

Environmental Assessment Revitalization Indigenous Implementation Committee Meeting – September 17, 2019 – 9:00 AM to 4:30 PM

Chairs: Ang Smith and Scott Bailey

Attending Members:

Anna Osborne (telephone), Nicole Kapell, Melanie Walker, Dave Nordquist, Verna Power, Bruce Muir, Jackie Thomas, Angel Ransom, Chief Maureen Chapman

EAO Attendees: Amy Avila, Kate Haines, Danielle Smyth, Trish Sterloff, Paul Craven, Tanner May-Poole, Fern Stockman (telephone)

FNEMC Observer(s): Paul Blom

Stakeholder Implementation Committee Guest: Bob Bocking

Regrets: John Risdale (Chief Na'Moks), Nalaine Morin, Sunny LeBourdais, Bob Chamberlin

Indigenous Nation Pre-Meeting Caucus

- Pre-meeting discussion occurred amongst IIC members and four areas were discussed:
 - Discussion of TOR (see below)
 - Co-drafting of materials. IIC reiterated their desire to co-draft materials.
 - Single submission of documents
 - IIC pre-meeting discussions requested prior to each IIC meeting.

Opening Discussion

- IIC is seeking clarity in timelines for the fall and upcoming commitments and to ensure members can come prepared for meetings.
- **ACTION:** EAO will provide a summary of the deliverables and process and timelines for review
- Based on the spacing of the meetings and length of time between revisiting topics IIC members would appreciate a re-cap at the start of each meeting.
- **ACTION:** Co-Chairs will re-cap preceding meeting and relevant topics previously discussed prior to meetings

Terms of Reference

- IIC members noted that there may be more work to do.
- **ACTION:** Conference call to be scheduled to finalize the TOR.

August 13 and August 27 Meeting Minutes

- EAO request for review of meeting notes and reminder that notes will be posted publicly once finalized.
- **ACTION:** IIC member requested to add page numbers to meeting notes.
- Request from IIC member to receive notes within 48 hours
 - EAO commented that the process being followed is to send draft notes to Paul Blom first prior to all members. Therefore it may be challenging to finalize within 48hours

- **ACTION:** IIC internal caucus to consider process for meeting notes
- Reminder that when notes are going to Ang ensure not going to Angel by mistake.

Remuneration

- EAO made phone calls to each member to give a heads up about contract approach.
- Contracts provided to all members; EAO reiterated that there is no pressure to sign today and questions/comments can be addressed prior to signing.
- **ACTION:** IIC members are requested to review and either accept or refuse contract offer.
- Scott Bailey can spend time at lunch or following the meeting discussing the contracts as a group or one on one.

Linkages with Stakeholder Implementation Committee

- Bob from SIC attended to provide a background on the purpose of the SIC
- Meeting schedule for SIC has been provided to IIC with the purpose to keep the IIC aware of the SIC proceedings
- **ACTION** – EAO will reach out to IIC representatives to arrange attendance to upcoming SIC meetings (next one October 2).

Consensus Seeking – Context/Vision

- EAO reviewed how we got here:
 - No manual/starting from scratch
 - First out of the gate for new statute
 - Did have some experience with collaboration agreements with Nations across BC
 - Extensive work with FNEMC prior to EAR mandate
- Comment from FNEMC observer that the point about burden of proof requirement (from UN Rapporteur's Report) if consent is not achieved is important and was key point of discussion during development of the Act. Comment that addressing this in the broader UN Declaration and Shared Decision-making legislation will be important.
 - EAO stated that dispute resolution provides the opportunity to address these concerns
 - Province is also working to implement the UN Declaration in other forms as it has a broader scope than the EA process alone.
- Discussion regarding how nations can prepare themselves for EA process and expression that each Nation may be coming from a different level of experience and orientation with EAs.
- IIC comment regarding that EA process is the main one that FPIC applies to and that it is essential that consent is received at the start of the EA for the project to proceed. It was asked if this would be an opportunity for nations to veto.
 - EAO understood that there is conflict and concern about large projects from the beginning and that this would be an opportunity to initiate meeting UN Declaration and FPIC. However, it could be more complex as situations arise where some nations provide consent while other do not. SOC may become relevant to seeking consent in these cases.
- IIC concern regarding tension between overlapping nations that may have different views or even different views within the same Nation
 - Questions raised about the SOC process and accuracy – what is the role and opportunity for SOC moving forward?

- Consent should be required by nations in the territory prior to other nations being allowed to expand their own.
- EAO explained that it was difficult to determine the form of information and accuracy required to make these decisions. The new Act has provided a new process to address this issue, as well as having a dispute resolution opportunity early in the process, as the SOC may not be the only or most effective method of establishing a nation's participation in decisions.
- EAO acknowledgement that some of these comments/tension points relate to next meeting's topic on assessing effects on Indigenous Nations
- IIC question to clarify opportunities for Indigenous nations to participate in the new EA process
 - It is understood by nations that under the new federal Act some funding will be provided
 - IIC feels BC needs to ensure nations are able to clearly state their capacity available to complete the necessary EA work as funding is only one component. Time and staff and other items also affect their involvement.
 - EAO noted that this is an important concern and that both efficiency and the ability to slow the EA process when necessary will be components to help address the concern.
- Question from IIC member about whether consent equivalent to veto from the Province's perspective.
 - EAO noted that this is not where EAO chose to focus.
 - Focus is on ensuring that the best information and process is put forward so that all governments can make decisions.
 - If consent is not achieved, then the onus is on the Province to provide rationale
 - This is why the process is designed to exhaust all options and efforts to achieve consent
 - The intent of seeking input from the IIC is to minimize and significantly reduce the likelihood of getting to a place where governments are not aligned on the point and expression of consent.
- Comment from IIC member that the EA Act aims to reach consent but does not implement FPIC because the Crown still maintains the final decision. Section 7 of the Act provides provision for Indigenous jurisdiction and decision-making and urged BC to use this section (not just in relation to treaty and title lands).
 - EAO noted that there are two places in the Act that hardwire the requirement for an expression of consent (Readiness Decision and Final Decision).
 - The decision on a provincial EA is made by Provincial Minister but the process is designed to respect Indigenous Nations' EA and decision-making process.
- Comment from IIC member that right to self determination is not the opportunity to say something; it is the right to determine a future. This means that to follow Indigenous law requires consent to be seen as a veto.
 - EAO noted that the idea behind the IIC is to work towards addressing these concerns. The issue with veto is that it can be seen as simply a method to stop a project rather than developing a project together that benefits parties and reaches consensus.
- Comments from IIC member regarding definitions of consensus seeking and consent and note that Indigenous nations may have different definitions than EAO:
 - In some experiences of the IIC member, not everyone has to love the decision but everyone needs to be behind it
 - There are different perspectives within each Nation and in relation to the Province's definitions about consensus seeking, consent and consensus.

- Request to leave room in the guidelines to bring forward different views on what consensus and consent is from Indigenous perspective.
- IIC member also liked the idea of looking at consensus seeking in a positive light – what can we do through a process to make all best efforts to reach consensus.

Question from IIC member – if S. 7 is applicable then what happens and if not triggered than what happens?

- EAO noted that there are two lanes:
 1. The Act speaks in broad instances and the application of the consensus seeking and consent model under the Act. If there is a lack of consent expressed there are two safeguards in place (triggers dispute resolution, offer for meeting with Minister).
 2. If there is a S. 7 Agreement that applies and lack of consent expressed that is within the scope of the S. 7 Agreement then a project cannot proceed without consent.
- EAO noted that a big part of making the new Act work is implementation and the role of the IIC is critical.

Advice regarding Consensus Seeking and Consent Guidance

- EAO noted its intent to bring back the first draft of the Guidance to the IIC for the November 4 meeting and would request any comments from the IIC with the next 2-3 weeks (by early October) to inform development of the first draft.
 - IIC members commented that timelines may be tight and requested to discuss further.
 - **ACTION:** IIC members determine feasible deadline, communicate this to EAO and provide comments by that date.
- Suggestion to consider UN resources on how to implement the Declaration
 - UNPFI, UN Forum
 - Other jurisdictions that are signatories to the UN Declaration and have developed similar guidance
 - UN former PFI co-chair (Grand Chief Ed John) is from BC – note from member that his input could be requested and possibly have him come and speak to the IIC
 - **ACTION:** EAO look into the PFI further.
- Question from IIC member about whether there will be a separate guidance that will be developed for Proponents and Nations. Comment that the guidance would likely be quite different for each.
 - EAO noted that the guidance is being developed for Nations and EAO staff but also can be used to inform other parties (i.e. Proponents)
- IIC member noted that the consensus tracking table will be helpful especially to communicate to leadership. Suggested that the consensus tracking table could be used in conjunction with a detailed technical issues tracking table to hone in on why consensus wasn't being reached. Example provided of issue with screening application.
- An issue to overcome will be what terminology to use to convey concepts at a high level. Boiling down issues into a table may not be possible.
 - EAO acknowledged that the table will have limitations and is one of multiple tools that can be used.
 - EAO could maintain the tracking table
- Case studies could be added as an Appendix to the Guidance to provide examples of how Nations are approaching consensus seeking (i.e. toolkit could be added to the end of the

guidance and possibly other guidance documents as well). Case studies of failed experiences would also offer some important lessons learned.

Key Discussion Questions

- 1) How should the EAO seek consensus on EA process with Participating Indigenous Nations who may have different interests in the project area?
 - You would ask them (i.e. when you go to a Nations territory, you respect their ways)
 - Sometimes there is work that Nations need to do internally first before being able to
 - “sometimes it’s salsa; sometimes it’s tai chi”
 - There should be some checklist/guidance that is broad enough to ensure that key questions are being asked/steps being taken to ensure Early Engagement is on the right path.
 - Have we answered this question? Do we need more time to answer the question? Are we happy with the answer?
 - EAO putting forward a one pager that includes **lines of inquiry** to need to start in early engagement and continue through process. This does not presume a specific approach but asks the right questions to determine what the right approach is. For example:
 - What needs to be asked or clarified in Early Engagement (i.e. decision-making processes)
 - If there’s some kind of conflict, how do you make decisions with your neighbours and what do you need from EAO or not need?
 - Will allow for flexibility to consider different systems of government (band and hereditary)
 - EAO role should not be to “fix” or divide and conquer but to allow space for Nations to work out different agreements

- 2) How should the EAO seek consensus on substantive issues/outcomes with Participating Indigenous Nations who may have different views on the project?
 - The Province (MIRR) should be contributing to funding Nation building work
 - Ensure that Nations meet and discuss issues at working group meetings or separately, including starting at Early Engagement.
 - How do you get people to the table that do not want to?
 - You have to go to them, take the time.
 - Not all Nations can be treated equally in terms of capacity and experience with EA processes
 - EAO noted that there could be a role for Strength of Claim where Nations disagree and efforts to reach consensus have failed.
 - Disputes are not usually about the project; the disputes are typically related to accommodation and what is appropriate (i.e. revenue sharing).
 - “How” to approach consensus is going to vary by stage of the EA and what the issues are at play.
 - Part of the challenge is that we are working within a process that includes a third party
 - Need to create space to have separate table with both governments to deal with broader issues that impact EA
 - When an EA is nestled into a higher-level reconciliation table (i.e. CRA, land-use planning, ESI) it is helpful.

Discussion on Process for Reviewing Documents and Receiving IIC Advice

- IIC member expressed interest in agreeing on a process

- IIC members noted that we should spend one day on concepts, then feedback used to produce draft 1 which can be reviewed by the IIC and key issues discussed as needed.
- IIC members felt that a second full day meeting for a previously discussed topic would be unnecessary.
- Concern expressed by IIC that single submissions are being brought into process that should be brought forward to the whole committee prior to submission.
- Now that there is a mechanism for funding to prepare for meetings members noted that some preparation can be done in advance.
- How do we know what quorum is to make decisions at the IIC?
 - IIC member noted that role of IIC is not to make decisions
 - IIC member noted that all members will wear “decisions” so it is important that all members have the opportunity to share their views.
- **ACTION:** Danielle will capture approach and provide to Ang/Scott before distribution to the IIC
 - Consider how to build in point at which the committee will agree together to the outputs.
- **ACTION:** discussion on TOR to try and capture question of quorum and role of IIC in making decisions.
- **ACTION:** Ang to email Gitxsan commandments for consideration of the committee.

Dispute Resolution

- Initial presentation and discussion held on Sept 17 to seek direction on focus for “deep dive” on Oct 16.
- EAO noted that dispute resolution is not required to follow timelines in the Act. However, it would be beneficial to establish timelines for a project.
 - Suggestion from the IIC that there be tiers of timelines to allow for different types of disputes
- Concern from IIC of recommendations provided by facilitator
 - EAO stated that facilitators will assist within discussions but that any recommendations in the report would be from conclusions that occurred during the dispute resolution
- IIC member commented that the term used for Facilitator is western focused
 - EAO noted that landing on the term was a key point of discussion during development of the Act and there was no perfect term.
 - FNEMC observer commented that the roster concept is important so that the Facilitator can function as independent and do not necessarily have to be from BC
- Intent of BC is to make space in the process for Dispute Resolution that respects and acknowledges the Nation’s specific processes that need to be considered.
- IIC member expressed concern that Minister is making the decision about the roster
 - EAO noted that there will be a recommendations process.
 - Facilitator qualifications will also be prescribed and standard of conduct will be applied in order to act as mediator in BC
- Question by IIC member as to who funds dispute resolution and facilitator
 - EAO noted that they have the authority to force proponents to pay the nations funds (via an order). EAO would fund the facilitator.
- IIC member queried as to if it would be EAO or FNLC to develop the pool of facilitators

- EAO responded that this would be the EAO but the method of establishing the pool is still something being developed.
- IIC member asked how nation could be involved in selection of facilitators to avoid political influence.
- EAO noted that the facilitators would be required to be qualified and neutral.
- IIC supported approach of a flexible, “minimalist” regulation to bring dispute resolution into force as early as possible, allowing for policy flexibility within the framework of the regulation.
 - **ACTION:** EAO to prepare two detailed documents for Oct 16 meeting: (1) potential content of regulation and (2) draft process/guidance for dispute resolution, noting areas that would flow from the regulation (less flexible) vs. areas that are policy-based (more flexible).
 - **ACTION:** IIC members reflect on discussion questions to prepare for Oct 16 meeting
 - **Intended outcome of Oct 16 meeting:** EAO has clear feedback from IIC on content of regulation and process for dispute resolution to inform drafting of regulation and move forward in finalizing process/guidance. EAO and IIC members have clear understanding of what products the members will see again and when.
 - **NB:** timing of actual draft regulation being available for review subject to availability of legislative counsel (government lawyers who actually write the regulation). EAO to provide update on timing at Oct 16 meeting.

Readiness Decision

- First draft of Guidance provided September 10 to IIC for review.
- In addition to input provided verbally during the Sept 17 meeting; **EAO requested further input by October 4 to inform next draft of Guidance. Further discussion can occur as needed at the November 4 meeting.**
- IIC member commented that if existing thresholds are set and current state is already at or near this threshold it may little impact that qualifies at extraordinary or significant.
 - EAO noted that it needs to be clearly defined in a project what qualifies as significant and what is extraordinary.
- Knowing whether an effect can be mitigated at the start of an EA is an important point to determining whether extraordinarily adverse would apply.
- IIC asked as to how rights are being established and what makes effects extraordinary vs just below this level.
 - The EAO noted that this is something still be discussed and that the SIC is also in discussion on this topic.
- IIC voiced concern regarding the accuracy of studies proponents use with some being over a decade old. Up to date studies are required to accurately establish accurate state of the land.
 - Readiness decision should be made in consideration of climate change (using information that is dated does not account for climate change)
- IIC member suggested using a tool for determination of extraordinarily adverse effects termed a “rights based harvest study” to determine if the project or component of the project would extinct the community. This has been used by a nation recently. It has been becoming more popular as it allows this topic to be quantified.

- This form of methods has been used by other nations recently to provide justification/proof of what they are stating to support their concerns/issues.
- IIC comment that readiness decision is another threshold. What work can we do now to define the considerations that would be used to determine when thresholds point to something that are extraordinarily.
- IIC member noted that the dialogue around defining extraordinarily should be stimulating a broader discussion.
- **ACTION:** IIC members to provide feedback on draft Guidance to Fern Stockman by October 4 and feedback will be incorporated to bring back for November 4 meeting. Definitions discussion to be brought back on October 16 meeting.

Indigenous Participation Guidance

- Deferred to October meeting.

Preparation for October 1 Meeting – Assessing Effects to Indigenous Nations

- EAO suggested a concept for how to approach the Oct 1 meeting (focused on Assessing Effects on Indigenous Nations)
 - Panel format where IIC members and/or guests provide 5-10 min presentations on their experience, approaches and methods assessments undertaken by Indigenous Nations with respect to the potential effects of the project on the nation and on its rights. These presentations can be based on experience/best practice or ideas that members wish to contribute.
 - EAO would provide a list of questions in advance which could guide the presentations and stories to be shared
- IIC members present agreed that the proposed approach would be amenable and the group identified some members and guests that may be suited and interested to present on the panel:
 - Angel on her experience with Mt Milligan
 - Nalaine on her experiences provincially with EA processes
 - Sunny on the SSN assessment process and Ajax
 - Guest from Tsleil-waututh with experience on trans mountain
- IIC members that were not present during the meeting and are interested to present or contribute are invited to do so and should confirm
 - **ACTION:** Danielle to send a high level summary of the afternoon discussion including the proposed approach to the Oct 1 meeting. This will ensure transparency and an opportunity for IIC members that were unable to attend the meeting or the afternoon portion of the meeting to provide input (prior to the full meeting minutes being circulated).

Action Items

Action	Lead	Date/Status
EAO provide clarity regarding timelines and IIC role for the fall	EAO	
Co-chairs will recap preceding meetings and relevant topics discussed at beginning of meetings moving forward	Co-Chairs	
Conference call to be scheduled with internal IIC caucus to finalize TOR prior to Oct 1 meeting. TOR to address question of		

quorum and role of IIC in making decisions (i.e. provides advice rather than decision making).		
Page numbers added to Meeting Notes	EAO	Completed
IIC members accept or reject remuneration contract offer	IIC	
EAO will reach out to IIC representatives about attending SIC meetings (Oct 2)	EAO	Complete (through email September 24)
IIC members will establish a feasible deadline to provide comments on the draft Consensus Seeking and Consent Guidance	IIC	October 1
EAO will look into UN resources regarding the implementation of UN Declaration in other jurisdictions	EAO	November 4
EAO will capture approach to reviewing documents and provide to co-chairs before distribution to the IIC. Consider how to build in point at which the committee will agree together to the outputs.	EAO	Complete
Ang will email IIC the Gitxsan commandments	Ang	
EAO to prepare two detailed documents for Oct 16 meeting: (1) potential content of regulation and (2) draft process/guidance for dispute resolution, noting areas that would flow from the regulation (less flexible) vs. areas that are policy-based (more flexible).	EAO	October 16
IIC members reflect on Dispute Resolution discussion questions to prepare for Oct 16 meeting. Questions provided by email on September 10 with the September 17 meeting materials.	IIC	October 16
IIC will discuss process for meeting notes at internal caucus	IIC	
IIC members to provide feedback on draft Readiness Decision Guidance	IIC	October 4
Danielle to send a high level summary of the afternoon discussion including the proposed approach to the Oct 1 meeting.	EAO	Complete (sent September 24)