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Dear Ms. Vinette,

RE: Recommendations for BC Environmental Assessment Office (EAO) Review of Public Participation

Pursuant to discussions at our meeting of October 21, 2014, we write to recommend resources regarding the spectrum of public participation opportunities, as well as identify models of participatory approaches to public involvement in environmental assessment.

This brief is not intended to be comprehensive, nor does it address all areas of change we believe are needed to achieve a meaningful public participation in the BC EA process. What it does is suggest some key approaches that would help the EAO better achieve its goals, consult meaningfully and ensure public 'buy in' that fall within the limited scope of its review.

Caveat

During our initial meeting in April, the EAO outlined the following objectives:

1. Decrease the duration of the assessment process, from beginning to end, while maintaining its integrity.
2. Increase certainty and transparency for all participants, while maintaining the integrity of the EA process.
3. Increase efficiency and effectiveness of EAO, while maintaining the integrity of the EA process.
4. Increase collaboration and decrease overlap with permitting agencies, while maintaining the integrity of the EA process.
5. Improve the value of environmental assessments for everyone.
6. Implement fees.

We caution that the dual goals of the first objective may be mutually exclusive, as well as irreconcilable with the Minister's mandate to ensure timelines are appropriate for

environmental protection and some of the EAO's other goals. Based on our experience with mandatory timelines, including most recently under *CEAA 2012*, decreasing environmental assessment process times has in some cases led to decreased certainty, transparency and effectiveness, and impoverished the value of EAs for members of the public, local governments, First Nations and other participants constrained and burdened by impossible timelines.

Accelerated decision making processes put First Nations, the public, government agencies and other participants at a disadvantage and can lead to the perception that "the fix is in." As the EAO is no doubt aware, perception that the process is equal and fair is essential for public buy-in.

Rather than the inflexible goal of decreasing the duration of assessments, we recommend a more nimble approach that would enable efficient processes without compromising the Minister's mandate to improve environmental protection or your goals of improving EAs for everyone.

The models we suggest are made with that nimbleness in mind, believing that they would help the EAO achieve its goals while ensuring robust public participation processes that help land on results acceptable to all.

RESOURCES

In addition to the specific references made in this document, the following are a range of leading resources on public participation that you may wish to consult with links where possible for your convenience.

1. Sherry R. Arnstein, "A Ladder of Citizen Participation," *JAIP*, Vol. 35, No. 4, July 1969 at 216-224, online: file:///H:/Program%20-%20Resource%20Tenures%20and%20Decision%20Making/EA/EAO%20-%20BC%20EA/Submissions%20re%20EAO%20Public%20Participation%20Reform,%20source/s/ladder-of-citizen-participation_en.pdf.
2. International Association for Public Participation, "Foundations of Public Participation," online: <http://iap2canada.ca/Resources/Documents/IAP-006%20brochure%20canada.pdf>.
3. Department of Environment and Conservation, New South Wales, "A Guide for Engaging Communities in Environmental Planning and Decision Making," online: <https://bch.cbd.int/cms/ui/collaboration/download/download.aspx?id=746>.
4. A Booth and NW Skelton, "We are Fighting for Ourselves' – First Nations' Evaluation of British Columbia and Canadian Environmental Assessment Processes" 2010 *Jnl Env'tl Assmt P & M* 13:3, 367 at 395.
5. René Parenteau, *Public Participation in Environmental Decision-Making*, (Ottawa: Minister of Supply and Services Canada, 1988).
6. Thomas C. Beierle, "Public Participation in Environmental Decisions: An evaluation framework using social goals," Discussion Paper 99-06 (Resources for the Future, 1998), online: <http://www.rff.org/documents/rff-dp-99-06.pdf>.

BEST PRACTICES IN PUBLIC PARTICIPATION¹

Environmental assessments should have early and ongoing processes, as well as adequate time and resources, to meaningfully engage the public. Limited participant funding, restricted opportunities, short timelines, poorly developed processes and narrow project scope impede public participation.

Effective participation can actually result in reduced project costs for proponents, as well as fewer social, environmental and health costs, by providing a forum for identifying potential issues and conflicts, as well as ways of avoiding and resolving those problems.

For example, a 2004 study of public participation in federal review panels found that public input has resulted in sometimes significant improvements in the process of consultation and in the planning and implementation of projects.² Conducting effective reviews lead to numerous short- and long-term savings, such as public acceptance, identification of issues and reduction of project and social costs. Moreover, an earned social license to proceed with a project gives better long term certainty than conflict and potential court challenges.

Conversely, a failure to incorporate public consultation in all stages of environmental assessments can lead to increased costs and unsatisfactory outcomes.

A multi-stakeholder Regulatory Advisory Committee to the federal Minister regarding the Canadian Environmental Assessment process (its members included industry representatives, as well as West Coast Environmental Law) advised that to achieve maximum results, public participation should:

- be based on full access to relevant and required information;
- include the opportunity to critically review and comment on the information in a two way or dynamic exchange;
- occur early enough to allow participants to have an influence on the planning of the project;
- allow sufficient time to review and respond;
- require a consultation plan to be developed and shared with the public;
- be efforts to relate public comment to process or project decisions;
- include notification, provision of information, discussion and exchange; and
- be timely.

While we are advocates for more substantive systemic shifts to enable citizen participation in environmental decision-making (including environmental assessment), a number of improvements could potentially be made even in the absence of statutory reform, including the following:

¹ Many of the suggestions we make in this section are based on the 10 core principles for strong environmental assessment laws we developed in conjunction with other environmental non-governmental organizations in early 2012 in anticipation of changes to federal environmental laws. The full list of principles and the full discussion paper can be found at

http://www.envirolawsmatter.ca/statement_of_principles and a list of the 58 endorsers at

<http://www.envirolawsmatter.ca/endorsers>.

² Karen Campbell and Susan Rutherford, *Time Well Spent? A Survey of Public Participation in Federal Environmental Assessment Panels* (Vancouver: West Coast Environmental Law, 2004), online:

<http://wcel.org/resources/publication/time-well-spent-survey-public-participation-federal-environmental-assessment-p>.

1. **Require the involvement of the public throughout all stages of the EA,** including:
 - determining the scope and process of review in the Section 11 Order,
 - determining the amount and process for distributing public participation funding,
 - identifying existing baseline conditions and the scope of the cumulative effects assessment, and
 - all other aspects of the pre-Application and Application stages, through to monitoring, compliance and follow-up.
2. **Ensure that formal public comment periods are sufficiently long** to permit a thorough analysis of the proponent and other participants' information, and the preparation of detailed responses (including expert reports).
3. **Build flexibility into formal public comment processes,** including the ability to grant extensions where necessary, to reflect the varying complexity of and public's interest in different projects, and accommodate identification of data gaps and the reception of new information.
4. **Ensure all relevant records** produced at all stages of the assessment, including those not produced that are not required by the EAO and those submitted outside formal comment periods), are considered by the EAO and made publicly available (e.g., on the e-PIC).
5. **Require that all information related to follow-up, monitoring, and compliance and enforcement** be posted to the e-PIC, including information received by the public and other government bodies (including First Nations).
6. **Require proponents to respond to all public comments** and post those responses to the e-PIC.
7. **Provide public funding** proportionate to the scale, scope and complexity of issues, and sufficient to enable participants to analyse information and prepare comments at all stages of the assessment on issues of importance to them, including retaining experts and counsel to provide scientific and technical critical analysis where appropriate.
8. **Establish means of providing “dialogue participation methods,”** such as advisory committees, task forces, and community or advisory boards,³ to emphasize ongoing dialogue and communication among project proponents, the EAO, civic organizations and other government bodies (including First Nations).
9. **Establish a mechanism for addressing and resolving broader systemic concerns regarding the EA process by First Nations and the public.** Currently, the only mechanism to raise procedural concerns with the EA process is through specific assessments, which is not effective, efficient, fair, reasonable, or procedurally equitable.⁴

³ E.g., the Clayoquot Sound Central Region Board, a co-management board comprised of First Nations and the BC government charged with ensuring that the recommendations of the Clayoquot Sound Scientific Panel for ecosystem-based management were reflected in all resource management plans and approvals in Clayoquot Sound. See Sharmalene Mendis-Millard, "The Central Region Board," in Daniel Arbour, Brenda Kuecks & Danielle Edwards (eds), *Nuu-chah-nulth Central Region First Nations Governance Structures 2007/2008* (Ecotrust Canada, Vancouver: 2008) at 21, online: <http://ecotrust.ca/sites/all/files/ECReport-FNGovernance.pdf>.

⁴ A Booth and NW Skelton, "We are Fighting for Ourselves' – First Nations' Evaluation of British

PUBLIC PARTICIPATION MODELS

There is a broad range of participatory approaches that could be used with respect to public involvement in EAs. We urge the EAO to consult citizens groups with knowledge and interest in public participation and EAs, as well as First Nations, to identify and explore such options.

We note that public involvement/participation is distinct from the Crown's constitutionally mandated role to accommodate decision-making aspects of Aboriginal title and Aboriginal governance rights in the design of environmental assessment processes. We recently completed a multi-year research project in which we examined models with potential applicability to cumulative effects assessment and management in British Columbia that explored best practices regarding collaboration between levels of government (including provincial and First Nations governments) as well as public participation and related issues.

With the above principles in mind, we note the following approaches with potential value in achieving your identified objectives:⁵

1. **Regional strategic environmental assessments (R-SEAs)** designed and conducted in conjunction with First Nations and local communities, especially of projects, plans or policies respecting heavily impacted areas or with the potential for broad cumulative impacts. We strongly recommend that the EAO work with First Nations and local communities to establish a fair and transparent R-SEA process for assessing multiple proposals, such as LNG and its associated natural gas in northeast BC. We and our allies requested an R-SEA of LNG in our letter to the provincial and federal Environment Ministers dated (February), 2014, and the University of Victoria's Environmental Law Centre, on behalf of the Northwest Institute, requested the same of the federal and BC Ministers of Environment in August 2013.

A low-hanging fruit, R-SEAs would be one of the most effective means of increasing the robustness of public participation while decreasing burdens on individual proponents. In Our recently concluded research project on best practices in cumulative effects management suggests that collaborative regional-scale approaches are more effective and efficient than individual EAs when assessing multiple similar projects and different development scenarios.⁶

Project-based assessments are typically not effective at addressing underlying concerns and issues, including cumulative effects and broad public policy matters. R-SEA facilitates attention to strategic issues, which can provide guidance for subsequent undertakings and project-specific decision-making.⁷ It can increase the effectiveness of project-specific EAs while making those processes faster, more streamlined and less costly.⁸

Undertaken in advance of development, R-SEAs reduce the burden on proponents, government bodies, First Nations, civil society groups, the public and other stakeholders,

Columbia and Canadian Environmental Assessment Processes" 2010 *Jnl Envtl Assmt P & M* 13:3, 367 at 395.

⁵ Jessica Clogg and Deborah Carlson, *Regional Cumulative Effects Management in British Columbia. A Legal Discussion Paper* (WCEL, forthcoming). For a presentation regarding preliminary research results, see: <http://wcel.org/resources/publication/who-owns-regional-cumulative-effects-assessment-presentation>

⁶ *Ibid.*

⁷ Brenda Heelan Powell, *Model Environmental and Sustainability Assessment Law* (Environmental Law Centre, 2013) at 14.

⁸ OECD, *Applying Strategic Environmental Assessment Good Practice Guidance for Development Co-operation* (OECD Publishing: 2006) at 32, online: <http://www.oecd.org/dac/environment-development/37353858.pdf>.

while enriching the quantity and quality of the information on which project-specific decisions should be made. Done properly, the decision-making process is more collaborative and inclusive than traditional EAs, increasing the likelihood of broader support for specific projects that are approved.

As Minister Polak recently experienced with the Orders-in-Council passed excluding natural gas facilities and all-season resorts from the *Reviewable Projects Regulation*, public and First Nations' frustration over rapid development in regions of BC and increasingly limited ability to have their views inform how or whether development proceeds is mounting, and lack of public, First Nations and community support can stall or halt development.

To reiterate, to facilitate the achievement of the Mandate and EAO goals, and enhanced social licence, we strongly recommend that the provincial government work with First Nations, local communities and the public to establish a framework for R-SEAs in BC generally, as well a fair and transparent R-SEA process for assessing LNG and its associated natural gas in northeast BC.

2. **Collaborative cumulative effects management.** Collaboration between provincial, federal and First Nations governments, and between government and non-governmental actors can and should be structured into project-specific EAs and cumulative effects management.
3. **Co-assessment bodies.** Collaboration between First Nations and other levels of government may be formally institutionalized in co-assessment bodies. In the Mackenzie Valley, for example, the Mackenzie Valley Environmental Review Board is responsible for conducting EAs in the region either directly or through a review panel appointed by it. Ideally these would be legislatively enabled (see for example the 2009 proposal from the First Nations Energy and Mining Council, entitled *Environmental Assessment and First Nations in BC: Proposals for Reform*).⁹ However, we submit that such approaches could also be enabled through agreements entered into under section 27 of the EAA or potentially through other government-to-government agreements with First Nations. An example is the Clayoquot Sound Central Region Board, a co-management body made up of equal representatives from First Nations and the provincial government, the latter of which were typically appointed from among local community members. The CRB reviewed all strategic and operational resource management plans as well as decisions regarding alienation of land and water resources, land tenures, wildlife management and mining in Clayoquot Sound, and recommended rejection, approval, or modification to the originating ministry/proponent. Co-review bodies could be similarly established to consider project or policy proposals, or the cumulative effects of multiple developments in a region.
4. **Independent science bodies.** One of the challenges for public participants in environmental assessment is the cost and complexity of engaging independent experts to assist in evaluating impacts. Independent Science Bodies can be used to develop a common set of scientific and Indigenous knowledge resources to various land use planning and decision-making processes. The Coast Information Team, for example, was established pursuant to a memorandum of understanding to provide independent information and analysis, based on best available scientific, traditional, and local knowledge on the development and implementation of ecosystem-based land use planning and management on the North and Central Coast and Haida Gwaii. Similarly, The Clayoquot Scientific Panel, an expert panel of Elders, Indigenous knowledge holders

⁹ Available on-line at: <http://www.fnemc.ca/wp-content/uploads/2014/01/New-Approaches-to-EA-in-BC-20aug09.pdf>

and scientific experts, made extensive findings and recommendations for “sustainable ecosystem management in Clayoquot Sound” that were adopted in 1996 as the basis of decisions about tenure, planning and practices in the region through an Interim Measures Agreement between the Provincial Government and the Ha’wiih (Hereditary Chiefs) of the Nuu-chah-nulth central region. Such panels could be established to inform project-specific EAs, R-SEAs and cumulative effects studies.

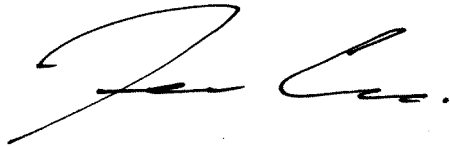
5. **Joint technical bodies.** Joint technical bodies are an emerging product of shared decision-making agreements between the Crown and First Nations. Responsible for collaboratively reviewing and making recommendations to decision-makers on land and resource applications in the nations’ territories according to an agreed-to “engagement” or “shared decision-making” process framework, joint technical bodies provide direction with respect to resource approvals. At a minimum, such “shared decision-making” arrangements should be extended to include environmental assessment.

CONCLUSION

We believe that the above suggestions could help ensure that development and resource use occurs according to long-term planning and policy objectives that have as their core objective sustainability, and that decisions about proposed development and resource use are made wisely and based on an effective, efficient, inclusive and robust assessment process that includes broad and meaningful opportunities for participation by the public, and enables a constitutionally appropriate decision-making role for First Nations.

We would be happy to discuss our suggestions and other policy and law reform measures in person or in supplementary submissions. If you have any questions, please do not hesitate to ask.

Sincerely,
WEST COAST ENVIRONMENTAL LAW ASSN



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