holistically.

This cumulative impacts assessment should be conducted by the Federal Ministries and agencies and not the Province or proponent. Sections allowing Provincial equivalence and substitution for federal analysis should be removed. Allowing the provinces or territories to conduct cumulative effects analysis through their own EA processes has failed to achieve the goals of the Act.

All EA's should take a watershed approach to the impact analysis as the smallest scale of review.

Currently under the Act, any designated project on non-federal territory with no aboriginal or trans-boundary implications, or any effects on local or regional air, water or soil, climate, biotic interactions (e.g. competition, predation, herbivory, etc.), ecosystem functions (e.g. nutrient cycling, energy flow, productivity, etc.) or wildlife other than fish and migratory birds, are excluded from consideration. *See* CEAA2012 §§ 5(1)(b) & 5(1)(c)). An impacts analysis for all of these values should be reinstated for all projects and the effects considered cumulatively.

Indigenous Consultation

The procedural aspects of Indigenous consultation are not adequately addressed and often left to the proponent. The Act should require a minimum prescribed level of consultation and include measureable benchmarks to evaluate the success of that consultation.

Indigenous governments, including those, such as Central Council, subject to transboundary environmental affects, should be invited to participate on environmental assessment working groups, which are tasked with leading a technical review of the environmental assessment information provided by a proponent. It should be a requirement both for direct engagement with Indigenous groups to determine how they want to be involved, and for negotiations of Impact Benefit Agreements. Early engagement allows for an early understanding, before the assessment begins, of what traditional or community knowledge exists, sensitive areas to be avoided, and considerations for the scope of the environmental assessment.

The Act should embrace as standards the UN Declaration on Rights of Indigenous Peoples and include specific language concerning free prior and informed consent to assure accessible, transparent and meaningful consultation including the right to appeal and the right to consent.

Specific Requirement for Transboundary Watersheds

The Federal environmental assessment process should apply to all projects that have the potential for transboundary affects. In addition, an independent oversight body (Panel) review should be required for all projects in a transboundary watershed, basin, acquifer and ecosystem to bring credibility to the environmental assessment process and give downstream users transparent access and ability to affect the decisions. This Panel should have the authority to amend decision statements issued to proponents to allow for implementation of findings.

Requirement to Conduct a Robust Alternatives Analysis

In the Act, explicit requirements for needs and alternatives analyses have been eliminated. *See* section 19(1)(e). A robust alternatives analysis should be reinstated.

The Operational Policy Statements under the Act should include the rationale for the selection of the project design among all viable alternatives that fulfill the project objectives. This should include a consideration of alternatives including the "no action" alternative, as well as the rationale for selection of the final project design and mitigation. Rejection of an alternative cannot be based solely on the cost to the proponent. Any consideration of cost should be accompanied by transparent financial information from the proponent. Business confidentially should not be a pretext for a proponent to withhold information in considerations of design and mitigation alternatives. If any of these requirements are waived, the rationale for the waiving of these requirements should be published in the Act's registry. *See* CEAA2012 § 19(1) (j) and § 19(2).

Alternatives analysis should begin with an Ecosystems Services assessment and be based on a set of general principles that include the inherent right to a healthy environment, by including, (i) long term impacts on communities from risky developments; (ii) a human right to clean water; (iii) protection of environmental, economic and cultural rights (that does not permit a trade-off of or off-set to food, air and water security); and (iv) human life and cultural practices equivalent to

or pre-emptive of profits, especially profits made excessive by externalizing the added cost of meeting environmental standards through best practices onto people and their ecosystem who would then bear the cost of pollution caused by discharges and accidents.

Must include an Evidence-based Approach based on Peer Reviewed Science

The Operational Policy Statements in the Act should be strengthened to specify that all predictions about environmental effects and their significance be accompanied by: (i) an explicit statement about the underlying causal hypotheses; (ii) an explicit account of the project-specific evidence that, in the view of the reviewer, justifies the predictions; (iii) an explicit assessment of the extent to which the predictions are consistent with the weight of current scientific evidence; and (iv) if they are not, an explanation for the discrepancy.

All parts of the EA should be based on credible and accountable peer-reviewed science. Every EA is concerned with (a) predicted effects; and/or (b) predictions about the effect of mitigation measures on these effects (i.e. predicted residual effects). A residual adverse environmental effect is an adverse environmental effect of a project that remains, or is predicted to remain, after mitigation measures have been implemented. All too often the scientific evidence for these predictions is lacking and there is little consideration of error or synergistic effects between multiple predicted impacts arising from a single project or cumulatively with other projects in the watershed. The rationale and/or evidentiary basis for these predictions is often weak, verging on non-existent. Without clear scientific evidence these predictions are mere guesses that lack a factual foundation or justification.

The hypothesis on which the impact prediction is based should be specified. All pertinent related science should be reviewed and referenced, including evidence that does not support the hypothesis. The EA should establish a clear cause and effect case based on evidence and data. Conclusions not based on actual evidence should not be allowed.

Mitigation plans also should be based on science and experience. Follow-up studies should be required to measure if the predicted outcomes of the mitigation (hypotheses) are true. Mitigation measures should be implemented regardless of whether the residual environmental effects are predicted to be significant or not to help account for unexpected cumulative and synergetic effects.

[end]