

Environmental Assessment Revitalization Indigenous Implementation Committee Meeting November 4, 2019 – 9:30 AM to 3:30 PM

Attendees:

Chairs: Ang Smith and Scott Bailey

Attending Members: Verna (morning), Angel, Dave (morning), Sunny (afternoon), Anna, Nicole, Nalaine (afternoon), Bruce

EAO Attendees: Amy, Danielle, Nathan, Tanner, Fern (phone)

FNEMC Observer: Paul Blom (morning)

Stakeholder Implementation Committee: Denise Mullen (morning), Karen

Introduction

- 2020 meeting dates still in discussion; however, current (2019) is to complete as much as possible prior to last 2019 meeting (December 10)
- The next feedback that is provided will be used to edit the “principles” of the document
- Then after that the following iteration will move on to “technical” components

SIC Report Out

- IIC report out on what was discussed during the SIC meeting. The discussion included Indigenous knowledge, which is an additional topic for the SIC to review above and beyond its priorities. IIC member noted that it is difficult to incorporate Indigenous knowledge without a relationship with nations, the need to be willing to learn and reach out to new parties, and stressed the importance of not trying to “indigenize” western knowledge.
- IIC member observed that it is important for the IIC to have more time with the SIC (which ideally would have occurred sooner).
- SIC guest noted that BC and under the IIC’s leadership, is leading the way with Indigenous Knowledge across Canada.
- SIC guest commented that there is some apprehension about timelines and what it means to have multiple projects in one Nation’s territories.
- In a perfect scenario, we could handpick a group of people (proponent, BC, Nations, local communities, etc.) that are willing to learn together for one of the first projects under the new Act. Mistakes will happen when working towards reconciliation and it is more important what actions are taken after the mistakes.
- SIC guest noted that the Champions Table of the Business Council of BC may be an opportunity to identify projects, proponents and Nations that may be willing to be early adopters under the new Act.
- IIC member additionally reported that in the early phases of an EA it is important for proponents to listen to public as well as nations. Especially important as many nations are involved in many EAs at the same time depending on project locations. This can be one of the factors that makes applying and using Indigenous knowledge complex.

- IIC comment:
 - No all proponents are created equally but overall proponents are often blamed for issues that come up despite following the legislation and processes in place which ultimately may be the source of the issue.
 - Proponents should be required to focus on relationship building in order to benefit the long term.
- SIC guest highlighted the concept of “Leadership as a way of being” – more important *how* we act through the process of implementing the new Act than *what* is done (timelines, process, etc.)

Respectful recognition of Indigenous governance of S. 35 Aboriginal Rights (including Title) in Environmental Assessments

Discussion on Briefing Note

- During the October 1 meeting IIC and EAO discussed the proposed approach to working with Nations to develop the Understanding of Interests that is foundational to scoping the EA process and discussed how the EAO can have these discussions in a way that respects Indigenous Governance of S. 35 rights.
- To help stimulate further dialogue on this topic, the EAO drafted a briefing note for IIC to review and to support further discussions.
- IIC queried if EAO would be undertaking/leading discussions on lines of inquiry with Nations or would FNLR or MIRR?
 - EAO would envision that it would be primarily EAO staff though there are differences by region and EAO would be interfacing with MIRR, MAG and FNLR.
- IIC comment on part A of the briefing note (identify Agreements) – this should be broader to consider active negotiations. The first questions should be to the Nations “what are your interests, what does your governance look like”? Should also describe the interaction with the other Provincial agencies more.
- More emphasis on options for collaborative discussions. The collaboration is with the Indigenous Nations not just across ministries. Collaboration process needs to be more iterative, to allow back and forth with Nation to refine BC’s understanding based on information from the Nation.
 - The EAO confirmed that iterative and collaborative dialogue would be the intention.
- IIC member stated that “Option 1” regarding collaboration needs to be expanded with more details. The G2G engagement needs to occur at beginning, not after EAO has collected information. All nations overlapping the project area should be approached for conversation about interests and governance process.
 - EAO confirmed that under “Option 1” the objective is to engage in early and iterative discussions about a Nation’s governance.
- IIC strongly stated there is an issue with the strength of claim process regarding what influence nations have. IIC member commented that concern is that they are pre-Tsilhqot’in and do not consider an appropriate timeframe and are not always based on the full scope of information that should be assessed.
- Multiple IIC members agreed that strength of claim is a larger issue than what the IIC can resolve and should be looked at by higher/legal levels.

- EAO asked whether the IIC would be comfortable generating options that could be elevated at a political level. Is this approach something that we want to flesh out further? If we elevate to political level, what are we elevating?
 - IIC concern that technical staff are being asked to provide a voice for all 203 nations, which is not appropriate.
 - EAO explained that while there is still a need to consider s.35 rights and any associated legal obligations under the new EA process, the objective is to provide a process that is centered around governance.
 - IIC member noted that a tool will still be required to address the potential for disagreements when multiple nations self identify on a project. Since the new Act is moving away from SOC the new process for broadly inviting nations to participate should be developed in greater detail.
- IIC member recommended that given that the Act provides for a broader approach to participating Indigenous nations, the role of the IIC could be to provide some options for what technical or procedural steps could be followed to address potential areas of disagreement, to be put forward at political level.
- FNEMC noted that higher political levels have made it clear that political concerns are not something to be discussed at the IIC.
 - EAO is working to shift to make the process more respectful, inclusive and focused on understanding the governance of a Nation regarding their rights. “Option 1” of the Information Note essentially states that engagement with Nations will focus on understanding how the governance of s. 35 rights in the project area can be respected.
 - FNEMC observer noted that during development of the Act, their understanding was that strength of claim would not be part of the Act or regulations; noted that FNLC does not support use of strength of claim.
 - Recommended removing “Option 2” entirely.
- The EAO noted that the Act references assessing effects to S. 35 rights and the Province has legal obligations so we need a tool to address S. 35 rights. The recommended option does not mention strength of claim.
 - EAO clarified that the Briefing Note is being drafted to propose options for how to proceed at the procedural/technical level which could potentially be presented at leadership levels.
 - IIC warned that while the term SOC has been removed from the Information Note, the same practices are in place simply without this title.
- IIC member recommended that the Province should do a scoping assessment with the Nation to understand the rights themselves (within the temporal/spatial context), characterizing the rights and let this inform the scope of the assessment. This should be done at the start of the process.
 - EAO noted that this is where we want to start to understand what information is needed to assess impacts to a Nation’s rights. The process order serves as the scoping exercise.
 - If there are disagreements related to impacts to S. 35 rights, EAO needs some way address this.
- IIC member recommended taking a step back to frame out what the IIC will be accountable through engaging in these discussions.

- EAO clarified that the briefing note is completely open for edits, modification, writing from the IIC to assist with ensure is not a concern.
- IIC members noted a concern that often going into the EA process a nation is not actually concerned about impacts to the pillars but rather the political context and their Rights.
- IIC member voice discomfort discussing the topic as this was not what they expected when joining the IIC and they do not have the authority to speak on this topic.
- IIC member suggested using the BN as a tool to identify the issue rather than generate solutions.
- The EAO noted that it would be helpful to understand what the IIC can advance and recommend related to assessing effects of a project on S. 35 rights while meeting legal obligations? What kind of conversations can we have at the IIC or do we need to have with Nations about their governance and how to assess effects to S. 35 rights? Under all scenarios we need to have the technical and procedural aspects of how to engage in these discussions therefore it would be helpful to have some dialogue at this level.
- IIC member proposed that the IIC could work through option 1 as a procedural suggestion that the IIC could put forward including areas of concern, uncertainty or areas seeking direction on that may be out of scope. Discussion is so complex that the IIC may not be able to generate a solution but we could focus on capturing the discussion and bring clarity to what the issue is and potential technical or procedural steps can be taken.
- What EAO is trying to do through the questions is better understand a Nation's connection to the land and governance framework to manage the land. EAO needs to ask these questions to inform the scope of the EA and if we are hearing that there are conflicts, we would ask whether DR is required (though cannot compel another nation to enter DR)
- IIC member noted that effective EA needs to start with an effective and collaborative scoping exercise; the problem that some Nations run into is that the EA becomes a table for resolving issues of rights and title. IIC member suggested that a table to address issues of rights and title should be established separate from the technical EA table. IIC member noted that DR under the Act is not equipped to deal with issues outside the scope of the EA.
- IIC member noted that the briefing note does not consider preliminary impact assessments (for Treaty Nations).
- IIC member requested this topic be tabled until next meeting to get approval from chiefs.
 - **ACTION ITEM** –table discussion on the Briefing note for now and to be discussed at next IIC caucus meeting.
 - IIC member requested that the document not be modified at this point until IIC members have gotten back to EAO.
- IIC member shared the view that that the aspects we are discussing relate to procedural and technical aspects of impacts to rights not the legal aspects therefore the topic has a place for discussion at the IIC.
- EAO noted that when this topic is tabled to bring back, it would be tabled based on the issues we are trying to resolve (rather than referring to as SOC) – we now have an Act that provides broad engagement, consensus seeking, notification of consent and we need to determine how we navigate this with multiple Nations that have distinct S. 35 rights.
- IIC member noted that the participants at the IIC table are in different roles (technical, grassroots, Indigenous governance, etc.). Therefore, this means we need to be clear recognizing

each participants responsibilities. Member commented that a decision to table this topic should be made by the full committee, as opposed to a single request.

Readiness Decision

- EAO clarified that the main change in the Readiness Decision guidance since the last IIC meeting was a section on project termination. The changes around terminology were discussed.
- In some cases, the timing of the project, availability of technology, current state of the environment (i.e. water quality) might impact the need for termination. It may not be that a project should not or cannot proceed, but it may be “not at this time” until broader effects in the territory are addressed.
- IIC member noted that the test of the terminology is going to be if a Nation and the Province do not agree on what an extraordinarily adverse effect is. The terminology needs additional discussion so that it leaves little room for interpretation. Example – if a Nation identifies an area and a project where the loss of cultural values is too significant this would be extraordinarily adverse.
 - EAO noted it may be worth working through case studies or examples from BC to see how this terminology would be applied.
- IIC member asked where the terminology will be captured, in a regulation or a policy?
 - EAO noted that the terminology is for discussion at this point and no current provision for terms to be included in Regulation.
- IIC member noted hesitation on terminology related to extraordinarily adverse effects because it is new and not defined in legislation. If a Nation were to pursue action to define what extraordinarily adverse means to their Nation, then this would be the starting point.
- IIC member noted a concern regarding how to consider the impact of potential future projects when making a readiness decision. If the project is going to last 10-20 years what if multiple projects are proposed later? Does the project consider indigenous knowledge?
- Another consideration is EAOs ability to come up with terminology that leads to resilient decisions that reduces the likelihood of being challenged by Proponents (legal and compensatory)
- IIC member commented that it may be known at the beginning of a project that an effect could be studied. A suggestion was made to ask the question “Under what conditions would this project be acceptable?” if the answer is none then maybe it is an extraordinarily adverse effect.
- IIC member noted that DR is not offered to enter an EA, and that this is not acceptable. Concern was voiced by multiple parties regarding deciding if project will proceed or not, and the need to allow a nation to provide consent.
 - **ACTION ITEM:** EAO needs to provide possible options for consent from legal perspective, and clarify opportunities for dispute resolution. (Section 16, 17 and 18)
- IIC proposed that what is being overlooked in readiness decision guidance is what the criteria is for requiring a revised DPD.
 - **ACTION ITEM:** EAO to expand the section in the Readiness Guidance regarding criteria for requiring a revised DPD.
 - IIC noted that unmitigable is subjective, as methods of mitigation can be found. However, these mitigation methods may not be acceptable to all parties. (i.e. under the HCA a burial ground may be moved).

- IIC suggestion to define a term for positive effects, how it will improve the environment, benefit the community and **have a net positive impact**.
- IIC brought up issues regarding residual effects definition. The method that mitigation has been done may not be accurate or effective. Needs to ensure the effect is properly being considered and evaluated. An example was provided where one company bought another and shut that one down to make it look like their impacts were reduced because they eliminated the impacts of the company they had bought
 - EAO acknowledged as a valid consideration.
 - **Action items** – EAO to address the recommendations for changes and consideration to the Readiness Decision guidance and terminology document.
 - **ACTION Note** – IIC to provide EAO comments on the Readiness Guidance by November 15
- IIC recommended simplification of the description of the term “significance”.
- IIC noted that at the beginning of the readiness decision consensus/consent is only sought regarding decision if it is in relation to exemption or termination.
- Request from IIC member to add in objective that sufficient Early Engagement with Nations (and public) is part of the readiness decision.
- EAO noted that the Act will go live by December 31. All guidance including Readiness Decision will be posted as drafts to allow for continuous improvement as the Act is implemented.
- SIC queried as to what the local government’s role in this area is as it is a significant issue that needs to be addressed appropriately. A local government does not have section 35 rights, instead acting as child of the province without significant legal influence. It is important to ensure that local governments work effectively to include their legal rights and opportunities in EAs.
- How can you mitigate an impact to a culturally or spiritually significant place? How can you communicate the significance of these areas to someone outside the Nation’s culture?
- There could be some benefit to keeping the definition of extraordinarily adverse less prescribed, to leave space for specific circumstances that cannot be defined upfront.
- IIC suggestion to expand section about what would occur when DPD needs to be revised.
 - SIC guest noted that revisions to DPD is another opportunity to reiterate to Proponents the expectation that changes be made.
- IIC suggestion to integrate a pathway for “not right now” –project should not necessarily be terminated and is potentially a viable project but there may be issues with the timing or readiness to proceed to EA. Some examples could be provided of when this pathway may apply.
- What is the justification for Serious Effect?
 - This is informed by practice and case law and is linked back to S. 35 rights and whether impacts have been adequately accommodated.
 - Suggestion to link back to Haida and the root of this term
- IIC member suggested that any effect can be mitigated but the mitigation may not be acceptable. Recommended terminology “effect is expected to be unacceptable or unjustifiable to the Minister, consistent with Section 2 of the Act”.
- EAO suggestions “effect does not require assessment to identify and is expected to be unacceptable or unjustifiable to the Minister, consistent with Section 2 of the Act”.

- IIC member noted that the definition assumes that mitigation is effective but this is not necessarily accurate due to lack of data to support that the mitigation will generate the desired outcome. The definition of residual effect should be tweaked to address this and this could potentially incentivize Proponents to quantify effectiveness to get the residual effects down.
 - EAO will seek to add this and will relate back to predictions as well.
- IIC member suggestion to make language more neutral (i.e. “decision” rather than “Ministers decision”) to avoid setting readers back immediately.
- How do you ensure Administrative fairness for proponents?

Indigenous Knowledge

- Reminder of Nov 14 teleconference regarding IK with IIC
- The focus of this meeting will be to workshop and refine the principles in the IK Guidance

MVRB Session – Nov 26 (AM)

- EAO noted that planning needs be done regarding what the focus and method of the meeting will be as the MVRB wants to have a contextual conversation with IIC regarding the WHY, not just the HOW.
- IIC stated interest in how the MVRB has approached the cultural pillar and what positive effects they are measuring and what issues the MVRB has encountered.
- EAO clarified that IIC co-chairs will create an agenda for feedback from IIC prior to MVRB meeting – **Action Item**
- EAO noted that in afternoon effects assessment, EA methods and capacity funding will be discussed within the IIC.
- **Action item** – create a one to two pager to help determine what is the key points to address regarding what is being credited to the IIC to ensure all participants are comfortable with what is being stated.