**YESAA Oversight Group – Record of Decision**

Meeting – September 11, 2018 – Elijah Smith Building, Whitehorse, Yukon

**Attendees**

Canada – Dionne Savill and Shane Kilpatrick

Yukon First Nations – Daryn Leas and Emmie Fairclough

Government of Yukon – Brian MacDonald, Keith Maguire and Andrew Smith

The purpose of the meeting was to discuss the priority areas each of the parties has put forward for discussion, consideration and adoption by the Oversight Group as it sets its priorities and associated work plan. A copy of each of the parties’ priorities is attached to this record of decision. There was no agenda developed for this meeting.

**Item 1** – A short discussion on the creation of records of decision for each meeting of the Oversight Group. It was agreed these records of decision would offer a short summary of the topics discussed and outline any decisions or direction agreed upon. It was noted the records of decision help to increase transparency of the Oversight Group’s work, but details on how the records of decision will be communicated out were not discussed.

**Item 2**  - The remainder of the meeting focused on the priorities put forward by each of the parties, and the creation of a unified Priorities of the Oversight Group document and associated work plan. Priorities discussed included:

* YESAA Forums – The parties discussed the current state of the YESAA Forums (Does it still exist?) and the revitalization of its terms of reference. It was agreed that it is important to identify the right people to participate on the YESAA Forums and that clear direction / guidance from the Oversight Group would be necessary to assist the YESAA Forum in achieving its outcomes. Emmie offered that CYFN (James MacDonald) could work with Canada and Yukon on updating the YESAA Forum terms of reference for the consideration of the Oversight Group at a future meeting. It was agreed research would be undertaken by Canada and Yukon into previous funding models that supported the YESAA Forum.
* There was a discussion on which priorities could possibly be examined by a YESAA Forum. These included:
  + Consultation and Engagement
  + Joint Processes for Decision Documents
  + Cumulative Effects
  + Improving Communications of Pre-submission requirements
  + Practitioner training, information sharing and community of practice
* It was requested that Yukon First Nations provide further clarity around the Economic Development and Traditional Knowledge priorities to better define the issues.
* The priority around engagement with unsettled Yukon First Nations was discussed and Yukon requested a bilateral discussion with Canada on this issue away from the Oversight Group table. Yukon First Nations noted they have interest in this issue as well and want to be part of the discussion.

It was agreed that Canada would draft all of the priority items identified into one document to be shared with the Parties. There was general agreement that the priorities document would revolve around three key themes (Consultation, YESAA Forum, and Procedural Aspect issues).

Lastly, it was agreed that the Oversight Group would attempt to meet next the week of **October 8-12, 2018**

**Canada Priorities:**

1. Decision Body Consultations and reliance on YESAA processes to fulfill s.35 Duty to Consult – The Crown relies heavily on procedural aspects of the YESAA assessment process to help inform the consultation record and help it fulfill its s.35 Duty to Consult. It may be of benefit to undertake an examination of the current practices in order to seek improvements, efficiencies and common practices.
2. Unsigned First Nations concerns, engagement and participation – Canada is seeing increased concern and involvement on the part of unsettled Yukon First Nations in the YESAA process. WRFN and LFN in particular. It would be helpful to identify processes and approaches, which could improve information sharing, engagement and participation of these First Nations in the YESAA process and other related activities (such as YESAA Forums). Also, what does s.74(2) statutory consultation between First Nation decision bodies and unsigned affected First Nations look like? Should there be a coordinated effort amongst the decision bodies to meet this requirement?
3. YESAA Forum Revitalization – Canada would like to better understand the interests of the other parties in revitalization of the YESAA Forum. Does the previous format need to be changed? What would be the purposes of the Forum – identification of best practices, drafting recommendations for resolving existing process issues, further implementation of Five-Year review recommendations? If there is mutual interest, how would Forums be administered?
4. Improved communication of pre-submission requirements and for proponents and consultation with affected First Nations – Can information, processes and expectations be better communicated to proponents to create more surety around expectations for pre-submission consultation with Yukon First Nations?
5. Cumulative effects – Canada is aware that this is an on-going issue and First Nation priority to address within YESAA processes. Federal Decision Bodies would also benefit from more significant consideration of identified cumulative effects during assessments. Currently, s.112.1 requests for consent are the existing statutory mechanism for the Minister to address this issue within the YESAA context, though there are process and policy gaps in implementing this mechanism (such as Rules, which may be created by YESAB under s. 30(3)(c)). How can federal departments help support or feed in to improved cumulative effects studies?

**First Nations Priorities:**

1. **Proponent Mitigative Measures.** NND and VG noted that during the assessment phase proponents will identify mitigative measures or steps they intend to take to address concerns they identified at the outset of their planning process. Those measures are referred to briefly and without detail in the Evaluation Reports and often are not described at all. As such, they are not qualified in any substantive way and do not make their way into any decision document as a result. YFNs would like those measures to be identified and a method put into place to track those throughout the development assessment process with a view to being able to enforce them in practice.
2. **Economic Development.** LSCFN is interested in developing a requirement or method to ensure proponents can “prove” that their project, if indeed it is a wealth generating project, can really generate profit. The concern here is that roads or other development projects occur under the pretense of economic development and there is not requirement to on the part of the proponent to demonstrate economic viability of the project. TH in particular raised concern about inadequate methods of assessing cumulative effects.
3. **Cumulative Effects.** YFNs maintain their concern about inadequate cumulative effects assessment. Directly linked to this is the lack of land use planning. There is a lack of mechanism for regional or cumulative effects monitoring and baseline data and lack of understanding of land use plans and the ongoing role of planning commissions.
4. **Traditional Knowledge.** YFNs feel strongly that YESAA is not achieving its aim or objective with respect to Traditional Knowledge. It is generally viewed by YFNs that YESAB and Decision Bodies are failing to consider TK in assessments and decisions, and that it isn’t being adequately included in proposals, evaluation reports and decision documents. Obstacles to adequate consideration of TK include: lack of common understanding of the nature of TK, gaps in existing compilations of “baseline” TK, and inaccessibility of recorded TK materials;conflicting methodologies (TK is valued less than its equivalent in western-scientific knowledge); and challenges with respect to sharing of sensitive and confidential TK.
5. **Decision body engagement with affected Yukon First Nations.** YFNs required federal and territorial decision bodies to engaged with affected YFNs when those decision bodies are considering recommendations from the Executive Committee or a designated office with respect to a project that may affect its aboriginal or treaty rights, titles or interests. This engagement must take place prior to the issuance of the decision document.

**Yukon Priorities:**

1. Authorization amendments and renewals - ways to work in policy for previously assessed projects that have limited change in scope, which can include agreed-to interpretations of ‘modification’, ‘project’ or ‘activity’: Would like to explore renewal or amendment of projects that have already undergone assessment, where the request is straightforward, and there is no change to activities that make up the project (temporal extension of assessed activities) using tools available in policy and the current Act. This may relieve an administrative burden for all organizations. This policy approach is being explored in YG, with S.83 being the focus, along with examining the definitions and interpretations in the Act. For example:
   1. Modification is not defined in the legislation or regulation. If possible, agree to a definition of modification and develop a coordinated policy approach to determine whether a change to a projects timeframe constitutes modification (i.e., if project activities are authorized by a previous decision document).
   2. Agree to an interpretation of ‘project’, which may be different in an application versus in an assessment – is it one activity (the triggering activity) or the collection of activities within a larger development program?
   3. YESAA Definition: 'Project' means an activity that is subject to assessment under section 47 or 48 and is not exempt from assessment under section 49.
2. Timelines in assessments: Notwithstanding future legislative, regulatory or rule changes, the Parties should commit to meeting existing timelines at every stage where they have some control. Typically, this is in seeking views and decision-making, and encourage all other participants to meet those timelines as well.
3. Common process for Joint Decision Documents: Come to agreement on a general process of joint DDs. YG has the technical tools and experience to issue joint DDs, and has led many in the past. A documented, agreed-to approach on how this occurs would assist in decision-making, and advise all parties with YESAA decision-making authority.
4. Practitioner training, information sharing and community of practice: The Oversight Group should organize regularly-held information and discussion sessions for exchange on how each organization is participating in the process, with the goal of understanding the details of practice outside the pressures of the project-specific. Joint sessions should be offered at least annually and when convenient for the most amount of people to attend. Insofar as a venue, this could be part of the YESAA Forum or a new equivalent. YG also holds monthly practitioner meetings, and is willing to explore opening up the invitation to FN and Canada practitioners.
5. Consultation during decision-making and creating consultation efficiency: YG check-ins at decision making are near standard practice, it should be established if this is meeting the expectation of the 5-year review, and if there is room for improvement or ways to remove duplication or unnecessary check-ins at decision-making. Adding or changing terms and conditions is addressed on a case by case basis, but must be supported by sufficient evidence demonstrating pathways for both effects and mitigation. A commonly understood approach for considering changes to recommendations from FNs when YG is the sole DB should be developed.
   1. Consultation is initiated during seeking views and information, extends through the development of the decision document, and continues during the licensing phase. Significant resources on all sides are tapped for a single project. If an agreement or standard on how reliance on SV&I input (or other aspects of the YESAA process) to qualify as consultation can be reached, it may save countless person-hours on future projects.