First Nations Perspectives on the BC Environmental Assessment Process
For Discussion Purposes

1. First Nations have no Decision Making authority in the process or the result

First Nations in the present EAO process are mere 'stakeholders'. They have no power or authority over the design of the process, or the ultimate decision. The Minister makes the final decision as to approval without any further recourse to the First Nation. The purpose of the process is to enable the Minister to weigh the larger 'public interest' against both environmental harm and First Nations interests. First Nations interests may not be fairly served in that process.

No matter how much they are 'consulted' in the design, First Nations feel powerless in the process. It is the EAO who draft all documents with legal power, and all interim and final reports. It remains the Minister who has complete power under s. 14 to determine the scope of the assessment and procedures. A proper process that recognized the existing legal interests of the First Nation, and the separate legal and jurisdictional status would have a true 'joint' role for First Nations in process-design, and in final report and other decision-making processes.

2. The Decision-Making Criteria under the EAO legislation does not include any mandatory First Nations criteria

As currently written the Minister (or ministers) has the decision-making authority following environmental assessment pursuant to s. 17(3). That discretion is completely unfettered by statute. The Minister(s) has no specific statutory responsibility to protect First Nations interests, or even to weigh those interests in doing so. The legislation does not refer to First Nations interests as an aspect of the decision but provides only that the ministers *"may consider any other matters that they consider relevant to the public interest in making their decision*" [emphasis added]. Although an obligation to First Nations can be inferred from the common-law *Haida* principles to be an aspect of the public interest, the Minister can meet that duty under the statute simply by paying lip-service to having considered it in the context of the economic development opportunity. In any event, the statute is discretionary.

Where the minister considers that the larger public interest is contrary to the interests of the First Nation (eg. where 'economic development' is a factor), such unfettered discretion means that even a project openly harmful to First Nations can be approved without any recourse. There is no appeal mechanism provided, and the absence of statutory criteria referencing First Nations interests means that any judicial review on that ground becomes very difficult.

Further, the presumed purpose of the EAO investigation is 'environmental' (although the Minister's discretion even for this purpose appears undirected). The investigation of First Nations interests remains a side-issue, and not part of the main focus of the legislation.

3. **The 2002 amendments to the BC *Environmental Assessment Act* removed a legislated role for First Nations from the process.**

In 2002 the *BCEAA* was repealed and re-enacted in a manner that appear to be a deliberate attempt to limit duties to First Nations. Even though the former legislation was also deficient in the manners described herein, the 2002 version removed almost all provisions that referenced a separate role for First Nations in the EA review process and more meaningful consideration of impacts of a project on First Nations communities.

The pre-2002 legislation required that representatives of any First Nation whose traditional territory included the site of the project or was in the vicinity of the project, be members of a "Project Committee" struck for the purpose of providing the EAO with advice and recommendations during the review. (s. 9(2)). Further, a stated purpose of the legislation was to provide for the thorough, timely and integrated assessment of the environmental, economic, social, **cultural**, **heritage** and health effects of reviewable projects. Similarly, the definition of "effect" also included cultural and heritage effects. The project approval application was required to include information, distribution activities and consultation activities undertaken by the proponent with a First Nation and a summary of the First Nation's response and of the issues identified and any program of information distribution or consultation proposed by the proponent with a First Nation during the next stages of project planning and review. (s. 7(2))

None of these requirements is contained in the current Act. There are no legislated requirements regarding a First Nations role in the EA process or a requirement that First Nations interests be considered. There is no definition of "effect" or requirements regarding what impacts must be considered in an assessment of a project. All decisions regarding scope, procedure and method of assessment are at the discretion of the EAO.

The new act weakened the role of First Nations in the EA process. It ignored (or worse, avoided) court decisions of the day that supported the requirements of the pre-2002 legislation for First Nations involvement and confirmed the there was an obligation on the government to consult and accommodate infringements of unproven aboriginal rights and title caused by permitting decisions of the government. Symbolically, if not in practice, these changes caused First Nations to feel that their role in the EA process and the issues we raise were not important to the EAO.

Although the current EA staff may attempt to design processes that replicate some of these former obligations, the fact that such involvement has been removed from the legislation, and become discretionary only, remains negative.

4. **The EAO does not measure impacts of a project from an Aboriginal perspective.**

As noted above, *BCEAA* does not require that an environmental assessment consider impacts on Aboriginal rights and title or cultural heritage. However, even when these impacts are considered in an environmental assessment conducted by the EAO they are not considered from an *Aboriginal* perspective. The EAO measures impacts in a linear and scientific manner. Impacts of a project on Aboriginal rights and title or cultural and spiritual activities or an

Aboriginal "way of life" cannot be measured using the same method as biophysical or socio-economic impacts. Only an Aboriginal group affected by a proposed project can measure how a project will impact its cultural heritage and determine if the impacts on its cultural heritage are too great to allow a project to proceed.

One way Aboriginal people can measure impacts of a project on cultural heritage is by way of *Indigenous Knowledge*. Indigenous Knowledge has been employed by Aboriginal Elders and leaders for thousands of years to ensure the impact of activities on the lands and waters within their lands is sustainable for generations to come. Indigenous knowledge has been defined in several different ways, but the definitions usually incorporate the following descriptors:

- Locally bound, indigenous to a specific area.
- Culture- and context-specific.
- Non-formal knowledge.
- Orally transmitted, and generally not documented.
- Dynamic and adaptive.
- Holistic in nature.
- Closely related to survival and subsistence for many people worldwide.[1]

Indigenous Knowledge can be utilized to measure, from a local, community perspective, the potential impacts of a project on the biophysical, cultural and socio-economic environment. The holistic nature of indigenous knowledge means that these interrelated impacts can be considered together as opposed to individually. Although EAO policies suggest proponents may include indigenous or "traditional" knowledge in their impact assessment, in practice, the measurement of "significant adverse environmental effects" is non-Aboriginal in perspective, traditional and science-based.

First Nations communities should have the opportunity to use Indigenous Knowledge to assist with a decision of whether or not residual impacts of a proposed project on a First Nation's cultural heritage are too significant for a project to proceed.

5. The Executive Director has no authority to accommodate infringements of Aboriginal and treaty rights and Aboriginal title.

At common law, the provincial government has a legal responsibility to consult with First Nations regarding how its actions and decisions might infringe Aboriginal and treaty rights and Aboriginal title protected by section 35 of the *Constitution Act*. Where an infringement may occur the government must accommodate the infringement in order to reconcile the Aboriginal interest with the non-Aboriginal interest. The courts have stated that the "honour of the Crown" is at stake in the governments' dealings with Aboriginal people.

The EAO is given discretion and authority to determine the scope, procedures and methods for a review of a project and make recommendations to the appropriate cabinet Minister as to whether

[1] United Nations Educational, Scientific and Cultural Organization, Best Practices on Indigenous Knowledge (http://www.unesco.org/most/bpindi.htm#_ftn3)

or not the project should be approved, approved with conditions or rejected. However, the EAO does not have authority to negotiate on behalf of the province with respect to accommodation of infringement of Aboriginal rights and title.

Accommodation of infringements of Aboriginal rights and title typically include compensating a First Nation by way of a transfer of land, natural resources or cash or resource revenue sharing. The EAO has no statutory mandate or budget to make such commitments on behalf of the Province. Such commitments require the involvement of senior civil servants and Cabinet Ministers. In any event, in practice, the EAO states that the infringements of Aboriginal rights and title are "beyond the scope" of a proponents EA.

Thus, the EAO remains unable to deal with accommodation but the EAO is deemed by the Province to be its agent with First Nations in undertaking the duty of 'consultation'. Consultation and accommodation cannot be separated in such a manner. This cannot give rise to the 'good faith negotiation' required by the Court in *Haida* and other decisions.

6. Resources and funding inequities leave First Nations disadvantaged.

Proponents have significant resources to participate in the EAO process, to do studies and to pay consultants. Proponents will recoup their investment when the project is approved. The EAO has a substantial provincial budget, and all staff participating do so on a salaried basis. Funding for EAO budgets comes from tax revenues arising from economic development, and is returned when the project is approved.

First Nations are expected to fund their own participation, reliant on minimal hand-outs from proponents or very limited funds from EAO. Often this means voluntary participation or participation by staff with limited training. The salaried staff within First Nations responsible for consultation (where such positions exist) are expected to assess and process a large volume of referrals that range significantly in size, scope and comprehensiveness of environmental review. Where capacity funding is available, the binding agreements are designed to meet the needs of the proponent and the Province – not the First Nations. Proponents and the EAO are therefore able to use (and do use) the limited funds handed out to attach conditions to participation that are unreasonable and sometimes in conflict with the legal interests of the First Nation.

The ability to participate fully in EAO processes on a fair or equal basis would require access to extensive funding, equal to the EAO and proponents. The current EAO structure has no such budgetary mechanism.

7. The Working Group format of review is not conducive to a productive discussion of infringements of Aboriginal rights and title.

Unlike the previous legislation, *BCEAA* does not require that any specific review process be followed by the EAO or that an EA application contain specific information. The process is entirely at the discretion of the Executive Director of the EAO. Nevertheless, the EAO's policy appears to be to create a "Working Group" of stakeholders similar in structure and purpose to the previous "Project Committee". However, these committees are not a practical or appropriate place for infringements of Aboriginal rights and title to be determined, analysed and accommodated.

The Working Group is a table of representatives of provincial, federal or local government agencies and departments whose mandate is to review a proponents EA application with respect to biophysical impacts of the project and possible mitigation measures. The table is made up of "technical" not "political" representatives of government. Discussions regarding accommodation of infringements of Aboriginal rights and title are too specialized, complex and lengthy for this type of forum. Discussion of First Nations issues often require all of the time set aside for a Working Group meeting. The impacts of a reviewable project on Aboriginal rights and title have significant legal and political implications for First Nations. These discussions need to be led by senior representatives of a First Nation and the provincial government whose obligation it is to consult with First Nations about impacts of a project on Aboriginal rights and title and accommodate First Nations for those impacts.

Further, this process attempts to artificially separate larger considerations of Aboriginal rights and title, and accommodation for general infringement, from specific environmental impacts infringements. Such distinctions usually cannot be drawn, and end up substantially devaluing the more important aspects of loss of Aboriginal title lands and rights in favor of a focus on individual site-specific issues.

The Working Group format for reviewing an EA application may be appropriate if infringements of Aboriginal rights and title were accommodated prior to a project undergoing an EA review. Once that occurs First Nations could better participate in the EAOs "Working Groups" because the "political" and "legal" issue of Aboriginal rights and title would be dealt with and the group could focus on the "technical" impacts of a project.

8. The independence of the EAO may be compromised by political interests.

As noted above there is no legislated requirements with respect to the scope, procedures or methods for conducting an EA review by the EAO.[2] *BCEAA* no longer contains a list of objective purposes of an assessment as was found in the pre-2002 legislation. These principles helped to guide the purpose of an EA review process and assisted in keeping the process objective and independent. Formerly, section 2 stated that the purposes of the Act included:

[2] The Public Policy Consultation Regulation provides "general policies" on public consultation, public notice, access to information and public comment periods. However, none of these policies are mandatory. Under the regulation the EAO need only "take into account" the "general policies" set out in the regulation and ensure that they are "reflected in the assessment."

- promoting sustainability by protecting the environment and fostering a sound economy and social well-being,
- providing for the thorough, timely and integrated assessment of the environmental, economic, social, cultural, heritage and health effects of reviewable projects,
- preventing or mitigating adverse effects of reviewable projects, and
- providing an open, accountable and **neutrally administered** process for the assessment of reviewable projects.

These purposes were removed from the legislation in 2002 and replaced with statutory requirements and policies that permitted assessments that could be directly influenced by political will.

The level of discretion *BCEAA* now provides to the EAO leaves considerable room for political interference in the EA review process.

BCEAA now requires that the assessment of the potential effects of a reviewable project must "take into account and reflect government policy identified for the Executive Director, during the course of the assessment, by a government agency or organization responsible for the identified policy area". (s. 11(3)) The EAO's policy document titled "Brief Description of the BC Environmental Assessment Process" describes the EA process as a political decision. It states: "The Act provides for a strategic-level evaluation of projects, which concentrates on the significant issues that need to be addressed as a basis for a political approval-in-principle decision."[3] The result of an EA process should not be a "political approval in principle". It should be a rigorous identification of potential impacts of a project, and a determination of how those impacts can be mitigated and a decision on whether or not the project under review should proceed in light of the impacts and mitigation measures identified.

Together, these aspects of the EA process mean that the EAO cannot be an unbiased arbiter of an EA application. Government policies regarding economic development are not usually consistent with environmental protection. As a result, the EAO may take into account short-term economic targets of the government over long-term sustainability and environmental protection when exercising its broad discretion in the EA process. This does not provide an objective assessment of impacts of a reviewable project.

9. BC EAO has never rejected a project since its inception in 1995.

Since 1995, approximately 65 projects have been approved and certified by the BC Environmental Assessment Office (EAO). No project has ever been rejected. The EA review process has become a process for mitigation of environmental impacts only. It is presumed by the proponent, stakeholders and government agencies participating in the review, and now more commonly by the public, that projects being reviewed will proceed. This puts the credibility of the environmental assessment process in BC in question. The adverse environmental impacts of SOME of these projects simply MUST be too great to permit their development.

[3] http://www.eao.gov.bc.ca/publicat/MOU-Wash_st-EAO_2004/brief-description-ea-process-10-29-03.pdf

The Reviewable Project Regulation under the *BC Environmental Assessment Act* (*BCEAA*) sets standards and thresholds that if met require the EAO to make a decision whether or not to undertake an environmental assessment. The standards and thresholds are such that the projects reviewed by the EAO are usually relatively "large" projects such as mines, hydroelectric and other large energy projects, tourism/ski resort development, and transportation projects, which often have the biggest impacts on the environment. This makes the fact that the EAO has never rejected a project even more significant.

First Nations governments are accountable to the members of their community of both current and future generations. Their members demand that their governments only support sustainable development and activities in their territories. This requires that proposed activities undergo a rigorous assessment of environmental and cultural impacts. If, after measures to mitigate impacts are considered, the residual adverse impacts of a project are significant, a project should be rejected. Rejection of some projects is a strong indicator that an assessment process works.

It is sometimes claimed by EAO that an alternative to rejection of specific projects is a process where further information is required, leading some projects to fall out of assessment through delay or inactivity. Such delay does not necessarily favor First Nations. Where timelines are extended, on-going resources are required for First Nations. If the project is neither outright cancelled, nor proceeding as originally planned, First Nations are left with uncertainty as to the level of resources suitable to commit to the ongoing planning for the review process.

10. The EA review process in BC is focused on ensuring proper "process", rather than "substance" of the EA.

As noted above, *BCEAA* does not contain any mandatory requirements for what information must be contained in an EA application. This is at the discretion of the EAO and has been the subject of guidelines published by the EAO. The legislation no longer includes objective purposes such as providing "a thorough … assessment" of a reviewable project. As a result, participants in the EA process find that the substance of the actual EA application is not as important to the EAO as ensuring that the proponent has simply completed the requirements of a review within the legislated time lines.

The EAO tends not to second guess the methodology, rigour or results of the EA application and baseline studies conducted by the proponent. Often too much of a proponents time, energy and money is spent on preparing the baseline studies, inventories and data collection that government departments no longer have the budget to undertake. Not enough time is spent on actual impact analysis. By the time the review of the EA application has been completed, proponents argue that they do not have the time or money to respond to comments about inadequate EA methodology and the EAO will not require substantive changes to the application.

11. Cumulative Effects Assessment does not address Aboriginal rights and title.

Cumulative effects are typically defined "as the impact on the environment which results from the incremental impact of the action when added to other past, present, and reasonably foreseeable future actions regardless of what agency or person undertakes such other actions."

When a CEA is undertaken by a proponent in the BC environmental assessment process (through the *Canadian Environmental Assessment Agency*), CEA "best practices" are not often applied by the EAO. For example, proponents are permitted by the EAO to use an inappropriately large study area for the CEA in order to conclude that the incremental impact of their project is insignificant when compared to similar impacts within the study area. Often proponents are only required by the EAO to consider the "incremental" impacts of their project as opposed to the impacts of their project together with other impacts.

A CEA for a project is an important aspect of an environmental assessment for First Nations. First Nation communities have witnessed the incremental degradation of their lands, resources and waters as a result of non-Aboriginal uses. A CEA should measure the impacts of a current project on Aboriginal rights and title interests, taking into account the impacts on those interests back to the time of contact with non-Aboriginal people. However, the EAO will permit CEAs that only consider impacts from the past 20, 30 or 50 years. Moreover, for First Nations who are currently engaged in treaty negotiations, the question becomes - based on existing and future development impacts, *to what extent is the exercise of Aboriginal rights still possible?*

12. The time limits in the EA process are too restrictive to allow for government and First Nations to negotiate accommodation of infringements of Aboriginal rights and title.

By regulation under *BCEAA* the EAO has 180 days to review a proponents EA application to determine if it contains the information required under the Terms of Reference, complete an assessment report on the application and refer the application and assessment report to the appropriate Cabinet Minister or Ministers. A typical review under the previous legislation would have taken two years. For several reasons, the current length of review is not adequate for most First Nations communities:

- First Nations are overwhelmed with referral letters and other forms of preliminary "consultation" attempts by government and third parties on a variety of land and resource projects within FN territories. The shear volume of referral letters and the lack of technical capacity within many First Nations to quickly evaluate which projects are likely to have significant impacts and which are not, can mean First Nations delay in getting engaged in a project under review by the EAO even though the impacts may be significant.
- Many First Nation communities must rely on third party consultants to provide technical and legal advice in relation to an EA review. This means First Nations require extra time to review documents and respond to the EAO within the EAO's timeframes.

- First Nations need to educate and consult with their membership before they can make a decision on whether or not the adverse impacts of a project under review are acceptable to us. This means First Nations require extra time to review documents and respond to the EAO within the EAO's timeframes.
- It can take at least 180 days and often much longer for a First Nation to understand how a project under review might impact Aboriginal rights and title. The negotiation of an Impact and Benefits Agreement or an Accommodation Agreement to accommodate infringements of Aboriginal rights and title can take equally as long.

In conclusion, First Nations need an environmental assessment process that:

- Is lead by an independent, politically neutral and unbiased agency;
- Is conducted jointly with First Nation governments;
- Considers impacts of the project on Aboriginal cultural heritage and Aboriginal rights and title;
- Utilizes science-based and indigenous knowledge to measure the significance of impacts of a project;
- Is community based and community driven (i.e. assesses impacts that are of concern to the Aboriginal community impacted by the project and takes place within a timeline that is reasonable for engaging, educating and obtaining feedback with an Aboriginal community);
- Is more concerned with the rigour of the assessment than with the process of assessment;
- Provides effective and equal funding;
- Ensures there is adequate time and an appropriate forum for negotiation of accommodation of infringements of Aboriginal rights and title; and
- Delays a final decision until accommodation of infringements of Aboriginal rights and title has taken place.