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August 2018

Dear Minister and Project Staff,

Thank you for taking on the important project of revitalizing BC's *Environmental Assessment Act*. We are glad to see many of our concerns addressed in your Discussion Paper and we likewise appreciate the opportunity to provide constructive criticism.

In particular, we are happy to see your government commit to sustainability in the EA Act; include BC climate targets; prioritize and enshrine the needs, rights, title, leadership and knowledge of Indigenous peoples; move up the timing of and weight given to community engagement; increase transparency and accountability; create new offices to support assessments; increase the variety of projects assessed; nip irreconcilable projects in the bud lest they waste everyone's time and money; expand monitoring, compliance and enforcement; and provide funding for all of the above.

Efficiency motivates us to focus the rest of our submission on what to improve so that British Columbians get an effective and satisfying EA process that fully aligns with the United Nations Declaration on the Rights of Indigenous Peoples, as informed by the excellent work of our allies at West Coast Environmental Law.

1. Next-generation assessment in British Columbia establishes sustainability as a core purpose and outcome

Sustainability criteria must actually establish legal requirements to which decision-makers can be held accountable, so that **projects which fail to meet defined legislative sustainability and reconciliation criteria – including Indigenous consent, a climate test and respecting ecological limits – must not be approved under a new assessment law**. In contrast, legislated criteria will likely be ineffective if they are simply a list of things to be “considered”. There is not yet enough information about the proposed sustainability criteria to determine whether they will be effective.

It is encouraging that the Discussion Paper identifies fostering sustainability across all pillars as a central purpose of assessment, but sustainability must also be meaningfully defined in law. A clear legislated sustainability purpose, which is given legal teeth through strong sustainability

decision criteria, will go a long way to helping a new assessment law further sustainability on the ground.

2. Next-generation assessment in British Columbia ensures climate targets are met

The strength of any climate test in an assessment will depend in part on the strength of BC's climate targets and strategies. In May 2018, the provincial government introduced legislation to update BC's greenhouse gas reduction targets, and committed to introduce an updated climate action strategy in autumn 2018 to seek to meet those targets.¹ New climate action strategies and new assessment legislation should be designed to reinforce each other through practical tools (for example, through provincial carbon budgets that are applied in assessments through sustainability criteria).²

Neither BC's Discussion Paper nor the Advisory Committee report mention the Paris Agreement or address how international climate commitments will be reflected in assessments. Some observers have criticized BC's new climate targets as "not strong enough to keep us below the amount of warming that global leaders committed to in the Paris climate agreement."⁶ New assessment legislation should explicitly recognize that a purpose of assessment is to assist BC in making decisions that support and are consistent with doing our share to meet Canada's international climate commitments. Also, the new assessment regime should leave "room for improvement" as BC continues to evaluate and strengthen its climate plans, for example through applying carbon budgets in assessments as described above, since carbon budgets can be periodically updated.

3. Next-generation assessment in British Columbia recognizes First Nations as decision-makers

Indigenous direction and agreement will be important to arriving at the details of legislative approaches on the above-noted issues to bring the UNDRIP standard of free, prior and informed Indigenous consent into action in the context of assessment.

The Discussion Paper is silent on what will happen if agreement is not reached with First Nations at the process planning stage, for example, on the question of whether the assessment should be by independent or Indigenous-led panel or some other approach, what studies are required and who will conduct them, timelines, funding, and so on. New legislation should require that, where desired by First Nations, government-to-government agreements are in place that address these matters before an assessment commences.

The Discussion Paper does not clearly establish consent from Indigenous governing bodies as a condition that must be met before an assessment certificate is granted.

4. Next-generation assessment in British Columbia promotes cooperation among jurisdictions

While it is generally true that a single process is preferable, fully collaborative assessments should ensure all jurisdictions carry out their assessment responsibilities to the highest standard

in that process. Thus, with the exception of recognizing Indigenous-led assessments, BC should scrap substituted assessments and prioritize collaborative assessment.

Any substituted assessment must meet key legislated requirements on issues such as public participation, transparency, publically available reasons for decision, and so on.

5. Next-generation assessment in British Columbia ensures the public plays an integral role

It is not clear how assessment legislation will guarantee that public engagement is deeper than simple comment periods. The Discussion Paper suggests that specific engagement such as community hearings will be identified in an Assessment Plan, but this case-by-case approach does not provide assurance that deeper public engagement will occur in practice. Legislation should include public hearings as a default component of assessments, and establish criteria for Assessment Plans to ensure that public engagement consists of more than just comment periods.

BC should implement the EA Advisory Committee's recommendation to provide for establishment of a Community Advisory Committee to act as "a visible device for gathering public feedback" and "help in the process of setting information gathering standards and conveying results to the lay public".³ A Community Advisory Committee could, for example, support proactive engagement with public assessment participants on key issues to be addressed in the Assessment Plan, such as what public engagement methods will be used in the assessment, and how evidence will be generated and reviewed and the role of public participants in that regard (see below for further discussion regarding evidence).

The Discussion Paper does not clearly identify who will lead public engagement, and its references to proponent-led engagement are troubling. While proponents will undoubtedly wish to conduct engagement of their own, the public engagement required by legislation should be led by the body conducting the assessment – not the proponent.⁴

6. Next-generation assessment in British Columbia protects human rights

The protection of human rights should be included in the purposes of the assessment law, and assessments should address impacts on human rights generally (i.e. in addition to impacts on Indigenous human rights set out in the UN Declaration). The Discussion Paper does not propose either of these measures.

7. Next-generation assessment in British Columbia addresses "big picture" regional and strategic issues up front

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.

8. Next-generation assessment in British Columbia is independently overseen

The Discussion Paper assumes that the EAO will continue to lead and oversee BC's assessment regime. The EAO is an agency housed within the provincial government and is not independent in the sense contemplated by the Vision that we support.

Unless otherwise determined through collaboratively developed Assessment Plans and related government-to-government agreements, independent or Indigenous-led panels should be the default for assessment, not the EAO.

9. Next-generation assessment in British Columbia assesses more projects

The Discussion Paper's proposal to maintain an ability to exempt listed projects from assessment, so that they "proceed directly to permitting", is entirely contrary to the Vision recommendation and poses an obstacle to strengthening public confidence in BC's assessment regime. The ability to exempt listed projects from assessment should be scrapped.

The Discussion Paper contemplates changes to the Reviewable Projects Regulation, however, it does not address related changes that are also needed to the assessment law itself. The new assessment law should include criteria and factors to define and guide when a project requires assessment because it stands to impact sustainability, including ensuring that the public and Indigenous peoples can trigger assessments. This is an important part of the reforms needed now to ensure that the number of assessments increase to meet sustainability objectives, yet the Discussion Paper suggests this issue will be postponed to future regulatory development.

The Discussion Paper does not address or reflect the Vision recommendation for a set of basic process requirements for provincial regulatory approvals (e.g. applying sustainability decision-making criteria, and applying management objectives from an applicable regional or strategic assessment), that would assist in tracking and managing cumulative effects regardless of whether an undertaking is subject to a "full" assessment.

10. Next-generation assessment in British Columbia ensures decisions are based on thorough and balanced evidence

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.”⁵

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.

11. Next-generation assessment in British Columbia requires transparent, accountable decisions

More detail is needed on the content of the factors and criteria before conclusions can be drawn about their effectiveness.

More detail is also needed about regarding the assessment stages at which criteria will apply. It seems clear that factors and criteria will apply to the effects assessment and recommendations,

as well as the final Ministerial decision about whether to issue an assessment approval. However, there are other important stages where criteria are required, such as criteria earlier in the process for determining the scope and procedures of an assessment (e.g., when an independent panel will conduct the assessment).

12. Next-generation assessment in British Columbia provides a right of appeal

It is concerning from an accountability perspective that BC's Discussion Paper makes no provision for public appeal of any assessment decisions. (While judicial review may be available regardless of whether a right of appeal is provided in legislation, in general the availability of Court oversight is narrower, and the issues subject to review are more restricted, than where legislation clearly provides for a right of appeal).

It is important that the factors and criteria set out in legislation are specific and clear enough that those conducting assessments and making decisions can be held to account in meeting them. One criterion should be that the Minister's decision is based on an effects assessment report that is legally valid and complies with all requirements of the assessment Act. Further, the Act should provide that the effects assessment report itself constitutes a decision that is judicially reviewable.

13. Next-generation assessment in British Columbia ensures robust monitoring and compliance

Further details on oversight as well as resourcing of these commitments are needed in order to determine whether they can be meaningfully implemented.

14. Next-generation assessment in British Columbia receives enough funding

The details of the framework for a public participation funding program are not addressed. It is crucial that this program be anchored in legislation to ensure that sufficient public participation funding is consistently distributed, in a manner independent from political interests.

The Discussion Paper does not identify the need to increase funding for monitoring and compliance. Improved compliance tools and better opportunities for engagement in monitoring are less likely to be effective if there are insufficient resources to take advantage of those tools and opportunities.

Thank you for reading our submission. We acknowledge the immense efforts put in to date by BC First Nations Energy and Mining Council, EA Advisory Committee, West Coast Environmental Law, and all other participants in this long-needed revitalization.

Best wishes to you as you delve into the feedback from this comment period. We look forward to reading your resultant "What We Heard" paper and of course the ultimately revitalized BC *Environmental Assessment Act*.

Endnotes:

1. West Coast Environmental Law, Ecojustice, Environmental Law Centre and Pacific Centre for Environmental Law and Litigation, A Blueprint for Revitalizing Environmental Assessment in British Columbia (April 2018), online: ["Blueprint"] page 3.
2. Caitlyn Vernon, "Time to stop dangerous wishful thinking about LNG Canada's climate impacts" (17 June 2018), online: .
3. EA Advisory Committee report pages 24 and 26.
4. Blueprint page 4.
5. EA Advisory Committee report page 25.