REPORT ON RECOMMENDATIONS TO REFORM CEAA, 2012

ON BEHALF OF CHIEFS OF ONTARIO

NOVEMBER 25, 2016

The Chiefs of Ontario (COO) is an advocacy forum and secretariat for collective decision-making, action, and advocacy for the 133 First Nations communities located in Ontario. Guided by the Chiefs in Assembly, we uphold self-determination efforts of the Anishinaabek, Mushkegowuk, Onkwehon:we, and Lenape Peoples in protecting and exercising their inherent and Treaty rights. Keeping in mind the wisdom of our Elders, and the future for our youth, we continue to create the path forward in building our Nations as strong, healthy Peoples respectful of ourselves, each other, and all of creation.

Following a two day meeting on November 9 and 10, 2016 during which the COO discussed the *Canadian Environmental Assessment Act, 2012* (CEAA, 2012 or CEAA) reforms, our membership agreed to the recommendations in this report. These recommendations are based on a preliminary review of the high-level issues associated with environmental assessment in its current form in Canada. The COO reserves its right to comment further on this process as more information is disclosed and consultation takes place.

The summary, issues, concerns and priorities presented in this report reflect those of the participants in attendance at the COO's meetings on November 9 and 10, 2016 specific to the federal CEAA Review and do not necessarily reflect the official responses from respective Provincial Territorial Organizations (PTOs), Tribal Councils, individual First Nations, elders and youth.

RECOGNIZE INDIGENOUS LAW AND INSTITUTIONS

The COO meeting participants clearly expressed the view that any reformed environmental assessment process in Canada must recognize Indigenous legal orders.[1] These legal orders and the institutions through which they operate must be respected and revitalised. The priority for COO is to advocate for due consideration and application of existing Indigenous environmental assessment processes and the proper opportunity for

[1] The terms Indigenous law, Indigenous legal orders and Indigenous legal traditions are each used by scholars to refer to ways that Indigenous peoples have governed themselves from before settlors arrived.

codification of cultural-based environmental decision-making principles. We call on the Expert Panel to acknowledge and support this initiative.

This perspective grounds our primary recommendation. The Political Confederacy of the Chiefs of Ontario has a strong position on inherent jurisdiction in Ontario. More than the effort to review the federal legislation, it is important to create space for the exercise of Indigenous jurisdiction.

The Chiefs of Ontario acknowledge that the EA Panel has asked for input into improving CEAA, 2012 and at Appendix A we provide such input for CEAA, 2012. The Expert Panel should be alive to the fact that the grassroots movement of "Idle No More" was most focused on the CEAA 2012 changes and most First Nations are opposed to many of the measures regarding time-lines, substitution, and purpose of EA that was focused on business certainty in CEAA 2012.

The importance of the land to Indigenous people and its link to reconciliation was also expressed at the COO meeting, and echoes the Truth and Reconciliation Commission (TRC) report. TRC heard repeatedly that reconciliation will never occur unless we are also reconciled with the earth.

Reconciliation with the land is at the root of the Indigenous perspective. Elder Reg Crowshoe told the TRC that indigenous peoples' worldviews can teach us about establishing respectful relationships among peoples and with the land and all living things:

> "*When we talk about the concept of reconciliation, I think about some of the stories that I've heard in our culture, and stories are important…These stories are as important as theories but at the same time stories are important to oral cultures. So when we talk about stories, we talk about defining our environment and how we look at the authorities that come out from the land and how that land when we talk about our relationship with the land, how we look at forgiveness and reconciliation is so important when we look at it historically*"[2]

Reconciliation between the Crown and Indigenous peoples includes the recognition and revitalisation of Indigenous laws, ceremonies, Indigenous institutions and connection to the land. For example, the TRC recognised the following principle as one of the principles to guide truth and reconciliation moving forward:

> "*Supporting Aboriginal peoples' cultural revitalisation and integrating Indigenous knowledge systems, oral histories, laws, protocols and connections to the land into the reconciliation process are essential*."[3]

The TRC report included the following call to action

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[2] Truth and Reconciliation Report Volume 6 page 13.
[3] Truth and Reconciliation Report Volume 6 page 23.

> "50. *In keeping with the United Nations Declaration on the Rights of Indigenous Peoples, we call upon the federal government, in collaboration with Aboriginal Organisations, to fund the establishment of Indigenous law institutions for the development, use and understanding of Indigenous laws and access to justice in accordance with the unique cultures of Aboriginal peoples in Canada."*[4]

Indigenous peoples in Canada have legal traditions. These traditions are not frozen in time but have developed as a result of the presence of other people in Indigenous territories. These legal traditions vary among Indigenous peoples in Canada. There are as many legal traditions as there are Nations. Professor Burrows has opined that:

> "*… the power to acknowledge and implement them more broadly is within reach,…Indigenous legal traditions could also be strengthened by more formal recognition by the courts and Parliament…The undermining of Indigenous legal traditions must be halted; this undermines respect for Indigenous communities and diminishes Canada as a nation. Connections can be and have been made between civil law, common law and Indigenous legal traditions without destroying the country.*" [5]

The Indigenous laws that relate to relationships with the earth are known as Natural Law. Dr. Deborah McGregor, who participated in the COO meeting, explains Natural Law using water as an example:

> "*People must relate to water in order to live. This is true no matter where you reside, whether in cities, on-reserve or in rural communities (your occupation or livelihood); your age; the nature of your relationship to water (good, bad, indifferent); or what your beliefs are about water (whether your view is primarily as a resources commodity, a human right, a life-giving substance or a sentient being). All humanity shares this basic need for survival: at a fundamental level we need water to live as the United Nations General Assembly recognised in 2010.*
>
> *Such basic understandings, from an Anishinaabek perspective, provide the foundation for what is referred to as "natural law", which is derived from fundamental experiences and "observations of the natural world" (Burrows 29). Through Anishinabek interactions and lived experiences with the natural world, we derive a great deal of knowledge. As Cecil King states, "we gained our knowledge by living on this land.(5)"*[6]

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4 Truth and Reconciliation Commission of Canada: Calls to Action, Page 5.

5 Indigenous Legal Traditions in Canada, John Burrows, Report for the Law Commission of Canada (January 2006), page iv-vi. http://publications.gc.ca/collections/collection_2008/lcc-cdc/JL2-66-2006E.pdf

6 "Indigenous Women, Water, Justice and Zaagidowin (Love)" Deborah McGregor, Canadian Woman Studies Volume 30 Numbers 2,3 at page 71.

An expression of Indigenous legal orders is contained in the Water Declaration of the Anishinaabek, Mushkegowuk and Onkwehonwe in Ontario (October 2008) (Water Declaration), attached as Appendix B to this report.

The Water Declaration speaks about how women are keepers of the waters, and that the Anishinaabek, Mushkegowuk and Onkwehonwe, through the teachings of women have responsibility to care for the land and the waters. It speaks about the need to show respect for waters in ceremonies, and for the laws and protocols to ensure clean waters for all living things. The Anishinaabek, Mushkegowuk and Onkwehonwe express the need to declare, retain and assert their relationship with the waters to ensure that there is clean water for future generations.

COO proposes a First Nations-led environmental assessment process based on existing cultural-based environmental decision-making principles and regimes. This First Nations-led environmental assessment would apply to projects as requested by First Nations. In order to avoid duplication, in cases where there is a provincial EA process, and/or a federal EA process, the First Nations EA could be substituted for the other EA processes.

Recommendations

1 Canada should provide support for the revitalisation and codification of existing cultural-based First Nations' environmental decision-making principles and an indigenous led environmental assessment process.

To demonstrate the efficacy of a First Nations-led environmental assessment to protect the environment and advance reconciliation, it should first be applied to one or two projects. In Ontario, there have been instances whereby First Nation-based principles have been successfully integrated into federal and provincial EA processes (see Ontario First Nations Environmental Assessment Toolkit). In addition, there are both major and local EA processes in-progress across Ontario that could serve as analytical pilots to evaluate and advocate for standardization of First Nations' cultural-based approaches.

Recommendations

2 Canada should provide support for one or more First Nations-led EA projects, for example, a First Nations-led regional strategic EA of the Ring of Fire area.

ADDRESS LEGACY OF PAST PROCESS

A second strongly stated theme was that there is a great deal of environmental damage affecting the land. Past environmental assessment and regulatory processes have resulted in disproportionate environmental and social impacts to Indigenous communities and their territories. Reconciliation will require identifying and remedying the legacy of harm to traditional territories.

Canada and Indigenous communities must work together to develop a plan to remediate the widespread contamination in Indigenous communities that was justified and

condoned under prior environmental assessment processes without regard to the impact on Aboriginal rights-holders.

Recommendations

3 Canada must work with First Nations to develop and initiate a plan to identify and remediate significant contamination affecting First Nations' lands.

NATION TO NATION RELATIONSHIP, INHERENT RIGHTS AND UNDRIP ARTICLE 32

A third theme expressed was the importance of the Nation to Nation relationship of Indigenous peoples and the Crown and Indigenous inherent rights. These rights exist independent of treaties and declarations.

However, these inherent rights are recognized in *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP) that provides in part:

> Article 32
>
> 1. Indigenous peoples have the right to *determine and develop priorities and strategies* for the development or use of their lands or territories and other resources.
>
> 2. States shall consult and cooperate in good faith with the indigenous peoples concerned *through their own representative institutions* in order to obtain their *free and informed consent prior to the approval of any project* affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources. [emphasis added]

The three phrases in italics above should each be incorporated into the Crown's dealing with the environment and natural resources.

First, Indigenous communities have the right to *determine and develop priorities and strategies* for their traditional territories. In order to facilitate this through CEAA, the federal government should support Indigenous communities to undertake Traditional Ecological Knowledge (TEK) and land use assessment to identify priorities and strategies. The results of these TEK and Land Use Studies will reveal Indigenous communities' priorities, which can then be used to scope larger Regional Environmental Assessments. A Regional EA identifies baseline conditions and ecological capacity/sensitivities. Indigenous input on all of this information will bring Indigenous communities meaningfully into the conversation.

Second, the federal government should cooperate with Indigenous communities in good faith through *their own representative institutions*. In order to facilitate this through CEAA, the federal government must recognize and incorporate Indigenous legal orders

including Indigenous Natural Law. Indigenous legal perspectives can be incorporated through a First Nations-led Environmental Assessment.

Another way incorporate Indigenous legal orders, involves the implementation of Indigenous co-management at the Regional EA level. In order to maintain the connection from Regional down to project-level EA, at least one member of the EA panel for each project should be Indigenous.

Third, the federal government should obtain the *free, prior and informed consent* (FPIC) of affected Indigenous communities prior to the final approval. Obtaining FPIC is a process that involves an active choice, as well as the ability to say "no" if necessary.

Free, prior and informed consent includes the following elements:

- Free – acknowledge the Nation-to-Nation relationship in decisions made over the land; Indigenous people are willing partners in developments; and Indigenous people receive benefits from projects within their territory.

- Prior – the process starts with identification of Indigenous priorities for the territory through a First Nations-led Environmental Assessment; the CEAA process should provide for Indigenous participation in baseline studies, and in regional environmental assessments; and Indigenous involvement in early scoping and determining the consultation process for project EAs

- Informed – adequate funding for Traditional Knowledge and Land Use Studies, and active (and equitable) participation in review processes; and involved in and directing baseline studies and monitoring

- Consent –involvement in the decision making process including on CEAA Review panels; ensure consent is achieved prior to Cabinet decisions; achieving consensus; the ability to say "no" by withdrawing certain areas from development when the consensus shows serious concerns have not been addressed.

Recommendations to the Crown about how the CEAA could incorporate UNDRIP are included in Appendix A.

CONCLUSIONS

COO's main concern with the federal environmental regulatory process is that it does not recognise Indigenous Natural Law. Participants at the meeting described asking Indigenous people to make recommendations for CEAA without acknowledging Indigenous Natural Law was like trying to fit a square peg into a round hole.

This does not mean codifying Indigenous Natural Law into CEAA. It means supporting the revitalisation and development of Indigenous Natural Law through an Indigenous-led process.

This is consistent with the Truth and Reconciliation Commission's findings, recommendations and calls to action. This is consistent with the Nation to Nation relationships that exist between the Crown and Indigenous governments. And it is a prerequisite to incorporating UNDRIP and Indigenous inherent rights into the EA process.

APPENDIX A

SPECIFIC RECOMMENDATIONS FOR *CANADIAN ENVIRONMENTAL ASSESSMENT ACT. 2012*

OBJECT OF RECOMMENDATIONS TO REFORM CEAA, 2012

Central to our recommendations is a new mandate and purpose of CEAA. A new CEAA must exercise EA powers in a manner consistent with a Nation-to-Nation relationship.

The purpose of a new CEAA must be forward looking - to plan for a future that benefits Indigenous communities as well as non-Indigenous communities. The new CEAA must be proactive, not reactive. It must draw from both western science and Indigenous Traditional Ecological Knowledge, and give equal weight to each.

To that end, the recommendations below focus on substantive and process measures to ensure full involvement of Indigenous peoples in the EA process. This process focuses on Indigenous involvement at all levels of a renewed and invigorated environmental assessment process.

NEW MANDATE AND PURPOSE FOR CEAA

The CEAA must be revised to require the Crown to exercise its EA powers consistent with:

- Inherent rights of Indigenous people
- Nation to Nation relationships
- Section 35, Constitution Act
- UNDRIP
- Fair dealing and reconciliation between Indigenous people and the Crown
- Free prior and informed consent

Recommendations

4 Section 4(1) of CEAA, 2012 should include as a purpose of the Act to benefit Indigenous communities, promote fair dealings and reconciliation between Indigenous people and the Crown, support the Nation to Nation relationship between First Nations and the Crown, and respect the inherent rights of Indigenous peoples.

5 Section 4 (2) of CEAA, 2012 should provide that Crown's exercise of powers should be consistent with Section 35, *Constitution Act*, UNDRIP, and in particular Free Prior Informed Consent.

6 The CEAA section 5 definition of environmental effects and CEAA decision making should be broad enough to promote sustainability not just to ensure that there is no significant adverse effect.

CLARIFY PROCESS

Clarity around process forms the foundation of meaningful consultation. The Crown must identify the communities to be consulted and include a transparent discussion of the depth of consultation and the Crown's analysis of each Indigenous community's strength of claim. To facilitate Indigenous involvement in EA, the EA process must be clear. Early in each project the Crown should discuss the EA consultation process with Indigenous communities.

To provide guidance to Indigenous communities and ensure early partnership, the consultation process should be captured in a written agreement before the EA begins.

Recommendations

7 Upon receiving the description of a designated project, the Crown must enter a full and transparent discussion leading to an agreement with the Indigenous communities about the process of consultation for the project including information about the Crown's strength of claim assessment; proposed depth of consultation; and any EA procedural activities that are to be delegated to third party proponents. If the Crown and Indigenous parties are unable to come to an agreement about the consultation process, there should be provisions for culturally-appropriate dispute settlement through mutually-agreeable mediation processes

RELATIONSHIP WITH PROVINCIAL EA

Indigenous communities should not fall through the cracks of split jurisdiction between federal and provincial authorities.

Where both a federal and provincial EA are required, the federal and provincial Crowns should coordinate consultation to ensure all impacts to Indigenous concerns are addressed.

In a situation where a provincial EA is substituted for a federal EA, consultation with the provincial and federal Crown should be as robust as the process under CEAA.

Recommendations

8 Remove substitution under section 32, the federal Crown could ensure that there is a one EA principle for project-based EAs, however, those EAs should be based on "Indigenous governance-based process approvals" for example, terms of references,

policy, and guidelines approved by the First Nations who hold Indigenous jurisdiction vis-à-vis a particular project.

RELATIONSHIP WITH IMPACT BENEFIT AGREEMENTS

The CEAA Expert Panel should consider the role of impact benefit agreements (IBAs) in the EA regime. IBAs are private agreements between parties that are one tool for addressing the impacts of development on Indigenous territories. However, they should not substitute for environmental assessment or Crown consultation.

Currently, where adverse environmental effects are documented and mitigation is possible, some proponents prefer to address mitigation of impacts in an IBA with an Indigenous community. To date there has been no oversight of what environmental monitoring, if any, forms part of an IBA. The IBA process is necessarily neither clear nor transparent. Many Indigenous communities do not have the benefit of skilled technical and/or legal representation, leading to a power imbalance with proponents and disadvantage in negotiating environmental terms.

The appropriate role and application of IBAs in the EA process has not been clear.

Recommendations

9 The Crown should define its position on the purpose of IBAs; they should not replace mitigation measures to be included in conditions of an EA decision. IBAs are but one partnership-based instrument that respective First Nations may deploy with respective proponents but are not an adequate substitute for Crown responsibility to Indigenous communities and their territories. Mitigation measures must incorporated into the decision-making regardless of whether they are included in an IBA.

10 The Crown should ensure procedures and capacity funding to ensure that Indigenous communities all have equal ability to negotiate fair deals.

DEFINE MEANINGFUL CONSULTATION

It must be recognized that EA is only a part of meaningful consultation and cannot replace the Crown duty to consult. COO recommends that the contribution of consultation through the EA process to the Crown's overall duty to consult be clear.

COO recommends that "meaningful" consultation in the EA process be defined in a federal guidance document. Essential elements of any definition must include the following:

- The schedule for consultation should be one of the determining factors for the EA timeline. Consultation should not be perfunctory or rushed.

- The consultation should reflect flexibility and willingness to change one's mind.

- The duty to consult must be discharged before the approving decision. As part of any Cabinet decision or Order in Council authorizing a project, the decision-maker must expressly address whether Canada has fulfilled its duty to consult. The decision-maker should include a statement about how the Indigenous groups' concerns were considered and how these concerns affected the resulting decision. If consultation has not been adequate, then the Crown must be willing to re-engage until issues and concerns are addressed.

Through the consultation process, the Crown must have obtained the free, prior and informed consent of affected communities.

Recommendations

11 CEAA should define through the Act or guidance documents what is meaningful consultation, and its contribution to the Crown's overall duty to consult.

12 CEAA decision makers must expressly address whether Canada has fulfilled its duty to consult, including disclosure to all respective FNs of the internal treaty impact assessments (TIA). The decision-maker should include a statement about how the Indigenous groups' concerns were considered and how these concerns affected the resulting decision. If consultation has not been adequate, then the Crown must be willing to re-engage until issues and concerns are addressed.

13 CEAA decision makers must determine whether the Crown has obtained free prior and informed consent of the Indigenous communities affected by the project, prior to making decisions.

14 Every five years, the Commissioner of Environment and Sustainable Development review the adequacy of Crown consultation provisions and whether the changes related to Indigenous consultation are being carried out in a fair and effective manner

NEW AND ADEQUATE FUNDING

Any reform of EA process must include statutory protection for new and adequate funding for all aspects of the EA process. The burden to fund and facilitate consultation with Indigenous communities cannot solely be left to proponents' discretion.

Funding areas must include a sufficiently funded and experienced federal staff in order to meet the duty to consult. Indigenous communities currently do not have adequate input and support from the federal government when they are negotiating with proponents. Both proponents and Indigenous communities require Crown involvement. This requires a fully resourced CEAA staff.

Funding must be also available for Indigenous communities in order to participate in the EA process, and to build capacity in order to respond to complex applications. A failure to fund consultation means that the burden to discharge the duty to consult falls on Indigenous communities. Indigenous governments do not have the resources to dedicate

to responding to proponent applications – nor should they have to subsidize a project and spend time in this capacity without funding.

Funding must extend to independent technical and legal advice to Indigenous communities. Indigenous communities need to understand the implications of a project before their consent can be obtained in accordance with the "informed" consent provision in Article 32 of UNDRIP.

Funding must be available for communities to generate their own Traditional Ecological Knowledge (TEK) protocols and manage their TEK systems. To provide for both a just and expeditious review process, Land Use and Traditional Ecological Knowledge studies should be pre-emptively completed in traditional territories prior to and without the need for a project as a trigger.

Indigenous communities require assurance that, should a project be abandoned in their territory, compensation to address ongoing environmental impacts will be available. Adequate funding to financial assurance fund must be available to engender trust in a renewed EA process.

Recommendations

15 The federal budget must ensure adequate funding for the CEAA process including for federal staff to meet the duty to consult, for Indigenous communities to participate in the EA processes, to build capacity within Indigenous communities, to support technical and legal advisors to Indigenous communities, for TEK studies before projects are proposed, and financial assurance for Indigenous communities to access if projects are abandoned.

FUNDING PROCESS

The process of funding Indigenous participation in EA review requires significant reform. Process must be established for a more timely decision on funding applications.

The current CEAA, 2012 regulatory review process is an example of late funding decisions curtailing Indigenous participation - although COO received some funding, the decision to grant funds was issued too late for COO to carry out anything beyond a high level consultation with a group of its members in Toronto.

A reformed process should provide an avenue to appeal funding decisions, as well as an opportunity to review funding decisions midway through the EA/approval process.

If a provincial EA is substituted for a federal EA, the federal government must ensure that adequate funds are available for Indigenous groups.

Recommendations

16 The CEAA Intervenor Funding process should ensure that affected Indigenous communities are properly funded to participate in the EA process.

17 The CEAA Intervenor Funding decisions must be timely. .,

18 The CEAA Intervenor Funding determinations should be made by an independent body based on transparent criteria.

19 The CEAA Intervening Funding process must provide for a mechanism to review funding decisions mid-way through the approval process, and top up funding as necessary.

20 The CEAA Intervening Funding process should be sufficiently broad to provide adequate funding where a substitute process is approved.

TRADITIONAL ECOLOGICAL KNOWLEDGE

Traditional Ecological Knowledge (TEK) is a subset of Indigenous Knowledge. It concerns the environment and use of the environment in the broadest sense and includes socio-economic environment. CEAA, 2012 refers to the term Aboriginal Traditional Knowledge, and this nomenclature may need to be re-considered.

The broader concept of Indigenous Knowledge resides in the people and their communities. Indigenous Knowledge is, and must continue to be owned and controlled by Indigenous people. COO does not propose to grant federal access to Indigenous Knowledge Systems. Proponents and governments are seeking to extract a subset of Indigenous Knowledge, TEK from Indigenous communities to use in the course of project approvals.

However, there are no consistent standards, guidelines or protocols about how TEK is gathered and what is done with it.

Further, as Dr. Deborah McGregor observed during the COO meeting, First Nations are losing control and governance of TEK because proponents and governments exclude Indigenous people from the decisions made based on TEK.

Instead of proactive gathering of TEK through a community led process in advance of projects, communities are funded by proponents to gather TEK about the specific area in their territory of interest to the Proponent. This puts the community at a disadvantage as the resulting reports are missing a more comprehensive understanding of TEK in the broader context.

COO can support the use of TEK to the extent that this information is used only to mitigate the environmental impacts of projects consistent with the rights and interests of Indigenous communities, and that its Indigenous ownership and control are not compromised. Indigenous people cannot lose control over the governance of TEK. They must not be excluded from decision making based on TEK.

A reformed CEAA, 2012 must strengthen the role of TEK, and ensure that Indigenous people are not excluded from decision making related to TEK.

All use of TEK must be strictly guided through a use and disclosure protocol. There are two prongs to this recommendation.

First, the federal TEK policy must contain clear, public and transparent, procedures and protocols about the gathering and use of TEK. Any use or disclosure of TEK must be solely for the purpose for which it was gathered, and must not exclude Indigenous people from decision making related to TEK. The principles of Indigenous ownership, control, access and possession (the OCAP principles) must be incorporated into all TEK gathering and use activities.

Second, TEK must be protected from disclosure under the federal Access to Information Act (ATIA). First Nation band councils are not included in the definition of "aboriginal governments" provided for in section 13(3) of ATIA and are, therefore, not afforded the same protection from disclosure of information provided in confidence to the federal government as other governments. There is no principled basis for such exclusion, particularly where the federal government is seeking to establish a Nation-to-Nation relationship with First Nations.

To bolster the proper gathering and management of TEK, CEAA staff should receive general cultural competency training, and training about the Truth and Reconciliation Commission findings and calls to action. They must also be trained on new TEK guidelines and policies.

Recommendations

21 CEAA section 19 (3) should be revised so that an EA shall take into account Indigenous Traditional Ecological Knowledge.

22 The Crown will support communities' Traditional Ecological Knowledge protocols and proactive gathering and management of TEK.

23 The Crown will have clear, public and transparent TEK policy, procedures and protocols for use and disclosure of TEK. They must be developed through consultation with Indigenous communities for use by the Crown and proponents.

24 The ATIA should be revised to ensure that all First Nations are included in the definition of government.

25 CEAA staff should include more Indigenous people to foster corporate understanding of Indigenous knowledge systems with a longer term goal of creating a joint FN-based EA Authority with equal standing as federal agencies..

26 CEAA staff should be culturally competent, and be provided with cultural competency training including education about the Truth and Reconciliation Commission reports findings and calls to action.

ELIMINATE BARRIERS

In order to meaningfully involve Indigenous communities in EA processes, Indigenous community members must be able to understand the legal and technical language that often adds unneeded complexity.

Plain language summaries about the law and process, plain language technical documents, and required translation into Indigenous language where needed (hearings, meetings and documents) are all necessary to facilitate knowledge transfer.

The timelines for Indigenous communities to review plain language documents should reflect Indigenous capacity and the realities of Indigenous governance, including community consultation.

**Recommendations **

27 The Canadian Environmental Assessment Agency should prepare and post on its website plain language summaries of the Act and regulatory process.

28 CEAA should require translation into Indigenous languages where needed for hearings, community meetings and documents.

29 Timelines should be sufficiently flexible to incorporate the realities of Indigenous governance and capacity.

BASELINE ASSESSMENTS AND MONITORING

In order to better understand regional cumulative effects and impacts from development, CEAA must perform more analysis of existing environmental and ecological conditions. This unbiased evidence will form an essential part of the EA process and lead to evidence-based decision-making.

Indigenous groups require federal support for Indigenous baseline studies, or studies that focus on relevant baseline information to Indigenous communities. This information should be provided to the Indigenous communities following completion and used to support Indigenous environmental monitoring programs.

Any baseline study, whether led by the Crown or proponent, must have Indigenous involvement.

A significant example of Indigenous-led baseline work has been performed by the Gitga'at Nation in its traditional territory. The Gitga'at Nation partnered with researchers from University of British Columbia and Michigan State University to generate baseline acoustical-ecological data in marine waters in their territory. Gitga'at representative Chris Picard describes the study as a "critical tool for protecting and managing our

Territory and marine resources against the cumulative effects of industrial development".[7]

Recommendations

30 The Canadian Environmental Assessment Agency must support and fund scientific baseline assessments either conducted by Indigenous communities or with their full involvement.

31 The Canadian Environmental Assessment Agency must provide any baseline assessments that may exist for an area to the Indigenous communities potentially affected by a project at the start of the EA process.

32 Section 53(4) and Decision Statements must provide for a role for affected Indigenous communities in monitoring.

33 Affected Indigenous communities must have the ability to seek to have the conditions in the Decision Statement amended if monitoring results so warrant.

REGIONAL ASSESSMENTS AND PROJECT EAS

The current federal EA model considers impacts from one project only. To adapt to conflicting land uses and recognize inherent and Treaty rights, CEAA must adjust its thinking from a one-project, one assessment approach and look at development in a regional context.

Regional Assessments provide proactive and future-oriented approach. A Regional EA assists decision-makers to see the broader impacts from development in a region in order to measure those impacts against desired outcomes. The advantages of proactive Regional EAs are realized through more streamlined project-based approvals and reconcilable economic and ecological values.

Under the reformed CEAA process, communities should be able to request a Regional EA for certain areas important to them before the area becomes developed. A Regional EA identifies baseline conditions and ecological capacity/sensitivities. Indigenous input on all of this information will identify Indigenous priorities for the region. The conclusions of Regional EAs must inform Project EAs for the region. In order to ensure that the Indigenous perspective is carried through to the project assessment, Review Panel must include Indigenous people as panel members. This is consistent with implementing UNDRIP, recognizing inherent rights and Nation to Nation relationships.

The Regional EA process is not new to Canada. A Regional EA is already taking place in the Beaufort Sea with the support and input of local government and the Inuvialuit.[8]

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[7] Gitga'at First Nation, "Gitga'at First Nation Records the Soundscape Of Its Marine Territory to Protect Against Shipping and Tanker Noise", 12 May 2016. Online at: http://www.marketwired.com/press-release/gitgaat-first-nation-records-soundscape-of-its-marine-territory-protect-against-shipping-2124376.htm

The Beaufort Regional Environmental Assessment team describes its goal as "to produce relevant scientific and socio-economic information that simplifies project-level environmental assessment and regulatory decision-making for oil and gas activities, while strengthening the relationship between environmental assessment and integrated management and planning in the region." Inuvialuit governing bodies are partners with government and industry in a well thought-out process of decision-making, design and review of information.[9]

Recommendations

34 CEAA, 2012 section 73 must be amended to provide for Regional environmental assessments across Canada to cover any geographic area where the CEAA could be triggered in the future.

35 CEAA, 2012 section 73 must be amended to allow Indigenous communities to request a Regional Environmental Assessment or other Study to be conducted by a panel which includes Indigenous members.

36 CEAA, 2012 section 73 must provide for a fair means of funding Regional Environmental Assessments and Studies that is spread out among future project proponents.

37 CEAA, 2012 section 73 must ensure that any Regional Environmental Assessment sets parameters for future Project Environmental Assessments.

38 CEAA should be amended to ensure Indigenous participation as members on review panels.

GENDER IN EAs

Other jurisdictions are recognizing the linkages between environmental security and gender roles. For example, the Organization for Security and Co-operation ("OSCE") in Europe has prepared a guide entitled "Gender and Environment – A Guide to the Integration of Gender Aspects in the OSCE's Environmental Projects" that addresses these linkages and states:

> "Women play decisive roles in managing and preserving biodiversity, water, land, and other natural resources at the local scale. On the other hand, while environmental degradation has severe consequences for all human beings, it particularly affects the most vulnerable, mainly women and children who constitute the majority of the world's poor… The needs and environmental knowledge of women are still often ignored and absent from major policies and daily project activities." [10]

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[8] Beaufort Regional Environmental Assessment, "About", Online at: http://www.beaufortrea.ca/

[9] http://www.beaufortrea.ca/wp-content/uploads/2011/03/governance-structure.png

[10] www.osce.org – January 2009 ISBN 978-92-9234-532-7.

The first part of the Guide provides a checklist for the integration of a gender perspective into the different components of the OSCE project cycle. Integrating gender equality into EAs is designed to better assess the implications of planned actions for women and men thereby enhancing gender equality and project success. As the Netherlands Commission for Environmental Assessment ("Commission") has stated:

> "In environmental assessment it is 'smart economics' to involve both men and women. Understanding their various uses of the environment creates a more complete image of positive and negative effects of a planned activity. Their unique knowledge on environmental sustainability can also enrich opportunities for mitigation"[11]

The Commission goes on to note that the various stages of EA offer opportunities for integrating gender equality as follows:

- Scoping: identify key gender issues
- Terms of Reference: indicate the need to collect gender-specific data
- Impact Identification: conduct a gender analysis identifying the positive/negative effects on women and men
- Public Consultation: ensure meaningful participation of men and women from different groups.
- Mitigation Measures: include measures to address the identified adverse impacts on both women and men.

Recommendations

39 CEAA should be amended to ensure that the various stages of EA offer opportunities for integrating gender equality along the lines set out above by the Netherlands Commission for Environmental Assessment.

[11] Key Sheet 21 - Gender in environmental assessment – April 2015 api.commissiemer.nl

APPENDIX B

WATER DECLARATION OF THE ANISHINAABEK, MUSHKEGOWUK AND ONKWEHONWE

IN ONTARIO

OCTOBER 2008

First Nations in Ontario walk to the future in the footprints of our ancestor[1]

Preamble

The First Nations Water Policy Forum hosted by the Chiefs in Ontario office in Garden River First Nation (October 15-17, 2008)

The Anishinaabek, Mushkegowuk and Onkwehonwe in Ontario met in Garden River First Nation to discuss their perspectives on the waters including water quality, water quantity, safe drinking water and models for a path forward. Central to the discussions were ceremony and spirituality as the Anishinaabek, Mushkegowuk and Onkwehonwe reflected upon their own inherent responsibilities and intimate relationships to the waters.

The Chiefs in Assembly at the 2008 Special Chiefs Assembly in Toronto passes Resolution 08/87 Water Declaration by consensus adopting the water declaration.

RELATIONSHIP TO WATERS

1. The Anishinaabek, Mushkegowuk and Onkwehonwe in Ontario are placed on Great Turtle Island by our Creator and;

2. The Anishinaabek, Mushkegowuk and Onkwehonwe in Ontario have our own territories that includes that waters which include the rain waters, waterfalls, rivers, streams, creeks, lakes, mountain springs, swamp springs, bedrock water veins, snow, oceans, icebergs, the sea, and;

3. The Anishinaabek, Mushkegowuk and Onkwehonwe women are the keepers of the waters as women bring babies into the world carried on by the breaking of the water and;

4. The Anishinaabek, Mushkegowuk and Onkwehonwe in Ontario through the teachings of women have the responsibility to care for the land and the waters by our Creator and;

[1] Kari-Oca Declaration and the First Nations in Ontario: Earth Charter (May 1992)

5. The Anishinaabek, Mushkegowuk and Onkwehonwe in Ontario know that we need to respect, honour, and share the spirit of the waters in the ceremonies given to us by the Creator and;

6. The Anishinaabek, Mushkegowuk and Onkwehonwe in Ontario have a direct relationship with all waters – fresh and salt that must be taken care of to ensure that the waters provides for humans on a daily basis and;

7. The Anishinaabek, Mushkegowuk and Onkwehonwe in Ontario have the laws and the protocols to ensure clean waters for all living things and;

8. The Anishinaabek, Mushkegowuk and Onkwehonwe in Ontario have ceremonies from birth to death that related to the care of the **waters** and;

9. The Anishinaabek, Mushkegowuk and Onkwehonwe in Ontario have knowledge, laws, and our own ways to teach our children about their relationship to the waters and;

10. The Anishinaabek, Mushkegowuk and Onkwehonwe in Ontario made treaties with the non-indigenous people based on the continuation of all life and;

11. The Anishinaabek, Mushkegowuk and Onkwehonwe in Ontario's treaty making with the Crown created a relationship of rights for all parties and;

12. The Anishinaabek, Mushkegowuk and Onkwehonwe in Ontario's treaty relationships make certain that decision making processes related to use and care of the waters is a right maintained by the Anishinaabek, Mushkegowuk and Onkwehonwe and not handed over with the making of Treaties and;

13. The Anishinaabek, Mushkegowuk and Onkwehonwe in Ontario's fundamental water rights is a social relationship based on an expression of a power relationship between ourselves and our Creator and;

14. The Anishinaabek, Mushkegowuk and Onkwehonwe in Ontario have rights to determine the key properties of the waters including distribution, contents and legitimacy of water rights to restore the balance and;

15. The Anishinaabek, Mushkegowuk and Onkwehonwe in Ontario have been able to make a review of the state of the waters within each of our territories and;

16. The Anishinaabek, Mushkegowuk and Onkwehonwe in Ontario have seen the need to declare, retain, and assert our relationship with the waters to ensure that there is clean water for the future generations and;

17. The Anishinaabek, Mushkegowuk and Onkwehonwe in Ontario are going to honour the spirit of the waters to begin a healing process which begins with men and women knowing their roles and responsibilities when it comes to the waters and;

18. The Anishinaabek, Mushkegowuk and Onkwehonwe in Ontario have met in Garden River First Nation to raise our voices to speak for the waters and;

19. Our Responsibility is to the future generations – for those children yet unborn is set out in this Water Declaration.

20. We announce and proclaim our role as the First Peoples of Turtle Island – the original caretakers – with rights and responsibilities to defend and ensure the protection, availability, and purity of all waters both fresh and salt for the survival of the present and future generations.

CONDITIONS OF OUR WATERS

21. The ecosystems of the world have been under considerable stress from misuse and abuse. The waters are polluted with chemicals, pesticides, sewage, disease, radioactive waste, dumping of waste from mines, dumping from ships in complete violation of our sacred laws given by the Creator and;

22. The Anishinaabek, Mushkegowuk and Onkwehonwe in Ontario have made a preliminary survey of the waters within our territories and found that the sensitive balance of the ecosystem has been compromised by the intervention of the non-indigenous people and;

23. The waste and destruction of entire waste systems have lead to the shortage of waters and the contamination of the waters and;

24. The Anishinaabek, Mushkegowuk and Onkwehonwe in Ontario have observed and heard the stories about the waters being polluted with chemicals, pesticides, sewage, disease, radioactive waste, dumping from mining, waste in waters that makes the peoples sick, ocean going boats who drop shipping waste into the waters and;

25. The animals, fish, and all living organisms are affected by pollution of the waters where we are told to eat one fish a week rather than following our own diet and;

26. The Anishinaabek, Mushkegowuk and Onkwehonwe in Ontario have been denied a role in the decision making which results in the contamination of this precious gift and;

27. The Anishinaabek, Mushkegowuk and Onkwehonwe in Ontario see the ground waters being disrupted by forestry and mining destroying ground waters, rain waters and spring waters and;

28. The effects of global warming has been changing the amount of snow and rain to replenish the water systems and;

29. All living things are affected by this destruction of the waters from the forests, land, plants, marine life, air, fish, insects, birds, animals and;

30. The destruction of all living beings have a direct relationship to the lives and health of Anishinaabek, Mushkegowuk and Onkwehonwe in Ontario and;

31. The Anishinaabek, Mushkegowuk and Onkwehonwe in Ontario have observed that the waters are increasingly being subjected to review and governed by foreign economic values which further alienate the relationships between the Anishinaabek, Mushkegowuk and Onkwehonwe in Ontario and our relationships to all waters.

MAJOR THEMES

32. As a result of our work we have organized ourselves into major themes as a starting point to set up a plan for the future care of the waters:
The main themes were:

1. The Anishinaabek, Mushkegowuk and Onkwehonwe perspectives on Waters
2. Water Quality
3. Water quantity
4. Safe drinking water
5. Models for a path forward.
6. Elders perspectives and knowledge on water issues and the importance of ceremony, songs and feasting, and all aspects of Anishinaabek, Mushkegowuk and Onkwehonwe spirituality in moving forward to protect the waters;
7. The vital importance of the traditional role of Anishinaabek, Mushkegowuk and Onkwehonwe women as water keepers and the need to ensure that youth are educated in all customs and spirituality related to the waters;
8. The important role of Anishinaabek, Mushkegowuk and Onkwehonwe collective knowledge systems in the protection of water sources and how our collective knowledge can complement and be superior to western science at times; the need for proper protocols to determine when and how to share this knowledge including a proposal from and Elders workshop held a few months ago to establish a regional panel of Elders in Ontario to provide advice to governments seeking traditional knowledge and relation-ship building among the Anishinaabek, Mushkegowuk and Onkwehonwe communities;
9. The Anishinaabek, Mushkegowuk and Onkwehonwe' lawmaking jurisdiction and sacred responsibilities to protect the waters in all its forms in all parts of our territories;
10. The importance of treaty making among the Anishinaabek, Mushkegowuk and Onkwehonwe as part of the collective work to protect the waters in Ontario and elsewhere;
11. The impacts of past damage and the Anishinaabek, Mushkegowuk and Onkwehonwe' assessment of current threats arising from major development projects, industrial activity and urban life in the Great Lakes basin, the St. Lawrence River system, the St. Claire River, the North French River, and the James Bay region among others;
12. Lessons learned from the international struggle leading to the adoption of the UN Declaration on the Rights of Indigenous Peoples, and how these lessons should be applied to the Anishinaabek, Mushkegowuk and Onkwehonwe strategies to work together to protect the waters;

13. The healing properties of the waters – physically, emotionally, and spiritually – especially natural spring waters and clean water sources compared to treated waters;
14. The inadequate resources available to ensure that the Anishinaabek, Mushkegowuk and Onkwehonwe in all parts of Ontario and Canada have proper waste water management, and have access to safe drinking water and current attempts to offload the legal liability for this situation from the federal Crown to the Anishinaabek, Mushkegowuk and Onkwehonwe themselves.
15. The Anishinaabek, Mushkegowuk and Onkwehonwe have the rights to fully participate in decisions rather than having an input.
16. The Anishinaabek, Mushkegowuk and Onkwehonwe are not stakeholders.
17. The Anishinaabek, Mushkegowuk and Onkwehonwe women are the holders of the rights to the waters.
18. Each Anishinaabek, Mushkegowuk and Onkwehonwe child born comes with the breaking of water which is a sacred obligation to the future generations.

RIGHT OF WATERS AND SELF DETERMINATION

33. An international protected right within international law relates to the right of self-determination. Indigenous Peoples' right to self-determination was recognized by the General Assembly of the United Nations with the passage of the Declaration on the Rights of Indigenous Peoples. By virtue of the right to freely determine our political status and freely pursue our economic, social, and cultural development. That means we have the right to exercise full authority as well as the responsibilities given to our ancestors by the Creator to care for our relatives (creation) including the waters.

34. Self-determination includes the rights to control our institutions, territories, social order, and cultures without external interference or domination.

RIGHTS TO WATERS AND TREATIES

35. When our Anishinaabek, Mushkegowuk and Onkwehonwe ancestors negotiated and concluded treaties with the Crown, we were exercising our right of self-determination as Nations. Our treaties are recognized under international law and are a source of rights. As treaty Nations, Canada has a legal obligation to engage us in a dialogue to determine their role in relation to the wellbeing of Mother Earth.

36. As the Anishinaabek, Mushkegowuk and Onkwehonwe in Ontario, we are telling Canada and the province of Ontario who are not parties to the treaty but entities who have inherited the obligations to implement the Treaties; we are going to make decisions related to the waters.

37. The Anishinaabek, Mushkegowuk and Onkwehonwe in Ontario have the authority and responsibility as given to us by our Creator. We are going to assert our authority. We have legal rights recognized by the laws given to us by our Creator, Constitution of Canada and International law.

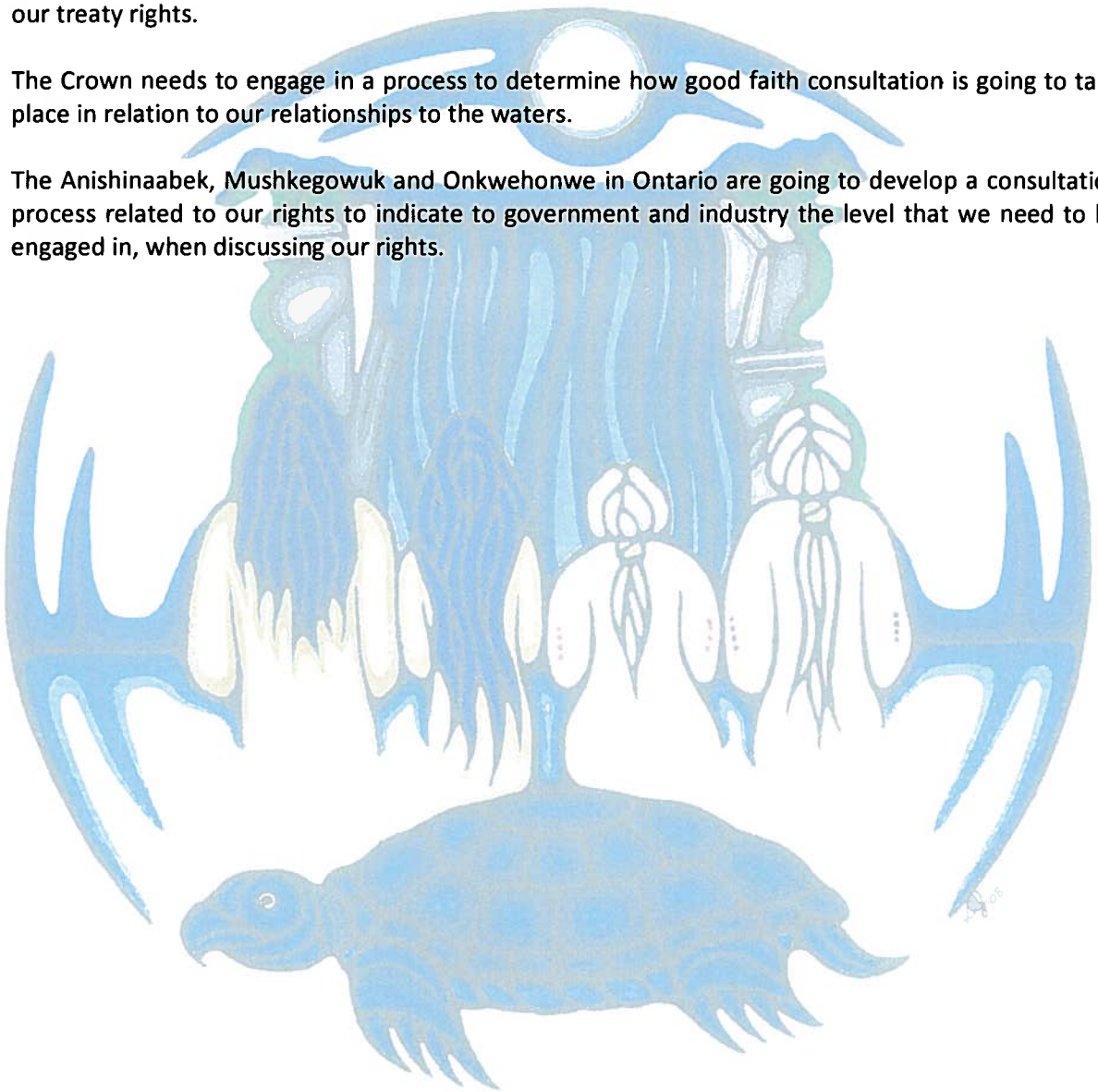
38. The Crown has a duty to consult with Treaty Peoples and to accommodate our interests is grounded in the honour of the Crown.

39. The honour of the Crown requires it to consult with and reasonably accommodate the interests of the Anishinaabek, Mushkegowuk and Onkwehonwe Nations.

40. The purpose of the duty to consult is to protect the lands and all our relations critical to exercising of our treaty rights.

41. The Crown needs to engage in a process to determine how good faith consultation is going to take place in relation to our relationships to the waters.

42. The Anishinaabek, Mushkegowuk and Onkwehonwe in Ontario are going to develop a consultation process related to our rights to indicate to government and industry the level that we need to be engaged in, when discussing our rights.



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