

## Environmental Assessment Revitalization Indigenous Implementation Committee Meeting – July 10, 2019 – 8:30 AM to 4:30 PM

**Chairs:** Scott Bailey

**Attending Members:**

Nalaine Morin, Sunny LeBourdais, Anna Osborne, Bruce Muir, Verna Power, Nicole Kapell, Angel Ransom, Chief Maureen Chapman, Jackie Thomas, Melanie Walker, Dave Nordquist, Ang Smith

**EAO Attendees:** Amy Avila, Nathan Braun, Paul Craven, Danielle Smyth, Mark Haines, Tanner May-Poole

**FNEMC Observer(s):** Paul Blom

**CEAA Guests:** Lydia Hwitsum, Tara Frezza, Regina Wright, Seth Cain, Stephanie Sabagio

**Regrets:** Bob Chamberlin (Co-Chair), John Risdale (Chief Na'Moks)

**Comment:**

- Meeting notes did not begin to be taken until 11:00 AM due to transportation issues affecting the majority of EAO staff arrival time.

### High Level Overview of New Environmental Assessment Act (To assist in the IIC's priority setting)

- The Environmental Assessment Act (EAA) will be brought into effect late fall of 2019 with time until then for development and engagement regarding policies and guidance for the EAA's implementation. As the EAA is not yet in force Project still fall under the 2002 EAA.
- Projects that have obtained their s. 11 order by the time the new Act comes into force have the option to transition to the new EAA. The EAO clarified that once the new EAA is in force projects that have passed under the 2002 EAA but not obtained an EAC have three years or will be required to be assessed under new EAA. Any new amendments to existing environmental assessment certificates (EACs) will automatically fall under new EAA.
- The new EAA increases involvement and the roles of Indigenous nations. The EAO explained that this includes building consensus with Indigenous nations and seeking consent at specific stages of an environmental assessment (EA).
- Consensus seeking process, as well as dispute resolution, are being defined implement the EAA and follow the United Nation's Declaration on the Rights of Indigenous Peoples (UNDRIP).
- Following a comment regarding funding for required resources the EAO noted that the fees and capacity funding will be provided to assist participating Indigenous nations effectively participate in the EA process.
- The Indigenous Implementation Committee (IIC) queried regarding if and how regional assessments would occur. The EAO noted that this topic was still in discussion with various parties, including the stakeholder implementation committee and other agencies, and would be brought forward.

- Concern was raised regarding proponents no longer being required to determine significance of effects and the EAO's capability of completing this component of an EA.
  - The EAO explained that the proponent would still be required to provide the data required to determine significance but that significance itself would be completed by the EAO, participating Indigenous nations, etc.
  - It was also noted that the EAO currently does not use the proponent's conclusion regarding significance as the conclusion of an EA but instead uses the proponent's data to work with assessment partners to complete the significance assessment.
- The IIC noted that there is potential for an insufficient quantity of technical information to be collected to accurately determine if a concern should be identified as significant highlighting the importance of involving Indigenous communities in baseline studies.

## New Environmental Assessment Process in Detail

### *Early Engagement*

- Early engagement allows Indigenous nations, the public and governments to be engaged and provide input early in the EA process and assist identification of issues.
- The IIR noted the term "nation" is unclear and could be interpreted to be other groups that are not recognized Indigenous nations such as bands or communities. This may work negatively towards implementing the UNDRIP requirements for government to government relationships.
- The IIR questioned when SOC would be considered and noted that while the new approach to inclusion of Indigenous nations is reasonable, SOC remains important.
- The EAO responded that this is explained in the EAA section 25 and that it would be discussed later in the IIC meeting. The EAO also noted that the new EA process does not ignore SOC but instead aims to have engagement begin early and not initiate with SOC.
- The IIC noted that numerous permits come in prior to an EA beginning. These are regulated by Acts such as the Wildlife Act; however, lack of incorporation of Indigenous knowledge (IK) at these investigative stages reduces accuracy of baseline studies (e.g., season or location of tests). The EAO and proponent should be engaging with Indigenous nations early to develop accurate Initial Project Descriptions
  - This is difficult to address but the EAO hopes to work with other Agencies to help improve baseline studies. The EAO can also consider incorporate this into the early engagement phase guidance documents being developed.

### *Readiness Decision*

- A readiness decision will allow for participating Indigenous nations to express consent if project is rejected or given exemption. Consensus on decision to commence an EA will be sought from participating Indigenous nations.
- The IIC queried how and when would a participating Indigenous nation would need to state what should be a concern that the proponent did not consider.
  - The EAO explained that early engagement should build towards a process order that would seek to address key concerns.
- The IIC also queried as to whom would define extraordinarily adverse effects
  - The EAO stated that this would be open to interpretation as to it would be greater than or equal to what was considered significant.

- The IIC noted that these effects should potentially defined as an Indigenous nation may consider it differently than the EAO. There is also the risk of without a definition it becoming a political factor without having a technical basis for decision making.
- The EAO explained that to determine that an early readiness decision to have extraordinarily adverse effects it would essentially mean that this readiness decision could not even be made.
- The IIC noted that a lack of definition does have the potential to benefit Indigenous nations by providing flexibility to be applied based on the individual Indigenous nation's interpretation and its application in a specific situation.
- However, the IIC also noted there is potential for a decision maker to define extraordinarily adverse effects conflicting a participating Indigenous nation's view. It would need to be ensured that these viewpoints are considered and effectively incorporated.
- Providing further definition was identified as a priority for the IIC.

#### *Process Planning*

- This includes a process order with an assessment plan, information requirements and permitting plans. 120 days are allotted for process planning phase which will require working with participating Indigenous nations as part of early engagement phase to assist with prioritization.

#### *Application Development and Review*

- Proponent develops a draft application which is then submitted for 180 day review period. Following which the EAO, participating Indigenous nations and technical advisory committee can query the proponent for clarification prior to proponent submitting final application.

#### *Effects Assessment and Recommendation*

- The effects assessment and recommendation phase allow the EAO and participating Indigenous nations to work together to draft Assessment reports, including information, seeking consensus on the conclusion, and moving together into the decision phase.
- The IIC noted that there are essentially three separate assessments: proponent's Application, the EAO's Assessment, and participation Indigenous nation(s)' Assessment(s).
- The IIC queried as to how the EAO would regulate their own Assessment including transparency of the assessment methods being used.
  - The EAO responded that they would ensure it was regulated and transparent, as is required in the new EAA. This falls under section 25(2) and 25(1) of the new EAA and policies and procedures to implement this are currently in development.
- The IIC voiced concerned about how legal challenges could be addressed and uncertainty considered.
- Further work on effects assessment methodology and mitigation policy was identified as a priority.
- The IIC noted that proponents have shown to better respect an Indigenous nation's perspective when the EAO shows support for their concerns.

#### *Decision*

- The EAO has 180 days to provide a recommendation to the Ministers which must include notification of consent or lack of consent provided by all participating Indigenous nations.

- It must be ensured that consensus is attempted to be reached, however this does not guarantee that an agreement will be reached.

#### *Post-Certificate (if approved)*

- New provisions are being implemented regarding mitigation effectiveness and the maximum EAC duration has been changed to 10 years with the option remaining to extend another five years.
- The IIC requested clarification as to how potential changes to situations over 10 years would be addressed. The EAO responded that the EAA allows for an EAC to be revisited after five years

#### Supporting Reconciliation and Implementing UNDRIP

- The allowance for Indigenous nations to self-identify in the early engagement phase is an essential component to support reconciliation and implement UNDRIP
- The new EAA includes a number of components for collaboration to work towards Indigenous partnerships. These opportunities include those to assess a communities' rights, access to dispute resolution, representation on the TAC and the new form of capacity funding.
- The IIC raised the concern that dispute resolution is non-binding.
  - The EAO responded that a number of Indigenous nations that were consulted during the EA revitalization process felt there should not be a standard as it will vary Indigenous nation by nation.
  - If there is an issue that has arisen it can be addressed as part of issues resolution.
- Currently there are already processes for projects to address the objectives and priorities of Indigenous nations and how they wish to have them assessed.
- The IIC asked in the EAO were to complete an EA would the Indigenous nation's Assessment be incorporated and in what way.
  - The EAO explained that it would depend on how much the EAO and the Indigenous nation collaborated on the Assessment. This includes the quantity of proponent data shared and amount of Indigenous nation information or conclusions from the Indigenous nation's Assessment were required to be incorporated into the EA report.
- There has been the initiation of discussion regarding agreements and collaborative arrangements across the province regarding having workings and trying to have new processes be initiation. These mechanisms can seek to maximize the alignment and collaboration between Indigenous and Provincial decision making and can change and evolve over time.
- The IIC quired if the EAA's section 50 agreement links to this or only the compliance and enforcement report.
  - The EAO stated that this would need further discussion but would be clarified as part of conditions and related items.
- The four principles of assessing effects on Indigenous nations were discussed.
  - The IIC noted that these were more statements than principles.
  - Greater clarity around consensus vs consent was sought.
  - The EAO responded that consent (the outcome) is something that occurs at key points in the EA process which consensus (the pathway) is something that is strived for throughout the entire process.
- The IIC will work to assist with development of methods to implement the EAA with consideration of free, prior and informed consent.

- The IIC noted that multiple Indigenous nations engaging with the EAO can cause issues to arise in some regions of BC. It should be ensured it is clear as to what is being done by the EAO with each Indigenous nation, striving to avoid conflicts. The IIC also noted that proximity is not necessarily the more accurate consideration for impact of a project on an Indigenous nation.
  - The EAO acknowledged that Indigenous nations in different locations may have different interests depending on their history in the territory, etc. The EAO is moving away from SOC to work towards avoiding only considering geographic proximity.
- The IIC voiced concern that valued components selected for EAs are often incorrect.
  - The EAO recommended that slides 41, 42 and 43 of the presentation be reviewed. d

### Reviewable Projects Regulation

- The reviewable projects regulation will be discussed separately in a teleconference (currently proposed for July 24<sup>th</sup> at 9am).

### Indigenous Knowledge

- The EAO noted that the IK information provided in this meeting was an initial step, including developed with other Indigenous nations through consultation, and that feedback and recommendation would be appreciated for further insight and options for how to best move forward.
- Presently the EAO has two primary components of IK: UNDRIP, and the current understanding of IK informed by engagement with Indigenous nations. The IK process has two primary objectives: (1) clarity regarding how IK informs EA Process and Decision; (2) clear policies for how EAO manages and protects IK
- The IIC noted the legal consideration regarding Indigenous information management (e.g., copyrights). It was also noted the similarity between Indigenous knowledge and consent.
  - The EAO noted that there are many ways to apply IK in practice, especially for individual Indigenous nations.
  - The IIC noted that this may make this ineffectual and that it would be individualized by each nation due to the significant differences.
  - Response – EAO would provide an initial interpretation of views and then distribute to IIC to receive feedback.
- The IIC noted that in the end it is what the outcome is that makes the biggest difference. Steps up to there will be important but the final decision is what really matters.

### Priority Setting

The IIC established a list of priority topics which will be circulated and inform the fall meeting schedule.

### New Federal/Provincial Cooperation Agreement

- The Canadian Environmental Assessment Agency (CEAA) stated intent to coordinate and cooperate to the greatest extent possible and that an agreement (memorandum of understanding) was already in place with the new agreement to address the new EAA and new federal Act. This new agreement would continue to allow for cooperation, substitution and joint panels.
- A 30 day public comment period (PCP) began on July 8, 2019 which the IIC can use to comment on the agreement but CEAA can also meet with the IIC directly for discussion.

- The IIC voiced concern about how the Metis are recognized as a nation by the federal government while not being recognized by the Province.
  - CEAA responded that the federal government's position is that Metis rights are recognized in BC and across Canada so that for federal assessments Metis can come forward to have their rights addressed. However, the wording on this topic has not changed from the former agreement.
  - The IIC noted that this would be an opportunity to address the concern by removal of the Metis' rights from the agreement. The Metis cannot simply state they have rights within one of the Indigenous nations' territory, the federal laws conflict with the provincial.
  - CEAA responded that the provincial and federal governments came to different interpretation of the supreme court case on this topic, leading to this discontinuity.
  - CEAA plans to finalize the agreement shortly after the PCP but this will not be the last change for nations to provide comments on it.
- From the new agreement the province and federal government plan to cooperate and work together in early engagement and continue with collaboration throughout the EA process.
- Indigenous nations will have the opportunity with meet with the federal government when it is known that is project is being initiated to discuss what it will entail and work with the federal government following the proponent submitting the initial project description.
- The IIC noted that BC would, in a substituted EA, be required to consult with Metis which would have the potential for conflicts to occur.
  - The EAO responded that as the province does not view Metis having rights in BC this will need to be a situation to work towards solving moving forward.
  - CEAA noted that generally the Metis would not be considered as participating Indigenous nations, just those requiring consultation.
  - The IIC commented that this would require political discussions with chiefs and should not be something to be determined by the IIC.
- The IIC noted three issues for discussion:
  - Deferral of duty to consult for substitutions to the EAO rather than confirming with affected Indigenous nations their opinion on this decision.
    - CEAA responded that in the new agreement CEAA will become more engaged and have greater opportunities to directly consult with Indigenous nations.
  - Strategic Assessments vary from provincial to Canada-wide in scope. However, some policy plans (e.g., climate change) should be scoped Canada-wide.
    - CEAA responded that the agreement is primarily focused on individual projects while federal strategic assessment are completed separate from the agreement. However, the federal government would need to ensure the project meets or exceeds Canada's climate change requirements. This would be something that BC would be required to considered to be allowed to complete a substitution.
  - How would strategic assessment be affected in terms of regulatory authority where different authorities maybe be in different positions?
    - CEAA responded that they would conduct their own significance assessment and that all parties can come to their own conclusions for considerations in their respective reports.

- IIC voiced concern regarding EAO determining significance and not requiring proponent to do so as well.
- CEAA responded that their final report would include their own determination of significance, not following the proponent's conclusions.
- IIC representative commented that they themselves no longer review proponent's significance because do not feel it is neutral. The EAO can work with Nations to strive towards being neutral.

### Next Steps

- IIC meetings will begin again in September and occur biweekly throughout October, November and December.
- These meetings could be organized in a format with general topics discussed in the morning (macro), followed by specific topics and components selected for detailed discussion in the afternoon (micro).
- Meetings in locations outside of Vancouver will be considered.

### Action Items

- EAO to provide additional material to IIC (IK slideshow, RPR, process map, notes and member lists from stakeholder implementation committee and consultant group, previous materials from the EA revitalization process).
- EAO to avoid using acronym of PN or PIN, instead use participating Indigenous nations in all documents.
- EAO to provide DoodlePoll with potential dates (and associated meeting topics) for IIC fall meetings and potential locations of the meetings.
- Hold separate RPR teleconference (July 24)
- EAO to provide a Priority List of items for the IIC to review.