

## Environmental Assessment Revitalization Indigenous Implementation Committee Meeting – October 16, 2019 – 8:45 AM to 4:30 PM

**Chairs:** Ang Smith and Scott Bailey

**Attending Members:** Verna (phone), Angel (phone) Jackie, Dave, Sunny, Anna, Nicole, Nalaine, Jessica (for Melanie Walker)

**EAO Attendees:** Amy, Danielle, Nathan, Tanner, Mark (phone), Tiffany, Kate (phone), Raluca (phone)

**FNEMC Observer:** Paul Blom

**Stakeholder Implementation Committee:** Karen (afternoon only)

### Introduction

- IIC Co-Chair provided update on meeting with Minister Heyman
  - Assured the Minister that if issues arose, the IIC would work directly with the EAO to find a solution.
  - Committee members felt it was important for communications about the Committee to come from the Committee itself.
  - IIC members expressed a desire to focus efforts on the policy work required for implementation of the new Act.

### IIC Meeting Schedule

- EAO provided a proposal for meeting topics and schedule for the remainder of 2019 and into early 2020 to IIC members.
- IIC member comments:
  - IIC member expressed support for proposed schedule
  - Member requested clarification on what Indigenous Participation Guidance is?
    - EAO clarified that the Indigenous Participation Guidance has a longer timeframe for completion and that this guidance will pull together what participation looks like through the entire EA process and will link to other stand-alone guidance on Assessing Effects, Consensus Seeking, Indigenous Knowledge, etc.
  - IIC member noted that the original list of priorities included mitigation and policies and asked why this was not on the schedule.
    - IIC interest includes Indigenous nations' involvement in monitoring and mitigation and post-certification, and how Indigenous knowledge (IK) feeds in.
    - EAO clarified that this was left off in error and EAO will add mitigation and policies to later topics in new year. This topics links to mitigation and effectiveness and application development and review guidance (CPD and table of conditions).
    - **ACTION: EAO to confirm status of these products and clarify the appropriate timing for scheduling IIC discussion.**
- IIC believes there should remain the ability of nations to participate in development of guidance and in involvement of applying it to new projects under the new Act after it comes into force.
- EAO will look at opportunities to continue engagement with nations about experiences and outcomes of the new EA process during the initial projects that are assessed under the new Act.

- **ACTION:** EAO will provide final schedule of future meeting topics and distribute to IIC by October 28.
- **ACTION:** EAO will ensure that each meeting ends with confirmation of the topics of discussion for the next meeting and IIC will discuss if changes are necessary to the schedule.
- **ACTION:** EAO will coordinate meeting dates for January, February and March 2020 (potentially one per month). A Doodle Poll will be distributed with potential dates
- FNEMC observer asked whether the IIC would like Chief Ed John to speak to the committee:
  - Comment from IIC member that this is not on the priority list but perhaps could re-visit in the new year.
  - Comment from IIC member that until the UNDRIP legislation is in place it is unclear whether there would be any additional value added given that the EA Act is already in place.
  - IIC decision to not include in the schedule at this time and potentially revisit for 2020 meetings.

### Indigenous Knowledge

- EAO drafted core principles to inform a draft document through research and collaboration with IIC.
- Further discussion is required regarding the covering letter from the IIC to support the document.
- IIC noted that the development of the IK Guidance to this point is the result of an open and honest conversation between government and nations and this is what we should be working towards.
  - EAO – agreed. The IIC is a leader in this topic and there are many other agencies within the Province that are interested in this work.
- EAO provided an overview presentation regarding the Indigenous Knowledge Guidance.

### Comments from IIC on Draft IK Guidance

- “Participants” is commonly used and the definition needs to be clarified.
  - EAO – the intended audience for the guidance is the proponent, nations and EAO staff so it will require this clarification. The EAO will include a definition in the guidance to clarify this.
- Multiple comments were raised regarding the 7 principles:
  - Overall the principles represent a good first draft, however, they are unclear and repetitive in some ways. For example – the proprietary nature of IK comes up in multiple principles and this should be bundled into one.
  - #1 Cultural Humility – IIC member noted that the concept of equity is missing; respect and recognition is about equity as well. Equity and equality are not the same and as IK has been overlooked in the past its usage must be carefully considered moving forward. If equity is provided for indigenous knowledge it will require greater resources since IK systems have not been validated in the past.
  - #2 Respect – consideration of “ethical space” should be added (i.e. walking on two legs)
  - #4 Flexibility – do not need to be “flexible” regarding Indigenous laws, policies and practices. Remove this and clearly state “Respect” for Indigenous laws. Remove reference to intellectual property.
  - #7 Permission of use – bundle together intellectual property points into this principle
  - IIC member suggestion to “nail the principles” and focus more time on these.

- IIC – see core principles as a very important and would like to closely work with EAO to finalize these (Sunny volunteered to work on this with EAO)
- **ACTION: EAO to revise principles and then schedule 1-2 teleconference sessions with the IIC to work through principles. Members can self select if they wish to participate. Doodle poll to suggest the dates.**
- Indigenous language should be clearly considered in one or more of the principles.
  - There will be different levels of capacity with language and this should be noted.
  - Language could be referenced in the context piece of the Guidance. For example, translating words from Indigenous language could be taken out of context. Only the Nation can decide what words they want to use and how they are defining it and what context is appropriate for using specific words.
  - Considering language is more than sprinkling a few Indigenous words into the guidance
  - Nations need to determine whether language is being appropriately used.
- Member has editorial comments on the Guidance that will be provided via email
- Suggestion to create an infographic that embodies the principles – rather than individual stories from specific nations
- Regarding “EAO staff readiness” – examples should be provided to help understand how IK has informed the EA process
- Storytelling and examples of how this could work throughout the guidance. Provide concrete examples of how IK has been successfully used in EA
- The guidance requires a glossary of definitions specifically include “Participants” and “Western Knowledge”
- Page 4:
  - IK falls within three general categories – this needs to be more broad
  - More categories are required than simply the three “general” ones provided.
  - Nations may have their own objectives. The document phrases things to be focused on the environment (tangible elements), failing to acknowledge intangible elements. Need to consider how to consider land use based on nation priorities and how their governance is involved.
  - The bullet point style may not be required. Quotes, visuals, graphics, etc. may be more impactful and able to assist with clear interpretation.
  - missing pieces around language, IK informing decision makin
  - IK informing compliance and enforcement of laws.
  - There is also what falls out of the EA and how IK is used
  - IIC recommendation to revise this section to characterize categories as “examples” add language that speaks to the fact that each nation will have their own definition and categories of IK.
  - Concerned about limiting the understanding what an Indigenous knowledge base is – it will be different for every Nation. Every nation will have a different understanding of what their knowledge base is.
- IIC queried as to what would the EAO would do if western science disagrees with IK
  - EAO noted the ability to use dispute resolution
  - IIC member suggested that going through scenarios about what disagreement could look like would be valuable
  - IIC member noted that the interpretation and valuation of IK is often incorrect

- EAO noted that the Act provides the space to allow for IK to be brought forward through the process and be used to inform both governments decision making. At the end of the day if there is competing information then it will inform two decisions.
- Recommendation from the IIC to frame the use of IK as “good governance and good decision making” which is what we are trying to accomplish under the new Act. Suggestion to reference this point at the start and the end of the Guidance. Linkage to governance is key. Should be referenced earlier and the guidance should be framed within the context of governance.
  - IIC member noted that it is important to ensure IK stays with the specific nation sharing it. There are concerns of IK being “taken” and nations not being contacted until afterwards as to how it is applied.
  - IIC queried if proponents will be required to follow the same process as the EAO with IK in the EA.
    - EAO – this is already in place but need to be improved. The EAO will need to have this in place for when the Act comes into effect.
  - IIC member commented that VCs can vary in meaning to each nation and the EAO may have a narrower view of what a VC means to a Nation. For example the value of “moose” has multiple aspects (cultural, spiritual, environmental, economic, etc.) whereas the EAO may view as value relevant to environment only. This needs to be considered.
  - IIC member noted that with western science there are decision making structures/tools to evaluate Western Knowledge. Is EAO going to use IK in tools that may lead to false outcomes? How will this be dealt with?
    - EAO noted that it will be important to have representatives from Nations that can help EAO understand what the appropriate evaluative framework is for considering IK in an EA.
  - IIC recommendation to provide greater clarify and emphasis on the role of the Knowledge Holder
    - EAO – understand that it is important that the knowledge holder is involved in the interpretation and will ensure this is emphasized in the guidance.
  - IIC member cited example of success in having project changes made as a result of consideration of IK and a Nation’s values (i.e. re-route of transmission lines and roads). However, what happens when the two systems conflict?
    - EAO – in some cases the answer may be to find a completely new solution.
    - IIC – this topic will be required for further discussion and development in future meetings. However, it will not be something to solve in this meeting or may not be feasible to completely solve overall.
  - IIC member asked - when EAO references “Nation” do they mean an individual community (rather than multiple communities that make up a Nation)?
    - EAO noted that the reference is to the group that EAO is working with on an EA
    - EAO will seek to clarify ahead of time, potentially before projects even begin, who is the IK holder and how to obtain permission for submission and use.
    - Although, this is a question that EAO is grappling with. How does EAO determine who the appropriate representative or governance structure is?
    - Some Nations may have clear governance while others may be in the process of clarifying. Governance readiness is going to be a key consideration of the Act overall. Not all Nations are at the same place with this.

- EAO is a project-based organization and are looking to other agencies via the broader reconciliation framework to help us with the readiness issue. EAO is trying to figure out what we can do to help with readiness.
- Term “benefits” of applying IK – need a different term (value, necessity, importance, requirement). How can we frame IK as requirement rather than a nice to have?
- IIC recommendation to discuss IK and Western Knowledge earlier in the document.
- **ACTION: IIC to provide input on potential stories to weave into the document and potential ideas for visuals.**

### *Confidentiality and Disclosure of IK*

- IIC member comments that when Nations build trust with EAO and share IK with EAO, they may not want this information passed to other agencies.
- IIC member noted concerns with the example of a recent letter received from Archeology Branch requesting information for use in a public GIS database.
- IIC raised concern regarding confidentiality of IK shared with other government agencies. Where is guarantee it will remain internally with EAO and not be transferred to other agencies?
  - EAO clarified that it will not share IK with other government agencies without the permission of the Nation. EAO may be required to share with MAG for the purposes of advice on the Project on which the IK has been shared. This will be clarified in the IK Guidance.
- EAO noted that some confidentiality provisions need to be further clarified in the guidance:
  - Sharing with other agencies for the purpose of subsequent permitting on the Project – the IK is likely to be relevant to these processes.
  - FOIPPA confidentiality protections and disclosure – need to clarify on what EAO can and cannot guarantee for protections under FOIPPA and ensure there is no harm regarding use of IK.
- IIC commented about the concern with sharing the draft IK Guidance with other agencies that may try to replicate the work the IIC has done without context and permission. Suggestion for the IK Guidance to include a reference at the start (possibly in letter from the Co-Chairs) with a disclaimer of use “Developed by IIC and not to be copied”. The guidance should clearly state how it was developed for future readers to understand who the contributors were.

### *Dispute Resolution – “Deep Dive”*

#### *Slideshow*

- EAO provided overview slideshow
  - Note – “conflict of interest” means both real and perceived
  - IIC – slide 8 – in this process it might be useful to have another arrow that talks about other factors that could affect the timeline (e.g. events in community)
    - EAO – this is something that is being worked through. Two options for extension are being formed. One for a DR looking promising having a 10 day extension. Second for extenuating circumstances requiring a longer extension.
  - IIC – is there an opportunity for a nation to put forward a facilitator that meets the requirements.
    - EAO – this could require two facilitators working together.
    - IIC – a facilitator should be able to “walk in both worlds” but this is hard to find. This is why sometimes it may be required to have two facilitators. For example experts who have knowledge about trauma and Indigenous point of view.

- IIC – not all facilitators will understand what is being shared in discussions so a facilitator should properly have the correct background knowledge.
  - EAO – the nation will be able to bring whoever they want to bring to the table to represent them.
  - SIC member commented that a powerful meeting that they attended was with a non-Indigenous and Indigenous facilitator both at a meeting. This helped address issues of equity.
  - IIC – the guidelines should be made more flexible to allow a nation individually to put forward a facilitator. A nation could have an individual who they feel is non-bias based on who they are and how they grew up despite that they are related to the nation and would not meet the currently proposed guidelines.
    - EAO – these are good points to consider in developing the DR policy.
  - IIC – maybe there needs to be an additional guidance for how to become a facilitator to help nations put forward facilitators to be added to the list
  - IIC – maybe nations should be able to put forward their own roster to choose from. Then the EAO could choose from that list based on trust they have with the individual from previous relationships.
  - EAO – gained advice from facilitators that sometimes in first meeting it is sometimes clear the two parties are not ready to talk.
  - IIC – mediation could be effective to start with the two parties understanding one another but perhaps not addressing the dispute itself.
- IIC – curious regarding the scope of facilitation. Need to make it clear what type of issues may potentially be addressed by DR and clearly communicate what will not. This will avoid time being wasted. If nations are not successful with their first DR experience, they may be unwilling to participate again in the future.
- EAO – The scope of DR pertains to issues that are within the scope of the EA.
  - EAO – if there are items entirely outside of the EA process. Alternative methods of DR outside of the EA process should be considered (e.g., external MOUs)
  - EAO – this conversation regarding in and out of scope has been had throughout application of the current Act. DR could potentially help identify how the nation and government can work together to identify potential “off ramps” that could be applied?
  - IIC – is facilitation worthwhile if it only produces a list of steps to complete for the items identified in the DR but only can be addressed outside of DR? Sometimes DR may result in a solution but other times disappointment which could dissuade nations from entering DR again.
  - IIC – will a DR be required to reach agreements in all situations? Are other options that aren’t included in the Act but may be far more effective able to be applied? Maybe there should be another tool put into place.
    - IIC – DR is much bigger than environmental assessment.
    - EAO – DR is an option to facilitate discussion regarding disputes if determined to be necessary.
    - IIC – it will be important to clarify that DR would not be designed to delay the entire project step by step.
    - IIC – need to consider on a nation by nation basis what they may have in terms of internal priorities for dispute resolution and considerations for potential internal disputes.

- IIC – DR will be a tool and potentially more effective if simplified. There needs to be motivation to initiate discussions and potential connections to government to government agreements.
  - IIC – the new UNDRIP legislation will also need to be incorporated.
  - IIC – DR is a topic for future IIC discussion and should be revisited at a later meeting.
  - EAO – DR will be brought forward to IIC meetings in December and January.
- IIC – slide 12 – timeframes should be more flexible, these could vary community by community based on situation.
- IIC – slide 11 – clarification should be required as to when the 15 days of referral initiates and if it refers to calendar days or business days.
- SIC – Slide 14 – once information is provided to the province as part of DR, how confidential would this be and what would be available publicly?
  - EAO – this is still under development. For DR specifically, the internal process will be confidential but the final report is being considered for public distribution. This would require an agreement to be reached between the nation and the EAO
  - IIC – need to ensure this is communicated to parties in the DR (tell them what is on vs off the record)
  - IIC – confidentiality is important to consider as you set up the DR process (e.g., do you need to have witnesses?).
- IIC – would there be difference in terms of type of process or scale of process? Size of project?
  - EAO – need to have this type of information taken into account as part of the DR.
  - IIC – readiness should be considered as well. Western system can be used against nations and the DR process needs to be open.
  - EAO – the DR process will need to be developed to be flexible and ensure it fairly considers both western science and indigenous nations.
- EAO – intent to provide a draft intentions paper by December 10, draft of the full regulations will not be available until 2020.
- **ACTION: IIC to provide by November 1 any responses to DR discussion questions that were distributed at the Sept 16 meeting.**

### Reviewable Projects Regulation

- EAO – review of RPR what we heard
- What was heard from outreach to groups and committees (ENGO, governments, public, etc.)
  - Important to ensure an UNDRIP lens is applied to RPR
  - Survey was completed
  - Public comment was offered
- What was heard regarding IN portion of the Act pertaining to RPR
  - Various perspectives were provided to EAO from IN lens
- EAO is proposing the RPR is the core tool to establish what is reviewable on day 1 vs not reviewable. But that there would also be tools within the Act that would address the variation on a nation by nation basis.
  - EAO in process drafting regulations with cabinet

- EAO is ensuring there are backstops to help ensure safeties are in place to capture projects that may not trigger but should. There are a suite of tools available in the Act and Regulations:
  - 1) A nation is a participating nation if it falls under the RPR:
    - They are within the project design thresholds;
    - Within project effect thresholds; and/or
    - Potentially in notification thresholds (if INs are notified they can request to be designated as participating nations)
  - 2) S11 Designations
  - 3) S41 Agreements
    - This will enable nations to undertake substitution
  - 4) Regional/Strategic EAs (this is a new Authority)
    - There is a tool here that nations must be involved in EAs from its application.
    - This will be as nations design their own EAs
- IIC – is this one of the only process in the new EA for RPR?
  - EAO – having the “red button” hopefully will dissuade the EAO from using it and instead try to work towards listening to nations in terms of their wishes. However, there is not a DR at this point.
  - EAO – the current Act does not define what a Minister has to consider. This new Act does require the impacts to a nation is considered (not just to the 5 pillars).
- IIC – if there is a policy in place for the nation, what will the minister need to consider?
  - EAO – the Act only states effect on nation on its rights. However, that would come in under the policy being developed.
- SIC – potentially add an example here to make it clearer to non-Indigenous readers (as a communication tool in the future). Doing the work up front will help see this Act as an opportunity (proponents). The more that can be shown to proponents the better.
- EAO will be circulating documentation in November that summarizes what we heard and any adjustments we are making in response to the public comment period.

#### November 4<sup>th</sup> Meeting Prep

- Further discussion required on:
  - Definition of extraordinarily adverse effects
  - Significance and value on defining on this
- New slide and briefing note regarding the Strength of Claim slide that was a concern in last meeting on Assessing Effects on Indigenous Nations.