THE NATIONAL ENERGY BOARD

AND

MI'GMAQ RIGHTS

A Paper submitted by Mi'gmawe'l Tplu'tagnn Inc.
on behalf of the Mi'gmaq of New Brunswick

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A. BACKGROUND

i. The NEB Modernization Review

In 2016, the Minister of Natural Resources Canada established an Expert Panel to conduct a review of the National Energy Board ("NEB"), its' structure, role and mandate under the *National Energy Board Act.* The review involves engagement with the public, including specific engagement with Indigenous peoples on a variety of topics. These topics include: Governance, Mandate, Decision-Making Roles, Life-Cycle Regulation, and Public Participation. It also includes Indigenous Engagement, which, according to the Terms of Reference, will consider the following issues:

1. Enabling early conversations and relationship building between the Government of Canada and Indigenous peoples whose rights and interests could be affected by a specific project under the NEB's mandate;

2. Facilitating ongoing dialogue between the Government of Canada and Indigenous peoples on key matters of interest on projects to inform effective decision-making;

3. Further integrating Indigenous traditional knowledge and information into NEB application and hearing processes;

4. Developing methods to better assess how the interests and rights of Indigenous peoples are respected and balanced against many and varied societal interests in decision-making; and

5. Enhancing the role of Indigenous peoples in monitoring pipeline construction and operations and in developing emergency response plans.

It is encouraging that the NEB review process recognizes that Indigenous people, along with their rights and interests, need to be specifically considered in the review process and also recognizes the significance of the foregoing issues to Indigenous people. We provide this written submission for the NEB Review Panels' consideration with respect to Indigenous issues pertinent to the Mi'gmaq, and to all Aboriginal Peoples throughout Canada.

ii. The Mi'gmaq

The Mi'gmaq are the Indigenous people of the Atlantic Provinces, and have occupied their traditional lands since time immemorial. Mi'gma'gi, our traditional territory, includes the provinces of Nova Scotia, Prince Edward Island, New Brunswick and parts of Newfoundland, Maine and Quebec, extending into the Gaspé region. Prior to European contact, the Mi'gmaq people recognized the significance of the environment to our survival as our very livelihood was grounded on the use of its natural resources, in accordance with our cultural understandings.

Mi'gmaq hunting, fishing and resource use was in accordance with cultural values. These values were established to protect and sustain the ecological the integrity of the environment and are the basis of the Mi'gmaq worldview. Mi'gmaq understand our interdependence with all aspects of the natural world. This forms part of the Indigenous knowledge of the Mi'gmaq.

The Mi'gmaq, along with our Wabanaki allies, are signatories to the Covenant Chain of Peace and Friendship Treaties with the Crown. The Treaties have been renewed many times with the Crown, and are not Treaties of surrender.

As Mi'gmaq, we continue to maintain our sacred relationship with our lands, waters and resources, through the practice of our Aboriginal and Treaty Rights. Our rights are constitutionally protected under s.35 of the *Constitution of Canada*. Further, the lands and waters that fall within the provincial boundaries of New Brunswick are the traditional lands and waters of the Mi'gmaq, which we have shared and continue to share with the Wolastoqiyik/Maliseet, and the Passamaquoddy in accordance with the sacred relationships between the members of the Wabanaki Confederacy. The Mi'gmaq have never ceded Aboriginal Title to Mi'gma'gi and continue to assert their Aboriginal Title to such.

iii. Mi'gmawe'l Tplu'tagnn Incorporated ("MTI")

In New Brunswick there are presently nine Mi'gmaq First Nation communities: Amlamgog (Fort Folly) First Nation, Natoaganeg (Eel Ground) First Nation, Elsipogtog First Nation, Oinpegitjoig (Pabineau) First Nation, Esgenoôpetitj (Burnt Church) First Nation, Tjipõgtõtjg (Buctouche) First Nation, L'nui Menikuk (Indian Island) First Nation, Ugpi'ganjig (Eel River Bar) First Nation and Metepenagiag Mi'gmaq Nation.

Colonization forced the Mi'gmaq off of much of Mi'gma'gi. Further, the *Indian Act*, organized communities onto Indian reserves and created Indian Bands. Despite

this, we the Mi'gmag continue to occupy and exercise our rights throughout our traditional territory.

The nine Mi'gmaq communities currently govern themselves as a collective Mi'gmaq government and have created the organization Mi'gmawe'l Tplu'tagnn Incorporated, ("MTI"). Mi'gmawe'l Tplu'tagnn, in its closest English translation, means "Mi'gmaq People's Laws" or "how we govern ourselves". MTI's mandate includes the protection, assertion and implementation of Aboriginal and Treaty Rights. For the purpose of this submission, MTI is acting on behalf of eight Mi'gmaq communities. Elsipogtog, one of our nine Mi'gmaq members, will be providing its own submission.

Mi'gmawe'l Tplu'taqnn's board of directors is the nine Mi'gmaq Chiefs, the Assembly of First Nations Regional Chief and a designated Elder; this group is the Mi'gmaq Sagamaq Mawiomi and is advised by a council of Elders representing each community.

iv. MTI involvement with the NEB and the review process

MTI and its member communities are intervening in the NEB process for the Energy East pipeline, and have firsthand experience with the shortcomings of that process, which will inform our submissions below.

We have made submissions to the review panel for the *Canadian Environmental Assessment Act* (CEAA) process on how to improve the environmental assessment process carried out under that legislation. Our submissions to the CEAA panel apply equally to the environmental assessments carried out under that legislation by the NEB.

Further, we appeared before the National Energy Board Modernization Expert Panel in Saint John, NB on March 22, 2017. We are providing the following submission, including recommendations, to expand on our oral submissions and which we believe, if considered and incorporated by the Minister of Natural Resources, will result in better inclusion of Indigenous Peoples in the NEB process.

v. Mi'gmaq Aboriginal and Treaty Rights

The Mi'gmaq possess established, proven Aboriginal and Treaty rights to hunt, fish, harvest and gather in Mi'gma'gi for food, social and ceremonial purposes, as well as for the purposes of trade and earning a livelihood. Mi'gmaq Aboriginal and Treaty rights have been confirmed in the following decisions from the Supreme Court of Canada:

a. *Simon v. The Queen*, [1985] 2 SCR 387, confirmed that the Treaty of 1752 constitutes a positive source of protection against infringements of Mi'gmaq hunting rights, and further confirmed that the right to hunt embodies activities reasonably incidental to the act of hunting itself;

b. *R. v. Marshall,* [1999] 3 SCR 456, confirmed as a matter of law that the 1760-61 Treaties affirmed "the right of the Mi'gmaq] people to continue to provide for their own sustenance by taking the products of their hunting, fishing and other gathering activities, and trading for what in 1760 was "necessities";

c. *R. v. Sappier & Polchies; R. v. Gray*, [2006] 2 SCR 686, upholding the decision of the New Brunswick Court of Appeal in *R. v. Sappier & Polchies*, 2004 NBCA 56, affirmed the Aboriginal right of the Mi'gmaq and Maliseet in New Brunswick to harvest wood for domestic uses on Crown lands traditionally used for that purpose by their respective First Nations.

As well, the New Brunswick Court of Appeal has also confirmed the existence of Mi'gmaq rights in the following decision:

d. *R. v. Paul* (1980), 30 N.B.R. (2d) 545 (NBCA), affirmed that the Treaty of 1779 contains a recognition of the pre-existing right of the Mi'gmaq to hunt and fish and such right applied unquestionably to the Mi'gmaq at Miramichi and consequently to the present day community of Metepenagiag First Nation

When making a decision that may affect asserted or established Aboriginal and/or Treaty Rights, the Crown has a legal obligation to meaningfully consult with Indigenous people, including the Mi'gmaq.

B. LEGAL RESPONSIBILITIES OF THE CROWN

i. The Duty to Consult and Accommodate

As established by the Supreme Court of Canada, the Crown has a duty to consult with Indigenous people when making a decision that has the potential to affect established or asserted Aboriginal and Treaty Rights, and accommodate those rights where necessary, (*Haida Nation v British Columbia* (Minister of Forests), 2004 SCC 73, para 43, 44.). In that decision Maclaughlin C.J., addressed the issue of consultation and the exploitation of natural resources, identifying that the honour of the Crown requires government to act honourably;

> "*The Crown, acting honourably, cannot cavalierly run roughshed over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiations and proof…"*, (para. 27).

The Crown's obligation to consult Aboriginal people has been reiterated and supported by further decisions of the Supreme Court of Canada, where guidance was provided for consultation:

> "*… consultation that excludes from the outset any form of accommodation would be meaningless*, *Mikesew Cree First Nation v Canada,* 2005"; para.55);
> "..*Governments and individuals proposing to use or exploit land, whether before or after a declaration of Aboriginal title, can avoid a charge of infringement or failure to adequately consult by obtaining the consent of the interested Aboriginal group, Tsihqoti'n Nation v British Columbia,* 2014 SCC 44, (para. 97).

The Supreme Court has also confirmed that the duty to consult can, in part, be discharged through regulatory processes such as environmental assessment, provided First Nations are meaningfully included in that process, not just as members of the public, but as rights holders.

As such, meaningful inclusion of Indigenous Peoples, and not just engagement, is a necessary part of any such regulatory process.

ii. The Duty to Seek Consent and to Minimize Infringement

Aboriginal and Treaty Rights cannot be infringed upon by the Crown without justification. In *Tsilhqot'in Nation v. British Columbia, 2014 SCC 44*, the Supreme Court of Canada reaffirmed that where Crown action impacts on established Aboriginal Rights, the Crown must either seek consent of the Aboriginal group, or justify the infringement. This includes taking steps to minimize the infringement, and to ensure the benefits of the action are not outweighed by the impact on the Aboriginal Group in question.

As the Mi'gmaq have established many of their Aboriginal and Treaty Rights, consultation and accommodation alone is not sufficient. The Crown has a duty to seek our consent and to justify and minimize any infringement of our rights.

iii. *United Nations Declaration on the Rights of Indigenous Peoples*

Under its Terms of Reference, the Panel was mandated to consider the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP") as follows:

> "the Panel shall, in reviewing the NEB structure, role, and mandate, consider the relationship between NEB processes and the Aboriginal and treaty rights of Indigenous peoples, as well as the relationship between NEB processes and the principles outlined in the UNDRIP.".

We draw the review panel's attention to Articles 18, 19, 25, 26, 31, and 32, all of which must be considered when amending legislation to ensure Canada's compliance with their international commitments. Specifically, we would highlight Article 32 (2), which requires;

> "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 resource, particularly in connection with the development, utilization or exploitation of mineral, water or other resources".

In MTI's view, the NEB Act must ensure that Canada is upholding its international commitments to Indigenous people by ensuring free and prior consent on projects that affect their rights, resources or lands. The NEB Act needs to reflect the requirement for the consent of Indigenous Peoples.

C. DISCUSSION OF ISSUES

Our submissions will address the following issues that arise from the Panel's terms of reference:

1) Indigenous "Engagement" by the NEB in the hearing and approval processes;
2) Inclusion of Indigenous Knowledge;
3) NEB Governance, Mandate and Roles; and
4) Lifecycle Regulation.

i. Indigenous Engagement by the NEB

The Discussion Paper on Indigenous Engagement and Consultation describes the role of the NEB in the duty to consult process as follows:

> "In recent years, the federal Crown has relied on the NEB process, to the extent possible, to fulfill its duty to consult Indigenous groups. This approach is consistent with existing consultation and accommodation guidance for federal officials, and has been done as a way of leveraging environmental assessment and regulatory processes to avoid and mitigate potential project impacts, including impacts on Indigenous rights and interests."

With respect to the Mi'gmaq, if the Crown intends to rely on the NEB process as part of the consultation process, it is critical that any and all relevant legislation is inclusive of the Crown's legal obligations to Indigenous Peoples. The Mi'gmaq maintain a close relationship with our lands, waters and resources and rely on such for the exercise of Aboriginal and Treaty Rights, and our way of life.

Projects considered and potentially approved by the NEB for development in Canada will, more often than not, involve the destruction or significant denigration of lands or waters by proposed projects, which will clearly and unquestionably affect Indigenous peoples and their established and asserted Aboriginal rights. In the context of environmental approval and environmental legislation, it is imperative that federal legislation is consistent with the Crown's legal obligations to Indigenous Peoples, including the duty to consult and accommodate.

a. The *National Energy Board Act*

Despite the importance place on the NEB process in discharging the duty to consult, the NEB Act is largely silent with respect to Indigenous Peoples.

Currently, the Act does not contain any legislative provisions that acknowledge the constitutional rights of Aboriginal people, or the fact that the Crown owes a duty to consult with aboriginal people and a legal duty to justify any actions that infringe upon the rights of Aboriginal people. This is astonishing, considering the rights which Indigenous people possess are protected by the Constitution of Canada and have been repeatedly affirmed by the highest courts of the land.

The lack of inclusion of Aboriginal people within the legislation is also contrary to reconciliation, a key principle that both the Liberal government and the courts have identified for considering Aboriginal Rights within the broader context of Canadian society;

> "Aboriginal rights are a necessary part of the **reconciliation** of aboriginal societies with the broader political community of which they are part; limits placed on those rights are, where the objectives furthered by those limits are of sufficient importance to the broader community as a whole, equally a necessary part of that **reconciliation**." (*Delgamuukw,* para 161.)

The NEB Act is the basis to pipeline and transmission line approvals in the country, most of which will affect Aboriginal rights and/or Aboriginal lands. In order to reconcile Indigenous rights and interests with pipeline and oil and gas development, the NEB Act must acknowledge the NEB's obligation to address Indigenous rights.

While the NEB Act is silent on Aboriginal Rights, it makes repeated reference to the "public interest" and to "public convenience" and "necessity" as the factors the Board must consider in making various decisions and recommendations. Aboriginal Rights cannot be subsumed under the public interest, and must be considered as part of any decision or recommendation by the NEB.

As such, MTI recommends that "the rights and interests of Aboriginal peoples" be added as a consideration in the relevant portions of the legislation where "public interest" or "public convenience" is referenced.

Moving forward, Canada's legislative regime for environmental approval of project development must include Indigenous people, their perspectives and rights, in a meaningful manner, and not as an afterthought.

It is MTI's position that the NEB Act will require substantial amendments if it is to properly address the rights of the Mi'gmaq. Currently, the present legislation falls short of recognizing and facilitating the inclusion of Mi'gmaq rights within the current regime, and does not support the government's constitutional and legal obligations to Aboriginal people. In addition to the change proposed above, further recommendations are made below.

b. The NEB Filing Manual and Consultation Policy

Currently, it appears that the NEB Filing Manual (Filing Manual), Section 3, is the primary document that the NEB relies upon to address consultation with Indigenous Peoples. The NEB Filing Manual directs the applicant to identify its Aboriginal consultation activities, along with its overall consultation activities with the general public.

The Filing Manual requires the applicant to identify where and how Aboriginal people were communicated with, and the concerns that arose. However, there is no language that identifies that Aboriginal people are the holders of constitutionally protected rights, and as such, may require accommodation or mitigation. Further, there is no requirement for applicants to provide details on mitigation or accommodation.

It appears that the Filing Manual's focus is on the process, instead of the substantive result of consultation. This is problematic, as the adequacy of consultation will depend on the strength of the Aboriginal claim or rights, and the effects of the project on such.

If the NEB is responsible for determining both the extent and the adequacy of consultation, then they must ensure that the information being provided regarding Aboriginal consultation focuses on the strength of the claim or rights first, then the effects of the project on such, and not on how many times a company has met with an aboriginal group.

The Mi'gmag possess constitutionally protected rights, which include Aboriginal and Treaty Rights recognized by the Supreme Court of Canada. As well, the Mi'gmaq have never ceded title to Mi'gma'gi by treaty or otherwise, indicating their strong position for Aboriginal Title. For the NEB, when considering an applicants' project in Mi'gma'gi, it should assess the consultation requirement, based on the existence of such rights, demanding deep consultation.

In addition, the NEB must be transparent on how it will assess the adequacy of consultation. Currently, as far as we are aware, there is no NEB consultation protocol or guide that provides this and in fact it appears that the last guiding document for consultation for Aboriginal peoples was the NEB's Memorandum of Guidance, which was issued in 2008, and subsequently withdrawn. The NEB should develop a Consultation policy that will identify how they will assess consultation, and where mandated, engage in consultation.

c. Delegation to Proponents

Another problematic area is the delegation of consultation to project proponents.

As identified in *Haida*, the Crown may delegate procedural aspects of consultation to the project proponent, but where substantive consultation is required, the Crown must participate directly. The Crown is prevented from delegating substantive consultation because the "honour of the Crown cannot be delegated." (para. 53).

In practice, this often leads to confusion as to what aspects of consultation are being carried out by the Crown, and what aspects are being carried out by the proponent, leaving Indigenous people unclear on what issues they are supposed to raise with the proponent, and what issues are to be raised with the Crown. Clear written direction is required from the NEB to ensure all parties are clear on their role in the process.

Further, the NEB cannot delegate the responsibility to determine the extent and the adequacy of consultation. However, this occurs in practice. For example, on the Energy East project, TransCanada made determinations of the extent to which First Nations were affected based on proximity of the pipeline to their reserve communities, and negotiated engagement agreements on that basis. Other Indigenous groups were engaged, while Mi'gmaq, who were determined to be less affected due to the location of their reserves were not; this despite reserves being a product of government policy and not reflective of our traditional territory over which our proven Aboriginal and Treaty rights exist. At the panel sessions for Energy East, TransCanada acknowledged that this approach to determining extent of consultation was problematic.

However, this should never have happened in the first place. The NEB, and not proponents, should be making determinations regarding the affected First Nations and the extent of consultation required, and should be providing clear written direction to proponents as to what procedural aspects of consultation

need to be carried out by the proponent. These directions should be shared with First Nations, so that they have a clear understanding of what is required.

d. Early Engagement and the Crown Consultation Process

With respect to the NEB's role in the consultation process, the discussion paper on Indigenous Engagement and Consultation states that:

> "For major pipeline projects regulated under section 52 of the National Energy Board Act (NEB Act) or transmission lines regulated under section 58.16 of the NEB Act, the Governor in Council (GIC)6 has final decision making authority.7 In these instances, the Crown has on some projects undertaken direct consultation at specific points in the process, in advance of a GIC decision."

In fact, for the Energy East project, a separate Crown Consultation process has been established through the Major Projects Management Office at Natural Resources Canada.

However, this process did not start until after the NEB hearing process had already begun, and to date, this process has largely consisted of the Crown, along with the NEB, telling Indigenous people about the importance of participating in the NEB process. If such a process is to have any meaning, it must begin earlier, and involve more than reinforcing the primacy of the NEB Process. It must involve genuine discussion with Indigenous people about the project, their rights and their concerns, in a way that assists in both the project scoping exercise, and determinations around how and to what extent consultation will take place.

Early dialogue builds trust and understanding ahead of the NEB hearing process, and Crown Consultation should supplement the NEB process.

e. NEB Hearings

Additional steps are required to facilitate meaningful inclusion of Indigenous people in the hearing process. At present, Indigenous peoples are intervenors, with rights similar to other interveners. The unique role and rights of Indigenous peoples needs to be recognized and included in the process as rights holders, not just stakeholders.

Some welcome improvements include stand-alone oral traditional evidence hearings. More can be done to facilitate the inclusion of oral traditional evidence, including allowing for panels of knowledge holders to give evidence, as knowledge is often shared by many community members, or best given by a group. The Expert Panel could look to practices contained in, for example, the Federal Court's *Aboriginal Litigation Practice Guidelines* for examples of how to better include Elder Testimony and Oral History Evidence in their hearings.

In addition, more opportunity should be provided for Indigenous peoples to welcome and introduce the NEB to their territory according to traditional protocol. While the panel sessions on the Energy East project were a welcome step, which allowed Indigenous groups and other intervenors to introduce themselves to the panel, they did not allow for an adequate introduction to the territory, with which many panelists would not be familiar. Allowing for ceremony, community visits, and other procedures already in use by many courts, would be of great assistance in this regard.

f. <u>Participation Funding.</u>

The current participant funding model is not working for Indigenous groups. Participant funding is both inadequate to allow meaningful participation in the process, and too limited in scope for what it allows Indigenous groups to do.

As an example, the cap for the Participant Funding Program for Indigenous people for the Energy East project was arbitrarily reduced from $80,000 to $40,000 due to the large number of applicants. This is barely enough to cover the costs of attending the hearing, and does not provide Indigenous groups with the needed capacity to fully participate in the hearings. Funding should be based on an actual assessment of the capacity required to meaningfully participate in the hearing, not an arbitrary formula based on the number of participants.

Indigenous groups should be given proper capacity funding by the NEB to perform a broader range of activities related to hearing participation, notably technical review, community engagement, and IK work, all of which are necessary parts of the process. In addition, the process for accessing funds is overly bureaucratic and confusing. Procedures and guidelines need to be simplified.

Indigenous groups are forced to rely on proponent funding to enable participation in the process, and the NEB does little to ensure that funding provides adequate

capacity. This is problematic; issues around proponent funding with respect to Indigenous knowledge are discussed below.

ii. Inclusion of Indigenous Knowledge

The term Indigenous knowledge (IK), sometimes referred to as traditional ecological knowledge (TEK) or Aboriginal Traditional Knowledge (ATK), is defined in the New Brunswick Mi'gmaq Indigenous Knowledge Study Process Guide (the "Guide") as: "a cumulative body of knowledge, practice, and belief, evolving by adaptive processes and handed down through generations by cultural transmission."

More specifically, Mi'gmaq Knowledge is described in the Guide as follows:

> "Mi'gmaq knowledge is a collection of shared and layered experiences of Mi'gmaq observations over millennia. These collections of observations on the lands and waters continue to develop with every new generation of Mi'gmaq. Mi'gmaq collective experience is a living body of knowledge known as Indigenous Knowledge (we prefer the use of Indigenous Knowledge (IK) over TK or TEK). It is an evolving knowledge system that is scrutinized and tested in accordance with the techniques that have been passed down by our Elders, as well as in conjunction with new systems of information and knowledge gathering."

The Guide provides a process for the research, gathering, verification and sharing of the Indigenous Knowledge of the Mi'gmaq. This process was developed by our researchers, with the support of our Elders and knowledge holders, and approved by the Mi'gmaq Sagamaq Mawiomi. It is the process that we expect to be followed when gathering IK from our member communities through an Indigenous Knowledge Land Use and Occupancy Study (IKLUOS).

It is our expectation that Mi'gmaq Knowledge be used in all natural resource management and environmental decision-making, particularly any decisions that impact our Rights, including decisions being made by the National Energy Board.

Currently, the NEB Act is silent on IK, but the Filing Manual identifies that applicants may consider IK or ATK as a component of their application. An Indigenous Knowledge Study (IKS) will identify on what lands or waters Indigenous people are exercising their rights and will also identify further information about ecological resources significant to the Indigenous group.

This information is necessary to ensure that the consultation process that should be occurring between the Crown and Indigenous people is meaningful, supporting accommodation and reconciliation between project development and Indigenous rights. Without an IKS, the ability for Indigenous groups to understand the effects of a project on their rights is severely limited.

MTI's view is that the gathering and inclusion of IK should be a mandatory to the NEB process, and done in accordance with the relevant protocols of Indigenous peoples themselves, such as our Guide.

The proponent, usually funds IKS', when it is available. This places all Indigenous people in a precarious situation where they are forced to rely on funding from a company whose project they and their community members may be opposed to. As well, accepting funds from the proponent can cause distrust by community members on the intention of those conducting the IKLUOS and their objectivity in relation to the project. The proponent does not owe the duty to consult to Indigenous people. This is an obligation of the Crown. As such, the Crown needs to ensure that IK Studies are funded and supported as a part of the environmental legislation, directly from the Crown.

Finally, our experience with Energy East was that the IKS was only funded and undertaken after the project had already been filed with the NEB, and after the panel hearing process had commenced. IK Studies should be conducted at an earlier stage in the process. This is important because the results of an IK study help inform other research that needs to be done: for example, an IK Study may identify species of concern to Indigenous people, which may impact the scope and methodology for a fish study. Further, an IKS helps identify the rights impacted, which assists the NEB in determining the depth of consultation required.

iii. NEB Governance, Mandate and Roles

Historically, NEB members have been appointed for their background and expertise in energy issues. Unfortunately, this has resulted in an overrepresentation of industry insiders on the board, and an apprehension of pro-industry bias and conflicts of interest.

Problems with this approach were most recently illustrated by the recusal of the panelists for the NEB panel for Energy East, a development which has done harm to the trust of the Mi'gmaq and other Indigenous peoples in the process.

The NEB needs to ensure that it is appointing panelists with backgrounds in Indigenous knowledge, environmental sciences, etc. and who have experience and familiarity with Indigenous peoples and cultures. More Indigenous panelists would go a long way to restoring trust.

In addition, all panelists should receive general training in Indigenous rights, Indigenous knowledge, and Indigenous language and culture.

Finally, as noted above, the hearing process should allow for panelists to be introduced to the culture, language and territory of the Indigenous people affected by a given project.

iv. Lifecycle Regulation

In addition to greater incorporation of Indigenous knowledge in the hearing and approval process, the NEB needs to involve Indigenous people and Indigenous knowledge more in the lifecycle regulation of projects, particularly in monitoring and enforcement.

Indigenous people are stewards of the land and water, and as frequent land and water users, are in a unique position to carry out project monitoring and enforcement activities.

This is hard to do when Indigenous people are not adequately involved in the development of monitoring and response programs. As an example, emergency response plans have not been filed as part of the NEB application for Energy East. Instead, the proponent has promised to develop them later.

Project approvals should be contingent on direct involvement of Indigenous people in the development and implementation of emergency response and monitoring plans. There should be a clear commitment to Indigenous “boots on the ground” as monitors and enforcement officers, reporting back to both the NEB and to their respective Indigenous Nations.

MTI has a roster of trained environmental, archaeological and cultural monitors that could be employed in project monitoring and enforcement.

D. SUMMARY OF RECOMMENDATIONS

In summary, we have the following recommendations for the expert panel;

1) The NEB Act needs to be amended to recognize Indigenous rights and interests, including the following amendments:

    a. “the rights and interests of Aboriginal peoples” should be added as a relevant consideration in the relevant portions of the legislation;
    b. The legislation should reflect the duties to obtain Aboriginal Peoples’ consent and to minimize impacts on rights.

2) The portion of the Filing Guide that deals with Aboriginal consultation should be replaced by an explicit policy on consultation with Indigenous peoples;

3) Where procedural aspects of the duty to consult are delegated to proponents, this should be done clearly, and in writing, so that all parties understand their responsibilities;

4) The Crown should conduct early engagement with Indigenous peoples to build trust, and to help with the scoping and determination of Aboriginal Rights;

5) The Crown Consultation process needs to involve more than explaining the NEB process to Indigenous People;

6) The NEB needs to better adapt it’s hearings to include Indigenous peoples, including:

    a. Incorporation best practices on Oral Traditional Evidence, including allowing for panels of knowledge holders;
    b. Allowing for ceremony, community visits, and other introductions to the territory and culture of affected Indigenous groups.

7) The participant funding process needs to be replaced by a capacity funding model which funds Indigenous Groups properly to perform a broader range of activities, including IK work, community engagement, and technical review;

8) Procedures to access funding need to be simplified;

9) The gathering and inclusion of Indigenous knowledge should be a mandatory part of the NEB process, and should be funded and conducted at an earlier stage in the process;

10) The NEB needs to ensure that it is appointing panelists with backgrounds in Indigenous knowledge, environmental sciences, etc. and who have experience and familiarity with Indigenous peoples and cultures;

11) All panelists should receive general training in Indigenous rights, Indigenous knowledge, and Indigenous language and culture; and

12) Project approval should be contingent on direct involvement of Indigenous people in the development and implementation of emergency response and monitoring plans, including by funding and training Indigenous environmental and cultural monitors.