



CENTRAL COUNCIL
Tlingit and Haida Indian Tribes of Alaska
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Expert Panel to Review Federal Environmental Assessment Processes; Indigenous Presentations: Central Council Tlingit and Haida Indian Tribes of Alaska Testimony

Date: December 9, 2016

Presented by: the Honorable Will “Yaan Yaan Eesh” Micklin, 2nd Vice President, CCTHITA

SUBMISSION

EXECUTIVE SUMMARY

CENTRAL COUNCIL OF TLINGIT AND HAIDA INDIAN TRIBES OF ALASKA [The Honorable Richard J. Peterson, President] submits testimony to the Expert Panel to Review Federal Environmental Assessment Processes to the Indigenous Presentations forum on December 9, 2016, recommendations to: Strengthen the Weak Cumulative Effects Analysis for Multiple Projects; Enhance Indigenous Consultation; Specific Requirement for Transboundary Watersheds; Requirement to Conduct a Robust the Alternatives Analysis; Inclusion of an Evidence-based Approach based on Peer Reviewed Science.

Strengthen the Weak Cumulative Effects Analysis for Multiple Projects.

The *Canadian Environmental Assessment Act 2012* (CEAA2012 or the “Act”) and its regulations establish the legislative basis for the federal practice of environmental assessment in most regions of Canada. The Act describes the Environmental Assessment (EA) process as “one project, one assessment.” This is not protective of the overall values in a watershed or region. The assessment of the impacts of any one project needs to be coupled with all other development in the watershed or region. Infrastructure associated with these developments (including power lines, road access and water use and withdrawals), should be integrated and discussed holistically.

This cumulative impacts assessment should be conducted by the Federal Ministries and agencies and not the Province or proponent. Sections allowing Provincial equivalence and substitution for federal analysis should be removed. Allowing the provinces or territories to conduct cumulative effects analysis through their own EA processes has failed to achieve the goals of the Act.

All EA’s should take a watershed approach to the impact analysis as the smallest scale of review.

Currently under the Act, any designated project on non-federal territory with no aboriginal or trans-boundary implications, or any effects on local or regional air, water or soil, climate, biotic interactions (e.g. competition, predation, herbivory, etc.), ecosystem functions (e.g. nutrient cycling, energy flow, productivity, etc.) or wildlife other than fish and migratory birds, are

excluded from consideration. *See* CEAA2012 §§ 5(1)(b) & 5(1)(c)). An impacts analysis for all of these values should be reinstated for all projects and the effects considered cumulatively.

Indigenous Consultation

The procedural aspects of Indigenous consultation are not adequately addressed and often left to the proponent. The Act should require a minimum prescribed level of consultation and include measureable benchmarks to evaluate the success of that consultation.

Indigenous groups, including those, such as Central Council, subject to transboundary environmental affects, should be invited to participate on environmental assessment working groups, which are tasked with leading a technical review of the environmental assessment information provided by a proponent. It should be a requirement both for direct engagement with Indigenous groups to determine how they want to be involved, and for negotiations of Impact Benefit Agreements. Early engagement allows for an early understanding, before the assessment begins, of what traditional or community knowledge exists, sensitive areas to be avoided, and considerations for the scope of the environmental assessment.

The Act should embrace as standards the UN Declaration on Rights of Indigenous Peoples and include specific language concerning free prior and informed consent to assure accessible, transparent and meaningful consultation including the right to appeal and the right to consent.

Specific Requirement for Transboundary Watersheds

The Federal environmental assessment process should apply to all projects that have the potential for transboundary affects. In addition, an independent oversight body (Panel) review should be required for all projects in a transboundary watershed, basin, aquifer and ecosystem to bring credibility to the environmental assessment process and give downstream users transparent access and ability to affect the decisions. This Panel should have the authority to amend decision statements issued to proponents to allow for implementation of findings.

Requirement to Conduct a Robust the Alternatives Analysis

In the Act, explicit requirements for needs and alternatives analyses have been eliminated. *See* section 19(1)(e). A robust alternatives analysis should be reinstated.

The Operational Policy Statements under the Act should include the rationale for the selection of the project design among all viable alternatives that fulfill the project objectives. This should include a consideration of alternatives including the “no action” alternative, as well as the rationale for selection of the final project design and mitigation. Rejection of an alternative cannot be based solely on the cost to the proponent. Any consideration of cost should be accompanied by transparent financial information from the proponent. Business confidentiality should not be a pretext for a proponent to withhold information in considerations of design and mitigation alternatives. If any of these requirements are waived, the rationale for the waiving of these requirements should be published in the Act’s registry. *See* CEAA2012 § 19(1) (j) and § 19(2).

Alternatives analysis should begin with an Ecosystems Services assessment and be based on a set of general principles that include the inherent right to a healthy environment, by including, (i) long term impacts on communities from risky developments; (ii) a human right to clean water; (iii) protection of environmental, economic and cultural rights (that does not permit a trade-off of or off-set to food, air and water security); and (iv) human life and cultural practices equivalent to or pre-emptive of profits, especially profits made excessive by externalizing the added cost of meeting environmental standards through best practices onto people and their ecosystem who would then bear the cost of pollution caused by discharges and accidents.

Must include an Evidence-based Approach based on Peer Reviewed Science

The Operational Policy Statements in the Act should be strengthened to specify that all predictions about environmental effects and their significance be accompanied by: (i) an explicit statement about the underlying causal hypotheses; (ii) an explicit account of the project-specific evidence that, in the view of the reviewer, justifies the predictions; (iii) an explicit assessment of the extent to which the predictions are consistent with the weight of current scientific evidence; and (iv) if they are not, an explanation for the discrepancy.

All parts of the EA should be based on credible and accountable peer-reviewed science. Every EA is concerned with (a) predicted effects; and/or (b) predictions about the effect of mitigation measures on these effects (i.e. predicted residual effects). A residual adverse environmental effect is an adverse environmental effect of a project that remains, or is predicted to remain, after mitigation measures have been implemented. All too often the scientific evidence for these predictions is lacking and there is little consideration of error or synergistic effects between multiple predicted impacts arising from a single project or cumulatively with other projects in the watershed. The rationale and/or evidentiary basis for these predictions is often weak, verging on non-existent. Without clear scientific evidence these predictions are mere guesses that lack a factual foundation or justification.

The hypothesis on which the impact prediction is based should be specified. All pertinent related science should be reviewed and referenced, including evidence that does not support the hypothesis. The EA should establish a clear cause and effect case based on evidence and data. Conclusions not based on actual evidence should not be allowed.

Mitigation plans also should be based on science and experience. Follow-up studies should be required to measure if the predicted outcomes of the mitigation (hypotheses) are true. Mitigation measures should be implemented regardless of whether the residual environmental effects are predicted to be significant or not to help account for unexpected cumulative and synergetic effects.

Sincerely,



Richard J. Peterson
President