

Environmental Assessment Revitalization Indigenous Implementation Committee Meeting – October 1, 2019 – 8:45 AM to 4:15 PM

Chairs: Ang Smith and Scott Bailey

Attending Members:

Anna Osborne, Nicole Kapell, Angel Ransom, Jackie Thomas, Sunny LeBourdais, Verna Power, Nalaine Morin

EAO Attendees: Amy Avila, Danielle Smyth, Mark Haines, Kate Haines, Tanner May-Poole

FNEMC Observer: Paul Blom, Zaria Stoffman

Stakeholder Implementation Committee: Bob Bocking, Karen Elliot

Meeting Notes

- IIC member commented that they want to see more of a focus on actions with timelines for follow up. IIC request to pull actions into a tracking table.
- EAO noted that it maintains an action table that can be circulated with the notes.
- One set of notes will be shared as soon as possible after each meeting (aim for within 2-4 days) with a date for comments and finalizing.
 - Note that it was unclear whether notes would be shared with all IIC members or with Chairs and FNEMC observer first.

Prioritization Review and Timelines

- IIC member commented that they do not want to spend much time on Capacity Funding. Would rather spend more time on Consensus Seeking, Indigenous Knowledge and Dispute Resolution.
- Comment that maybe we should spend less time on administrative discussion to allow for more time on the substantive materials.
- IIC member commented that their priorities are Dispute Resolution and Indigenous Knowledge.
- IIC member commented a desire to move forward with the content of the meeting.
- IIC member commented that some topics are “meatier” discussions where others feedback can be provided and then closed off; other topics for example consensus and consent and Dispute Resolution may require more time. We should be identifying what may require more time vs what can be addressed quickly.
- IIC member commented that Indigenous Knowledge will require more iterative approach.
- IIC member asked whether there is potential for meetings continuing into 2020.
 - EAO is working with assumption that Act is taking effect in late December
 - Some pieces will have a longer timeframe to finalize and may require testing as drafts before finalized. This could occur after the Act has taken effect.
 - EAO is not closed to formal role of IIC post-December and this can be explored further prior to the October 16 meeting.

Linkages with SIC

- **ACTION:** the following IIC members to attend the following SIC meetings:
 - Sunny to attend October 17
 - Melanie to attend November 14
 - Angel to attend December 11

Setting the Context – 19(4) Assessments

- IIC member commented that building consensus seeking into the process is important so that you are doing it all along rather than a point at the end.
- IIC member commented that in practice they have tried to do this but there have been some issues.
 - EAO noted that the issues are what EAO wants to hear to work through how we can try to address and work together as much as possible.
- Analogy provided by IIC member – we are two salmon swimming up river and need to keep swimming. BC and Indigenous and local governments are all swimming up the river and we all need to know where we are going.
- Need to have the space for Indigenous Nations to make decisions; especially on what the impacts are to Indigenous Nation's rights and interests.
- **ACTION:** At next meeting EAO will bring back first draft of IK Guidance. We can pull concepts in the IK Guidance into the Assessing Effects guidance.
- IIC member commented that we need to think about when an Indigenous Assessment and EA assessment have different outcomes (seriousness of impact) – **how do we create a process where the Indigenous assessment is considered equally to EAO's assessment?**
 - EAO commented that we need to be clear how the assessment is being considered (i.e. through the reasons for decision).
 - If there are multiple decisions being made decision makers need to have access to the same information/assessments being used to make decisions.
- IIC member asked who would have access to Indigenous Knowledge and other information the nation provided to complete their 19(4) assessment.
 - EAO explained that this would be kept as transparent as possible but that it would be based on the Nation's decision.
- Duelling experts may agree to disagree on methods and information requirements and these issues could be resolved by decision makers.
- Comments from IIC member on scenarios:
 - Capacity Funding: Where Nation does not want Proponent to do baseline collection about Nation's interests. If there isn't a good relationship with the Proponent they would not be discussing capacity needs with them for baseline collection. Does a Nation have to have a relationship with Proponent to receive this funding? Scenario 3 costs a lot of money to undertake this work.
 - Another member commented that sometimes the data used by a Proponent does not represent the 4 seasons, it only represents one.
 - Nation Goals and Objectives should be included as part of the assessment (i.e. Impacts to Salmon need to be assessed because as a future state a Nation want them to exist).
- If a Nation is not doing an assessment on their interests then it is possible a Nation may agree to have a Proponent can take this on. However if a Nation is doing an assessment of their interests then a Proponent should not be required to do so. Let's not be duplicative if the Nation is taking the lead.

- EAO agreed the goal is to find clarity early in the process of what the requirements are and how they are being assessed. Need to be clear about the scope of 19(4) and any role for a Proponent.
- Could use principles:
 - avoid duplication
 - emphasize clarity
 - will vary by project and value.

Sunny LeBourdais – SSN Ajax Experience and Assessment Process

- Issues included:
 - recognition of SSN's role in governance by Proponent
 - little Early Engagement occurred which resulted in a missed opportunity to align processes
 - lack of inclusion of SSN wishing to have a review panel for oral concerns to be voiced
 - narrowed scope and content of SSN assessment when interpreting
- Key Components:
 - Cultural Heritage Study brought forward Trout Children telling and the indigenous law was brought forward and became foundational to the whole process.
 - SSN considered both western science and Indigenous knowledge in their assessment
 - SSN used a panel approach to gain Indigenous knowledge
 - Consensus seeking to avoid dispute resolution
- Issues that can arise:
 - Relationships can be established with a junior company who is later purchased by a larger company
 - Timing of effects assessments and timing of Indigenous decision making or procedural requirements may not align with timing of EAO's process and decision making.
 - The SSN storytelling method of EA does not typically fit well with standard EA methods and western science
- Main learnings from Ajax:
 - Establish relationships early in the EA process
 - Discuss title with nations and understand how decisions are being made with or by Nations
 - Proponents should not be interpreting Indigenous law
 - Concept of the timing of when a decision is going to be made is very important
 - Need resources to be collaborative

Nalaine Morin – HVC Experience

- Many Nations will likely go the route of the SSN and do their own process.
- Reality is that this takes capacity and resources that many Nations may not have to undertake this type of assessment.
- In these instances, there are opportunities for Nations to work collaboratively together and with EAO within the broader assessment process to meet the Nation's specific governance and process requirements while taking advantage of an established EA process and the resources available.
- The importance of relationships is key to this approach.
- Strategy broken down to 3 relationships
 - Proponent and Nations
 - BC and Nations
 - Between communities and Indigenous government

- What are the gaps in the process that cause angst and strain these relationships?
 - Comprehensive engagement strategy is important
 - Nation specific impact assessment tool – to understand and define potential impacts to their rights and interests on the land
 - The approach uses a matrix that summarizes the strategy:
 - The matrix goes through the stages of a typical EA process and focuses on the 3 relationships and identifies specific tools that correspond to each of the phases of an EA that can address some of the gaps that the Nation has pre-identified.
 - Allows Nation to focus early on the concerns that they have
 - Ensures the communities to play an important role in making the decision that the Indigenous government is making.
- The approach was described as a hybrid between an Indigenous assessment and an EAO assessment
 - For example, Nation develops an engagement strategy approved by the Nation's government
- This allows to consider the nation's capacity, the complexity of the project and the direction received by the Indigenous government
- This approach has been the result of the experience with encountering gaps on 16+ environmental assessments
- IIC member asked whether conceivably, under the new Act, if the matrix serve the same purpose of the process order?
 - It goes a long way to doing that but before it's complete it needs to go to the respective Nations to make sure there is nothing missing.
- EAO expressed an observation that this approach is similar to the goals and scope of a 19(4) Assessment.
- **ACTION:** Nalaine will share a slide deck regarding this approach and specifically the matrix, if it can be shared.

Capacity Funding

- IIC member commented that \$25K may not be enough to cover a Nation's initial assessment of potential impacts to inform what their participation will need to be
 - Early engagement funds inform the preliminary understanding of engagement requirements. There are additional funding amounts available in process planning
- IIC member expressed concern that Indigenous Knowledge is still listed as being covered under Proponent and Nation agreement for funding. This can be problematic if the relationship is poor, if the Proponent questions linkages to VCs and the assessment.
 - The process order gives authority to require information from Proponents and these information requirements are required prior to moving through the EA process and are subject to consensus seeking and defined in the process order.
 - **IIC member suggestion to re-frame the column that notes proponent funding IK to articulate the nuances of the process and expectations of Proponents**
- EAO noted that the objective is to communicate to Proponents that there are additional activities outside of those funded by EAO that need to be funded. **EAO to revise the title of the Proponent funded activities to clarify this – not only if a Nation “opts in” to EA funding.**
- IIC request to create space in the Proponent funding for additional and specific requirements that might need to be undertaken in order for Nation to participate.
- IIC member request that additional funding could be negotiated with Nation and EAO under 19(4) or otherwise.

- Nations may be unwilling to sign an agreement with a Proponent that they don't have a relationship with.
- **Is there an opportunity for EAO to support capacity that is not necessarily tied to a project?**
 - This could be helpful for a Nation to prepare and get ready for projects in the future.
 - Providing "baseline funding" might take less money over a longer period of time but decreases a nation's reliance on consultants and over time builds capacity for Nation to participate in project EAs.
- **Could there be a fund similar to the federal funding to allow Nations to become "ready" for the new Act? Could be funded through MIRR, FLNR, EMPR, other agencies? Nations could apply to access these funds.** How is EAO planning to help build capacity for participation of Nations under the new Act?
 - EAO is working on developing a training/development program
 - EAO will follow up with MIRR about this idea of a nation building fund
- IIC member comment that opening up areas that have not had access before leads to greater infringement. Suggestion to re-frame the criteria that are being used to define a level 1 funding.
- IIC member concerned that capacity funding reg may incentivize Nations to broaden their scope of interests to the full scope as opposed to using the Early Engagement phase to determine the scope of interests, appropriate scope of assessment and appropriate amount of funding.
- FTE basis is beneficial but does not account for broader capacity needs for participation (i.e. legal, communications, community engagement, etc.)
- EAO asked IIC for advice on whether the amounts per year seem reasonable?
 - Depends on the number of projects.
 - Depends on whether the proponent is providing funding. Without funding from Proponent, proposed amounts from EA would not be enough.
 - Depends on experience of the lands office and whether they are already structured appropriately
 - Size of project and complexity of the EA is a factor that needs to determine requirements for participation and capacity funding needed.
- Nation would have autonomy to use the funds how they need during an EA.
- What is EAO charging for fees of Proponents?
 - Model is shifting to be increased (nowhere near full cost recovery)
- Work planning is an opportunity for Nation and EAO to discuss budget and engagement requirements
- IIC member wants to see what the definition of "Indigenous Nation" is under the fee reg
- **ACTION:** For November 1 meeting, EAO to bring back to the IIC the substance of what we think the regulation would look like, the supporting policy guidance which will aim to incorporate the feedback from October 1 meeting that is within scope of capacity funding regulation.
- **ACTION:** IIC members to provide additional written comment on the capacity funding discussion to the EAO by October 18.

Assessing Effects to Indigenous Nations

- For a nation to be Participating Indigenous Nation they need to:
 - Be a rights holding entity (Section 35 rights)
 - Interests being assessed need to fall within jurisdiction of the Province and under the scope of the assessment

- IIC member comment that rights stem from title. Can't have rights if you don't have land.
- EAO confirmed that provincially BC does not recognize Metis as having S. 35 rights.
- IIC member comment that disputes between neighbouring nations may require space and resources to resolve.
 - DR is not meant to replace any other process that a nation or nations may need to use
- Dispute Resolution process may inherently benefit those Nations that are more experienced than other nations that have less capacity or experience.
- Strength of Claim (SOC) needs to be revisited, in light of new relationship, reconciliation, UN Declaration. It is an outdated process and approach that may not be suited to the new way of working together.
- Comments on EAO's characterization of the role of SOC – does not consider title, indigenous law, and uses terms like consultation and accommodation.
 - EAO to re-think the slide to tie in elements of UN declaration and how areas of the Act weave in the Declaration and reconciliation.
 - The bar is no longer duty to consult, it is an important legal consideration that needs to be taken into account and S. 35 rights need to be respected.
- IIC member asked that if EAO is open to any Nation being a Participating Indigenous Nation but scoping of interests is informed by SOC – will you end up in the same place under the old act where you are narrowing down Nation participation?
 - EAO noted that we would not be using understanding of interests to shrink down participation. We would be using understanding of interests to hone in on where we are focusing our assessment activities with Nations.
- Lines of inquiry that are importing to the understanding of interests and planning for engagement and assessment activities:
 - How are you working with your neighbours?
 - What are the commonalities within aspects of title?
 - Where are there areas of disagreement, how can we use DR to address?
 - Where we agree with technical issues but not accommodations (i.e. economic), how can we resolve through linkages with other agencies?
 - Would be interesting to explore with MIRR how to preserve the EA table for what it is there for (technical EA review).
 - Accommodation measures for EAO are conditions; mandate for revenue sharing is with MIRR.
 - IIC member noted Article 28 of the UN Declaration that EAO is the crown and has a responsibility to find solutions to providing restitution.
- FNEMC observer commented that he was surprised to see SOC in the slides, based on the understanding he had from FNLC leadership discussions. The observer suggested to move to Minister and Leadership level.
 - EAO expressed that it would prefer to bring forward solutions to leadership and agreed to work up some ideas and options for the IIC to consider further at a future meeting.
- IIC member noted that in their experience, although SOC is flawed, it does have some value in helping to address some questions that arise when thinking about removing SOC completely:
 - Who has the authority to make decisions? How is the decision making shared? Or not?
 - What is the appropriate level of consultation?
 - What falls out of level of consultation is accommodation and revenue sharing?
- How do you deal with these questions without SOC?

- Possible solutions could be looking at revitalizing the SOC process, making it more collaborative and inclusive of Nations views.
- EAO goal is to have a broader conversation that isn't narrowed to SOC.
 - It is really a governance issue and trying to understand how a territory is governed.
 - What we are really talking about is a lack of consensus about how a territory is governed.
 - This doesn't only have to occur or be informed by SOC. Perhaps this could occur in many different ways (i.e. through traditional governance structures for example through long house).
- IIC member commented that respectful recognition of governance and jurisdiction has to be the foundation. This is what the new Act is supposed to do.
 - There needs to be an opportunity to talk about the nature of interests, governance and jurisdiction with greater detail as a foundation to scope the assessment
 - What are the other foundation pieces or questions that need to be answered to inform governance and jurisdiction (which really stems from title)?
- IIC member shared some ideas for consideration:
 - Change the name SOC
 - Adapt the process to be more inclusive while still satisfying legal requirements
 - Allow for discussion and rebuttal
 - Indigenous Nations do not feel comfortable with SOC and never have. This has to be acknowledged. There should be a reconciliation process around this.
 - May need to lean on higher level (i.e. political bodies)
 - Be careful not to rebrand SOC
 - What are some of our questions around this?
 - Consent – decision making, how will this be determined?
 - Level of consultation and funding
 - Accommodation
 - Competing interests
 - Reframing to talk about governance: how an area is governed; understanding that, where jurisdiction is/was and how to develop a decision-making structure for project-specific impacts; this process is done collaboratively
 - Respectful recognition of jurisdiction has to be foundational
 - Package to FNLC and Ministers that is solutions oriented but also frames the discussion
- **ACTION:** EAO to bring back a revised slide to get at the need to consider governance and jurisdiction. This will include some options for the IIC to consider further prior to considering whether to bring forward to leadership.

Discussion of Meeting Schedule and Priorities

- IIC member comments that priorities are Indigenous Knowledge, Consensus seeking, Dispute Resolution
- Suggestion to focus on the products that need to be done for the new Act – Dispute Resolution, Capacity Funding, Early Engagement (specifically the understanding of interests) and readiness decision
- IIC Member expressed their priorities as Assessing impacts to Indigenous Nations (Early Engagement piece, PINs, 19(4) options), capacity funding, readiness decision.

- **Key principles:** What's needed right now and what's going to require more conversation?
- If there are 4 more meetings and 4 priorities that need to be focused on (DR, Readiness, Assessing Impacts, capacity funding)
- Are there places that we can go less deep to potentially narrow the priorities?
- **ACTION:** EAO can provide a simple table to identify what products will come forward when and proposal for how to use the next 4 meetings including whether there is potential to continue meeting into 2020.

Chief Ed John Invitation

- Discussion regarding Grand Chief Ed John attendance
- FNEMC expressed a willingness to extend the invite.
- IIC agreed this could be discussed further and revisited when we discuss the meeting schedule and priorities to determine the best meeting to have Chief Ed John attend.
- **ACTION:** EAO will add to the priority list for members to receive feedback
- If it's not possible to have him attend a meeting, IIC member suggested that at a minimum EAO should reach out to Chief Ed John.