Assembly of First Nations

Submission to the House of Commons Standing Committee on the Environment and Sustainable Development

Canadian Environmental Assessment Act Seven-year Review

November 28, 2011

Introduction

Summary

- First Nations are interested in, and impacted by, the terms and implementation of the Canadian Environmental Assessment Act (CEAA)

- CEAA provides an opportunity for reconciliation of First Nations sovereignty and Crown's presumed sovereignty with respect to impacts of development on our lands, territories and resources

- The process for the seven year review is similar to the process that First Nations face with respect to project reviews. First Nations are often engaged late in the process. When combined with the sheer length and technical nature of many environmental assessments, First Nations are left without the opportunity to conduct a meaningful review of materials.

- In too many circumstances, First Nations are forced to resort to litigation because the environmental assessment process does not adequately consider aboriginal and treaty rights. First Nations issues dominate litigation of environmental assessments, yet First Nations are not meaningfully involved in legislative or policy development.

- First Nations, especially those facing high profile projects, are now openly questioning the integrity and effectiveness of the environmental assessment process. If our input is simply an afterthought, or a political expedient, our input will not be useful and the integrity of the environmental assessment process will be at risk.

- First Nations want to work with Parliament and with decision makers on the review of the CEAA. Litigation and confrontation are costly for First Nations, project proponents and government, but often necessary. For example, one Crown agency has suggested that an absence of litigation implies First Nations consent.

About the Assembly of First Nations

- The Assembly of First Nations (AFN) is the national representative organization of First Nations in Canada. There are over 630 First Nations communities in Canada. The Chiefs meet regularly to set national policy and direction through resolution. The National Chief is elected every three years by the Chiefs-in-Assembly. The present National Chief of the Assembly of First Nations is Shawn Atleo.

- The Environmental Stewardship Unit of the AFN contains experts in public health, environmental science, law and policy and works on a range of issues, including primary environmental health research, environmental assessment support for First Nations, Nuclear Waste Management, Fisheries and Species at Risk policy.

- The AFN is mandated to work on CEAA related issues primarily through support resolutions, such as Resolutions 03/2010, 01/2010, 29/2010, 59/2010.

Sustainability is a foundation for reconciliation

Sustainability and Environmental Assessment

- One of the purposes of the Canadian Environmental Assessment Act is to, "to encourage responsible authorities to take actions that promote sustainable development and thereby achieve or maintain a healthy environment and a healthy economy"[1]

- Realization of sustainable development requires a rights-driven process: "Both aspects of man's environment, the natural and the man-made, are essential to his well-being and to the enjoyment of basic human rights the right to life itself."[2] A robust environmental assessment process is intrinsically linked to sustainable development, which itself requires recognition and respect for indigenous rights.

- In light of the upcoming United Nations Conference on Environment and Sustainable Development (Rio +20), the importance of federal legislation on environmental assessment is properly placed in a broader context. Environmental assessment is closely linked to the principle of sustainable development because it provides a process to identify, characterize and mitigate the impacts of development projects, preserving environmental resources for future generations, while meeting the needs of this generation.

- Linkages between sustainability, poverty eradication and promotion of human rights explains why international best practice is currently evolving towards more comprehensive processes, including socio-environmental impact assessments[3] and human rights assessments.[4]

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[1] *Canadian Environmental Assessment Act*, s. 4(1)(b).
[2] *Declaration of the United Nations Conference on the Human Environment*, Stockholm (1972).
[3] Secretariat of the Convention on Biological Diversity *Akwé: Kon Voluntary Guidelines for the Conduct of Cultural, Environmental and Social Impact Assessment regarding Developments Proposed to Take Place on, or which are Likely to Impact on, Sacred Sites and on Lands and Waters Traditionally Occupied or Used by Indigenous and Local Communities* (Montreal, 2004).
[4] International Finance Corporation, Guide to Human Rights Impact Assessment and Management (Washington, 2010), available online at: http://www.ifc.org/ifcext/sustainability.nsf/Content/Publications_Handbook_HRIA.

- For example, Principle 17 of the Rio Earth Declaration states, "Environmental impact assessment, as a national instrument, shall be undertaken for proposed activities that are likely to have a significant adverse impact on the environment and are subject to a decision of a competent national authority." In addition, several decisions of international courts have either upheld the importance of environmental impact assessment, or have commented on the sufficiency of specific assessment procedures.[5]

- AFN applauds Canada for reflecting Principle 17 of the Rio Declaration in its legislation. Principle 22 of the same Declaration states, "Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development."

- First Nations are expert in managing the environment. When this territory was under indigenous management, the rivers were filled with fish and the forests were full of trees. First Nations have always been available to share our knowledge of environmental management and sustainability. First Nations demand that exchanges of information are respectful; respectful of our traditions, our elders, our women and our Nations.

- Indigenous peoples require clean environments and access to natural resources in order to continue and maintain our cultures and our livelihoods. Sustainability is a foundation for reconciliation because in the absence of a clean environment, First Nations cultures cannot be preserved or promoted. Moreover, First Nations rights, particularly harvesting rights, cannot be exercised when environments are under stress and species are near the brink of extinction.

- First Nations are not opposed to economic development. First Nations support responsible economic development. The Canadian Environmental Assessment Act has a central role to play in the determination of whether a particular development proposal is 'responsible'. If the Act does not provide adequate consideration for First Nations rights, then it will play a marginal role in First Nations decision making processes.

- AFN would like to offer comments to Parliament and to the Agency in the spirit of supporting the effective participation of First Nations in the realization of

[5] For example, the *Gabcikovo-Nagymaros Project* (Hungary/Slovakia), (1997) ICJ Reports 7; *Lac Lanoux Arbitration* (France v. Spain), (1957) 24 ILR 101. See also the *Mox Plant Case* (Ireland v. UK), the *Nuclear Test Case* (New Zealand v. France) and the *Trail Smelter Arbitral Decision* (United States v. Canada) 3 RIAA 1905, for examples of environmental assessment processes used in the settlement of international disputes.

sustainable development through the CEAA. AFN recognizes that sustainable and responsible development is a necessary precursor for full and effective recognition of our rights, for protection of our environments and for closing the socio-economic gap between First Nations and other Canadians. A strong CEAA is necessary to achieve reconciliation and is vital to attaining prosperity for our future generations.

Reconciliation of knowledge

- CEAA is a revolutionary piece of legislation because it provided one of the first opportunities for practical application of traditional knowledge to an environmental policy process.

- Indigenous knowledge is closely linked to biodiversity because customary forms of environmental management are demonstrably linked to more diverse environments. Moreover, the correlation between linguistic diversity and biological diversity has been well established for some time.

- Implemented properly, the CEAA process may provide First Nations with critical information regarding both the current state and the estimated impact from a project of our lands, territories and resources. First Nations support economic development and seek to ensure that projects are implemented in a way that is respectful of our cultures, our economies and our rights.

- **The CEAA should be amended to require consultation with First Nations on scoping decisions and on identification of parameters for assessment. In identifying parameters, First Nations should also be consulted on proposed methodologies for assessing environmental impact.**

- Provided the information is accurate and objective, this is precisely the information that First Nations need in order to properly manage our lands, territories and resources. Unfortunately, the information in many environmental impact statements is not easily accessible to First Nations. This is due to a propensity to 'swamp' First Nations with thousand page reports and bury critical details in technical language or in hidden assumptions.

- **The CEAA should be amended to require proponents to develop plain language summaries that respond directly to concerns raised by First Nations in the scoping process. Plain language summaries should detail any assumptions made, as well as the effect of the assumption, including, where possible, an explanation of outcomes using alternate assumptions.**

- AFN stresses that First Nation expertise in environment arises from a different language, a different epistemology and a different culture than expertise held by

scientists and engineers performing environmental assessments. Although this has been a barrier to full and effective participation of First Nations in environmental assessments, it could also be an opportunity for a more complete process.

- CEAA also provides an opportunity for First Nations to apply traditional knowledge regarding either the state of the environment or the projected impacts of a project. This practical application of traditional knowledge could build bridges between First Nations, policy makers, project proponents and the scientific community.

- Information produced during a CEAA process is critically important for First Nations and the Crown to assess projected impacts on aboriginal and treaty rights. This information requires careful analysis by traditional knowledge holders and scientists, to determine the extent of impact on key resources, and by legal specialists, to determine the strength of any claims that might be impacted by those impacts. The standard of Free, Prior and Informed Consent means that the bridge between traditional knowledge and western scientific knowledge needs to be substantially strengthened, if not reconstructed.

- **The CEAA should be amended to require the Crown to share 'strength of claims' assessments with First Nations, and First Nations should be consulted and invited to comment, in order to provide a full and common understanding of the Crown's position.**

Sustainability requires reconciliation of rights

- Economists have long understood the importance of resource rights to environmental issues. In absence of such rights, a "Tragedy of the Commons" may occur, where actors all have strong incentives to deplete resources, but weak and ineffective incentives to conserve.[6] One 'solution' to the 'tragedy of the commons' is to ensure that rights to scarce resources are allocable and enforceable. Aboriginal title and treaty lands are not commons even though the Crown, industry and others often act as though they are, creating a tragedy of the commons in First Nations lands. One of the solutions to the problems posed by the 'tragedy of the commons' is recognition of First Nations proprietary interests in our territories.

- International law also recognizes the close connection between sustainability and rights.[7] The United Nations Declaration on the Rights of Indigenous Peoples states, "Indigenous peoples have the right to the conservation and protection of the

[6] Garret Hardin, "Tragedy of the Commons", Science, 162(1968):1243-1248

[7] GA Res A/RES/45/94 (14 December 1990). See also the related study; Special Rapporteur Fatma Zohra Ksentini, *Review of further developments in fields with which the Sub-Commission has been concerned human rights and the environment*, UN Doc. E/CN.4/Sub.2/1994/9 (6 July 1994).

environment and the productive capacity of their lands or territories and resources".[8]

- The CEAA has not been reviewed since the Supreme Court of Canada's landmark decisions in *Haida Nation, Taku River, Mikisew* and the adoption of the United Nations Declaration on the Rights of Indigenous Peoples. As a result, there are several matters related to "consultation" which should be examined by the Committee.

- Over the past 9 years, constitutional and common law has developed recognition that in order to achieve reconciliation, the Honour of the Crown imposes a duty to consult and accommodate in certain circumstances. In particular, the Supreme Court of Canada has held that where there is an asserted claim of aboriginal rights, aboriginal title or treaty rights, the Crown must consult with and accommodate First Nations rights.

- **AFN recommends that the Standing Committee and the Government commit to a joint legislative development process with First Nations to substantially reform the Canadian Environmental Assessment Act and ensure the Honour of the Crown is upheld.**

- Environmental assessment processes are often used by governments in an attempt to fulfil their constitutional duty to consult and accommodate aboriginal and treaty rights. In the *Taku River* case, the provincial environmental assessment legislation was sufficient to discharge the duty to consult and accommodate, based on that statutory scheme, which has since been replaced, and the facts of that particular case. However, that legislation had a number of significant differences from the CEAA currently under review.[9]

- There have been several international law developments of note in the past seven years. Environmental Assessment is now directly linked with First Nations human rights, and particularly the right of self-determination.[10]

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[8] UNDRIP, Art. 29(1).

[9] For example, the court noted that the TRTFN was part of the Project Committee, overseeing the assessment [para. 22]. See also para. 42, where the court notes that the proponent was required to respond to specific issues raised by the First Nation or para. 44, where the court notes the province developed accommodation measures specifically linked to concerns raised by the First Nation. Since *Taku*, BC substantially weakened provisions relating to First Nations consultation and accommodation. As a consequence, the BC environmental assessment regime is currently subject to a great deal of litigation from First Nations.

[10] Case of the Saramaka people (Saramaka v. Suriname) para. 93.

Achieving reconciliation through CEAA

- During the last CEAA review, AFN made submissions regarding the importance of meaningful consultation with First Nations, particularly in relation to lands within First Nations traditional territories. The amendments to the Act insufficiently addressed these concerns, leaving it to the courts to provide First Nations with a remedy.

- According to Canadian common law, the government's duty to consult with Aboriginal peoples and accommodate their interests is grounded in the honour of the Crown. The honour of the Crown is always at stake in its dealings with Aboriginal peoples…It is not a mere incantation, but rather a core precept that finds its application in concrete practices.

- Environmental assessment processes are often closely linked to the duty to consult and accommodate because the exercise of First Nations aboriginal and treaty rights requires a clean and healthy environment. First Nations often appeal to the environmental assessment process to make determinations relevant to key resources required for the continued ability to exercise our constitutionally-protected rights.

- This means CEAA may present considerable legal risk to the Crown and a financial risk to project proponents. This is because under the current policy framework, consultation and accommodation of aboriginal rights are not dealt with in a rigorous or explicit fashion. They are often treated as interests that are subordinate to environmental or economic considerations. Aboriginal and treaty rights are explicitly recognized and affirmed in the Constitution, economic and environmental considerations are not. Ambiguities in terms of consultation means increasing litigation which in turn means increased costs for First Nations and proponents, and fewer developments receiving approval due to delay.

- **AFN recommends the Committee consider substantial amendments to the Act on Free, Prior and Informed Consent through a joint dialogue with First Nations. While AFN has identified some specific issues, the importance of the "consultation" combined with the potential for development of processes and procedures to manage the duty honourably and effectively suggest a major legislative overhaul is required.**

Roles and Responsibilities

- Courts have stated that procedural aspects of the duty to consult and accommodated may be undertaken by third parties, although the Crown is ultimately responsible for discharging the duty honourably.

- It is often unclear to First Nations how the role of the proponent and the role of the Crown relate to "consultation" requirements. Ambiguous roles and responsibilities of First Nations, the Crown and proponents create confusion and delay, undermining the legitimacy of the process. Clarifying roles and responsibilities is an issue that should be clarified in the text of the Act.[11]

Notice

- Courts have held that the Crown must be on notice that there is an aboriginal or treaty right which needs to be accommodated. The CEAA Act does not require notice if a project is being proposed in a First Nations traditional territory. First Nations cannot inform the Crown about aboriginal or treaty rights in relation to specific projects, if they are unaware those projects even exist.

- Notice must be adequate. This means there must be sufficient time from when notice is provided for First Nations to register concerns regarding the project. If CEAA requires First Nations to particularize potential claims at the outset, then quite a bit of time will be required by First Nations to secure the necessary factual analysis and legal work. AFN suggests that notice should be used to identify 'potentially interested First Nations'.

- **The CEAA Act should require notice be provided directly to First Nations, where a project may have impacts on that First Nation's traditional territory. The Standing Committee may be referred to best practices in other provinces, as applicable.[12]**

Strategic Environmental Assessments

- According to Canadian common law, the duty to consult and accommodate requires the Crown to undertake a 'strength of claim' analysis prior to determining whether consultation or accommodation is required and, obviously, before taking any actions which would violate the duty to consult and accommodate.

- Because the duty to consult and accommodate is highly fact specific and highly location specific, the use of strategic environmental assessments is inadequate to discharge the duty to consult and accommodate. Effective use of strategic environmental assessments requires an assumption that the environmental impacts of the proposed activity are the same everywhere.

- This directly contradicts duty to consult and accommodate jurisprudence. AFN emphasizes that environmental impacts that seem minor to the Agency or a

[11] AFN recommends consideration of the processes established under the Yukon Environmental and Social Assessment Act.
[12] See Yukon Environmental and Social Assessment Act. See also, the Aboriginal Consultation Guidelines for Renewable Energy Projects (Ontario).

proponent may nonetheless require accommodation. We rely on a healthy environment to exercise our aboriginal and treaty rights, and in many cases, to live.

- The current provisions on strategic environmental assessment may be unconstitutional because they expressly permit activities which violate the Honour of the Crown. The Act should be amended either to repeal those provisions allowing the use of strategic environmental assessments or amended to require Free, Prior and Informed Consent, even where a strategic environmental assessment has been completed.

Capacity

- AFN welcomes the outcome of the last review of the CEAA, which created a funding mechanism for First Nations to engage in environmental assessments.

- Since the last review, the increased importance of the legal requirements on "consultation" law means that First Nations must respond not only to technical issues raised by a proposal, but must also demonstrate a legal base to trigger the duty to consult. In some cases, this means compiling a considerable amount of evidence to support a *prima facie* claim for an aboriginal or treaty right.

- Capacity funding for First Nations participation in reviews needs to be dramatically increased. The additional cost incurred by First Nations includes not only legal experts, but also experts who can determine the linkages between technical issues (chemical contamination, hydrogeological change) and aboriginal and treaty rights.

- If First Nations are deluged in thousand-page technical reports and appendices and not provided any meaningful opportunity to explore potential impacts on rights, then increasing numbers of projects will be forced into high-cost, high-stakes litigation.

- **The Aboriginal Capacity Funding Enveloped should be dramatically expanded to ensure First Nations are capable of engaging meaningfully in environmental assessments.**

High level policy decisions and CEAA

- CEAA requires stronger provisions allowing for First Nations involvement in all stages of the assessment process. Particularly where the duty to consult may be triggered, simply soliciting information and judging its value is not sufficient. First Nations need to be involved in scoping, policy development and setting procedures for environmental assessments.

- In *Rio Tinto Alcan*, the Supreme Court of Canada stated, the "duty to consult may arise not only with respect to specific physical impacts, but with respect to high-level managerial or policy decisions that may potentially affect the future exploitation of a resource to the detriment of Aboriginal claimants."

- It is also good policy to ensure First Nations are involved in all aspects of the environmental assessment process, not just consulted on conclusions. Consultation and involvement in process and study design ensures that key 'valued ecosystem components' are properly scoped and assessed for study by the proponent. Environmental Assessments are then relevant for First Nations and for the Crown, which is required to accommodating those interests.

- Finally, Consultation must be more than a legal risk management exercise. Failure to address issues of consultation and accommodation in this review of the CEAA will likely lead to an adversarial relationship between the Crown and First Nations. The reason is that policymakers will rely only on their own internal analysis of the strength of a claim, most likely prepared by the Department of Justice, which also has the responsibility for defending those claims. It is only logical to assume that less collaboration will lead to increased differences.

- Changes to the provincial EA process which minimize the role of First Nations has led not only to an increasingly adversarial environment, but one marked by increased litigation, as First Nation counsel and Crown counsel compete over which legal analysis is correct, rather than working together to determine appropriate action.

- Although it is not possible for the Crown to 'over-consult', failure to consult appropriately will breach the Honour of the Crown and will lead to increased litigation, draining resources from First Nations, from proponents and from the Crown.

- Article 18 of the UN Declaration on the Rights of Indigenous Peoples states: "Indigenous peoples have the right to participate in decision-making in matters which would affect their rights, through representatives chosen by themselves in accordance with their own procedures, as well as to maintain and develop their own indigenous decision-making institutions."

- **The Canadian Environmental Assessment Act should be amended to require First Nations representation within the policy making process, as well as on the decision making process for all relevant processes under the Act (including recommendations made to the Minister)**

Aboriginal title or treaty rights should be a Trigger

- Any project impacting on an aboriginal or treaty right should provide a trigger for the CEAA. Treaties were made with the federal Crown and the Honour of the Crown is implicated in their fulfillment.

- **CEAA should be amended to include aboriginal or treaty rights as triggers for a CEAA review.**

Reconciling Nations through CEAA

Free, prior and informed consent

- AFN also notes the United Nations Declaration on the Rights of Indigenous Peoples. Article 32(2) requires Canada to "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."

- Article 32(2) and Article 18 of the Declaration also clarify that First Nations have the right to make decisions, through our own decision-making institutions. This is particularly the case where those decisions may impact First Nations lands, territories, resources or cultures. CEAA allows for three types of decisions: Approval, conditional approval, or rejection. CEAA does not contemplate rejection of projects by First Nations.

- A recent meeting of the Expert Mechanism on Indigenous Peoples has held that 'effective participation' and, in some cases, free, prior and informed consent are now established standards of international law.

- There is no recognition in CEAA of free, prior and informed consent. First Nations have complained that EAs are often completed on the assumption that the project itself will proceed, irrespective of concerns raised by First Nations.

- More than any other identifiable group, First Nations must resort to litigation in order to raise issues with the conduct or the content of environmental assessments. One reason for this is the silence of the Act on such matters. Another is the lack of any other objective mechanism that reconciles the operation of the Act with aboriginal and treaty rights.

- International human rights law, including instruments to which Canada has already agreed recognizes that the free, prior and informed consent of indigenous peoples

must be secured. This is particularly the case in major projects. Failure to secure free, prior and informed consent would place Canada in breach of its obligations regarding the International Convention on the Elimination of All Forms of Racial Discrimination and the International Covenant on Civil and Political Rights, among others.

- **The term "free, prior and informed consent" should be referenced in the language of the Act, and the Act should further specify the circumstances under which free, prior and informed consent of First Nations must be secured.**

First Nations self-government over EA processes

- Section 59(l) of the Act allows the promulgation of regulations for the development of First Nations environmental assessment laws. These laws would provide a legal foundation for environmental protection of on-reserve environments, promote further application of traditional knowledge and enhance democracy by recognizing First Nations communities control over on-reserve environment and land use planning decisions.

- The development of regulations pursuant to s. 59(l) of the Act requires government approval and action. To AFN's knowledge, no regulations have been developed under s. 59(l). AFN is aware of only one outreach or pilot initiative involving development of s. 59(l) regulations with the Union of Nova Scotia Indians, but is not aware of any outcomes from this initiative.

- Even if s. 59(l) were applied more broadly AFN recommends the Act be amended to provide a required budgetary allocation for compliance assurance and enforcement, for FNs undertaking EA regulations. The allocation should vary based on the number of FNs that develop regulations and should be indexed to either inflation, or community level demand.

Regulatory Advisory Committee - RAC

- During the previous review of the CEAA, AFN requested membership in the Regulatory Advisory Committee. Although a First Nations representative was appointed to the RAC, it appears that the RAC itself has not met in quite some time and may be without purpose. This is quite disturbing.

- The Regulatory Advisory body should be re-started and given a statutory mandate to review the operation of the Act on an annual basis and to participate in future legislative reviews of the CEAA.

- Moreover, the Standing Committee should consider providing the RAC with the power to issue public binding or non-binding opinions on disputes between First Nations, proponents and/or the Agency.

- First Nation participation on the RAC might be able to address, for example, the failure of the Crown to act on implementation of regulatory development under s. 59(L) of the CEAA. This issue was raised by AFN in the last review of the CEAA and AFN is unaware of any follow up.