NATIONAL ENERGY BOARD MODERNIZATION

Submission by

Pacheedaht First Nation

To

National Energy Board Modernization Expert Panel

March 31, 2017

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I. INTRODUCTION

Pacheedaht First Nation ("Pacheedaht") welcomes the opportunity to make these submissions to the National Energy Board ("NEB") Modernization Expert Panel to ensure that the NEB process is consistent with reconciliation with First Nations. Reconciliation requires a collaborative approach that respects First Nation decision-making authorities, and is aimed at achieving First Nation consent. Having been involved in various National Energy board reviews, including in relation to the Trans Mountain Pipeline Expansion Project, we have important insights and suggestions to share with the Panel.

This submission needs to be considered and understood in the context of Pacheedaht's submissions to the Expert Panel reviewing Canada's Environmental Assessment ("EA") Process, which we attach as an Appendix. Any changes to the NEB process need to be undertaken consistently with changes to Canada's EA process, and the two processes need to be inter-related and complementary. An NEB decision on any given project needs to be consistent with outcomes from the EA process for that project.

II. THE PACHEEDAHT FIRST NATION – PEOPLE OF THE SEA FOAM

Our Territory is located on the southwest coast of Vancouver Island between Bonilla Point and Sheringham Point, near the communities of Jordan River and Port Renfrew. We hold unextinguished Aboriginal title and other Aboriginal rights in our Territory. We are in the process of negotiating a modern-day Treaty in the British Columbia Treaty Process in order to finally reconcile our title and rights with the Crown's assertion of title, and to obtain recognition of our right to govern our Territory.

Our name means "People of the Sea Foam", which is linked to our origin story at the head of Port San Juan. Our lands, waters, terrestrial and marine resources are essential to maintaining our culture, our way of life and our community. We rely heavily on the resources in our territory to feed our families, and to maintain our cultural connection.

Unfortunately, development has taken a huge toll on our lands, waters and resources, as well as our ability to exercise our Aboriginal rights. Our Territory has been heavily impacted by forestry, mining and hydro-electric projects. This development has taken place without our consent, and without due consideration for our title interests and other Aboriginal rights. We suffer the impacts of all of this development, yet reap very few benefits.

In recent years, we have made significant strides to restore the ecosystem in our Territory, both terrestrial and marine, to help it recover from the impacts of development. For example, we have been doing a significant amount of fisheries rehabilitation work in the rivers in our Territory. Unfortunately, with each new project that is approved in our Territory, the successes we have achieved in our rehabilitation work are compromised, and further degradation of the lands, waters and resources ensues.

We are hopeful that a robust environmental assessment process will result from the important work that the Panel is undertaking so that impacts from development in our Territory are properly assessed and addressed. It is critical that environmental assessments adequately assess and address

impacts to the environment as well as Aboriginal rights, including title; mitigate or otherwise address those impacts; and achieve the goals of both sustainability and reconciliation. In our view, sustainability and reconciliation go hand-in-hand.

III. RECONCILIATION AND NEB PROCESSES

In our experience, current federal environmental assessments do a poor job of adequately assessing environmental effects, particularly cumulative effects. They do an even poorer job of assessing impacts to our constitutionally-protected Aboriginal rights. Given the level and extent of development in our Territory, our ability to exercise our Aboriginal rights and to continue to live as Pacheedaht people are seriously threatened.

While our interest in this review is fundamentally based upon our continuing work to govern our own Territory - as was the case with our participation in the EA Review Process - it is also based upon the negative experiences we have had in participating in the CEAA and NEB processes that were used for the review of the Trans Mountain Pipeline Expansion Project. An example of these frustrations was the lack of appropriate assessment of impacts from the Trans Mountain Project to Swiftsure Bank, an area of great cultural importance to Pacheedaht; it is a shared exclusive hereditary fishing bank governed with Ditidaht First Nation. This incredibly rich fishing area is located at the mouth of the Juan de Fuca Strait and has been used by Pacheedaht members for countless generations. The designated shipping lanes that will be used by marine traffic associated with the Project cross over Swiftsure Bank. This is of great concern to Pacheedaht because of the very real threat to Pacheedaht fishers of collisions between their vessels and other marine traffic. There is often dense fog in this section of the Strait, making visibility poor. Despite the severity of these potential impacts, the Project application as prepared by the proponent did not include any consideration of impacts from impeding access to Swiftsure Bank. When this concern was raised by Pacheedaht, the proponent's response was to provide information about mitigation measures relating to river banks. This level of fundamental misunderstanding about Pacheedaht's Aboriginal rights and interests, as well as our concerns, was deeply troubling.

As this example illustrates, many of our concerns with development in our Territory relate to impacts in the marine environment. Some of these impacts include:

- Impacts from vessel wake including damage to shoreline archaeological sites;
- Impacts from vessel wake including safety concerns for Pacheedaht fishers. For Pacheedaht fishers on Swiftsure Bank, on calm foggy days, waves generated by passing project-associated vessels, and others, can create unanticipated boat motions, creating the threat of capsize, injury from falls inside the boat, or falling outside the vessel. Such waves, unlike wind-generated or other natural waves, can be unanticipated, so boat operators are unprepared for their approach ;
- Impacts from vessel noise on marine species including whales and fish;
- Impacts from project-associated vessels including interference with fishing activities and access to preferred fishing areas. In order to avoid collisions with shipping vessels on Swiftsure Bank, Pacheedaht fishers often have to quickly haul up fishing

gear and anchors, then move out of the route of incoming traffic, and then re-establish fishing position and gear, often accompanied by the threat of harm to themselves, their vessels, and their equipment;

- Impacts to traditional knowledge due to the heightened risk of being out in the marine environment as Pacheedaht fishers now seldom bring elders or youth with them, therefore deteriorating the traditional intergenerational transfer of knowledge concerning fishing;

- Lack of consultation on the International Marine Organization changes to the shipping lanes in 2002;

- Lack of appropriate recognition of Aboriginal Rights and Title as related to the increase in shipping traffic on and through our Territory;

- Impacts from potential accidents or malfunctions, including spills and ship groundings; and

- Cumulative effects.

As part of our participation in the review of the Trans Mountain Pipeline Expansion Project, we also brought forward the need to increase marine shipping emergency response capacity in Port Renfrew. Considerable efforts were made to highlight the need for emergency response equipment to be located in our Territory, including skimmers, boom, tugs, fire-fighting equipment, and trained crew. Working with Pacheedaht to improve emergency response capability so that our Territory might be less threatened by the Project would have been a simple way to accommodate some of the most adverse impacts from the Project. However, our efforts fell on deaf ears and we were very disappointed to see that this issue was not addressed or even considered by the Panel or the GIC.

As the NEB is often the only regulator for the marine environment, the NEB process must be capable of assessing and addressing these impacts, including the impacts from marine shipping. To date, impacts in the marine environment have not been adequately assessed by the NEB and as part of the process towards reconciliation, we urge the Panel to ensure that the new NEB process is equipped to properly protect waterways, aquatic resources, and Aboriginal rights.

Like the EA process, the NEB process needs to be repurposed and redesigned to build the relationships, structures, processes, understandings and agreements between Aboriginal and Crown governments to ensure collaboration, alignment and effectiveness in reaching consensus-based decisions. This means refocusing on positive and collaborative Aboriginal and Crown relationships that respect Aboriginal rights and title and Treaty rights.

This approach to reconciliation is consistent with the federal government's commitment to a renewed, Nation-to-Nation relationship with Aboriginal peoples, based on recognition of rights, respect, co-operation, and partnership and to implementing the *United Nations Declaration on the Rights of Indigenous Peoples* ("UNDRIP"). First Nations have their own laws and are decision-makers according to their own authority and their own representative institutions. The Government of

Canada requires modern legislative tools that respect and acknowledge First Nations' authorities, including Aboriginal rights and title and Treaty rights.

To implement UNDRIP and work toward reconciliation, it is critical that First Nations are respected and engaged in a government-to-government manner in NEB processes. Potentially impacted First Nations need to be involved at all stages of decision-making in all regulatory review processes in relation to a proposed project, including NEB processes as well as the EA process, from the determination of a project's location and scope, to the final decision on whether a project should be approved. Impacted First Nations must be part of decisions regarding how the NEB will review a proposed project (for example, by way of a hearing and, if so, what type of hearing, to ensure Aboriginal perspectives are taken into account), the terms of reference for the NEB's regulatory review, and all final recommendations and decisions.

For impacted First Nations that have proven Aboriginal rights or title or Treaty rights, or have strong claims of Aboriginal rights or title, that could be impacted by a proposed project, there should be separate bi-lateral discussions between the Crown and those First Nations to address their specific concerns, in the context of NEB, EA and other regulatory processes for that project.

The objective at each stage of the process needs to be to obtain the consent of potentially impacted First Nations on each decision point in every regulatory process relating to a given project, including both NEB and EA processes. Legislation requires a statutory statement expressing that the Crown's preference is to approve projects where First Nations consent is evident - whether it is in an NEB, EA or other regulatory context. In cases where consent is not obtained, dispute resolution processes need to be utilized.

Dispute resolution can be initially undertaken at the political level, with First Nation leaders and Ministerial representatives. If political engagement does not resolve the issue, formal dispute resolution processes could be undertaken, such as mediation. In the event that some First Nations consent, and others do not, there should be an opportunity for First Nations to file "majority" and "minority" reports so that the NEB has all perspectives on the issues.

Canada needs to fulfill its duties under Section 35 of the *Constitution Act, 1982* ("Section 35") to consult and accommodate throughout all regulatory processes, including NEB processes. In addition to fulfilling these obligations, there needs to be legislated collaborative decision-making requirements to avoid infringement on Aboriginal rights and title and Treaty rights.

Ultimately, it is essential that both federal and First Nation decision-making authorities are respected. The federal government may decide to approve a project, whereas First Nation governments may decide to reject it. Neither government should have the authority to fetter the other's discretion. In some cases, the parties may have to "agree to disagree." In those circumstances, litigation may be the outcome, but the entire process will be designed to make this the exception rather than the rule, given the focus on collaboration at every stage.

We have organized our submission to accord with the Expert Panel's Terms of Reference and the questions posed by the Panel.

IV. PACHEEDAHT'S COMMMENTS ON NEB PANEL'S IDENTIFIED ISSUES

A. Governance and Structure

The Panel has requested input on the following issues:

- Governance and division of the NEB's operational and adjudicative functions, including the roles of the Board's Chief Executive Officer and Chair;
- Role of the NEB in implementing Government policies and priorities, including mechanisms for policy direction; and
- Delegation of authorities to Board members and senior NEB staff.

We would like to provide our perspective on the following discussion questions that have been posed in relation to the above-noted issues.

1. *What are appropriate requirements for Board Members (particularly regarding composition, expertise, regional representation, and Indigenous representation)?*

It is critical that NEB members include Indigenous persons so that the Aboriginal perspective is present in every NEB panel review. The Indigenous representative for any given project should be from the geographical region in which the project is being proposed, to help ensure that the requisite Indigenous knowledge is being brought to bear – it is not appropriate to assume that all Indigenous peoples across Canada have a common understanding of cultures, traditional knowledge or perspectives.

In addition, all non-Indigenous members of a panel should be required to undergo cultural awareness training and a course on Traditional Ecological Knowledge ("TEK") so that they have an adequate foundation to understand the perspectives of Aboriginal peoples and groups participating in a panel review process.

Further, panels should be provided with the power to retain experts on Aboriginal issues, such as elders or anthropologists, so that panel members' understanding of, and approach to, issues brought before them are not limited to a western or Euro-centric perspective.

2. *Where should NEB Board Members be located and why?*

It is important for all Board members to have knowledge of the project area in question. In addition to the Indigenous Board member, at least some of the other Board members presiding at a panel hearing should have experience in and knowledge of the project area, ideally through having lived in the geographical region of the proposed Project.

The current requirement that permanent NEB Board members reside in the Calgary area has resulted in a lack of balance on the Board, given that many people in the Calgary area have been involved in the oil and gas sector and have certain biases toward that industry. A broader perspective could be brought to bear on NEB applications if permanent Board members could reside throughout Canada.

3. What are your views with respect to the Chair of the Board also being the NEB's CEO?

One of the concerns with having the Board Chair also be the NEB's CEO is that the CEO's business roles and responsibilities can easily become inappropriately intertwined with his/her role as the Chair of the Board. This can improperly influence the Board Chair's decisions and recommendations if he/she sits on a panel review. For example, it is inappropriate, and inconsistent with the independence of the Board, for the Board Chair to be permitted to liaise with the Minister of Natural Resources, the Department of Natural Resources and the rest of the federal government. Although this may be acceptable for the CEO, it is unacceptable for a Board member who is making decisions on applications to have this level of engagement with federal government representatives.

It is our view that the preferred approach is to have the business responsibilities of the CEO separated from the Board decision/recommendation role of Board members so that the CEO is not sitting on panel reviews or making decisions on any applications to the NEB. This will help ensure the true independence of Board members in making project-related decisions or recommendations.

4. How should the Government of Canada provide the NEB with policy direction? What should be the role of the NEB in implementing Government policies and priorities?

It is absolutely imperative that the NEB be truly independent from all political influences. As a result, the Government of Canada should not be providing policy direction to the NEB, and the NEB should not be implementing Canada's policies or priorities. Otherwise, the NEB can be improperly influenced by the political winds at any given moment and will lose much of its independence.

The only exception should be with respect to constitutional imperatives or domestic and international obligations or commitments. With respect to constitutional imperatives and domestic/international obligations and commitments, the NEB should be required to operate in a manner that recognizes and respects Section 35, the Crown's duty to consult, and Canada's implementation of UNDRIP. Currently, the NEB appears to operate in a way that does not reflect a proper understanding of, or commitment to, constitutional and international principles, which has resulted in Indigenous issues being downplayed and misunderstood in NEB processes.

B. Mandate and future opportunities

The Panel has identified the following issues:

- Defining and measuring public interest (e.g., consideration of national, regional, Indigenous, and local interests as well as environmental, economic and social factors);

- Potential to clarify and expand the NEB's mandate with respect to collecting and disseminating energy data, information, and analysis; and

- Potential to expand the NEB's mandate (i.e., in emerging areas such as offshore renewables and to support the transition to a low carbon economy in light of Canada's climate change commitments).

The following are our answers to the discussion questions that have been posed.

1. *What does the 'Canadian public interest' mean to you?*

It is critical that the NEB consider impacts to Aboriginal title and rights and Treaty rights, as well as whether the Crown has met is constitutional duty to consult with potentially impacted First Nations, in considering whether a proposed project is in the public interest. A project cannot possibly be in the public interest if it stands to unjustifiably infringe Aboriginal title and rights or Treaty rights, is undertaken in the absence of adequate and meaningful consultation, or violates the principles set out in UNDRIP. The Board needs to be expressly mandated and directed to consider these constitutional considerations in deciding whether a proposed project is in the public interest.

2. *What factors should be taken into account when determining whether a pipeline or power line project is in the 'public interest'?*

As noted above, it is critical that impacts to Aboriginal title and rights and Treaty rights, the Crown's duty to consult, and the principles set out in UNDRIP be considered as factors relating to the public interest. It is also important that the public interest not be interpreted too broadly as equating with the national interest in relation to the GDP. Such a broad interpretation fails to take into account the regional and local impacts.

The Board should be expressly directed to consider the public interest from the perspective of risks and benefits – who will bear the risks of a proposed project, and who will gain the benefits? To truly be in the public interest, there should be an alignment of risks and benefits. If most of the risks, including from any marine traffic associated with a pipeline project, are borne by First Nations or local communities, while benefits (such as project revenues or job and contracting opportunities) are largely enjoyed only by corporate entities and individuals employed hundreds of kilometres away, that alignment is lacking and such a project should not be considered in the public interest.

With respect to environmental impacts, whether a proposed project will have serious environmental impacts must be a factor in considering whether the project is in the public interest. However, the NEB should not be conducting environmental assessments itself as its members do not have the requisite expertise to conduct EAs. Rather, an independent environmental assessment board (as described in submissions to the EA Review Panel) should conduct the environmental assessment before the NEB considers the project. The NEB should be guided by the conclusions and recommendations from the EA. In cases where the EA concludes that there are significant adverse impacts from a proposed project that cannot be mitigated, the NEB should be required to conclude that the project is not in the public interest. Such an approach is consistent with a regulatory regime founded on sustainable development.

3. *For factors that fall within the jurisdiction of provinces and territories, such as land use planning, should the federal government and agencies take these into account in their public interest determination? If so, how?*

Land use planning is a key issue. Provincial and territorial governments should be encouraged to develop and implement land use plans so that cumulative effects from development can be properly considered. Land use planning represents a proactive approach to development that can help ensure there is a proper balance between economic and environmental considerations. One way to encourage land use planning is for the federal government to offer stream-lined EA and NEB processes for proposed projects that are consistent with land use plans. Addressing cumulative impacts is an absolutely critical challenge currently facing First Nations across the country. Project-specific EAs and regulatory processes are not well-suited for dealing with cumulative effects. As a result, the federal government needs to create incentives for strategic and regional EAs to be undertaken and land use plans to be implemented by provincial and territorial governments.

Land use initiatives conducted by First Nations also need to be taken into account in assessing cumulative effects and in public interest determinations. For example, where a Project is incompatible with a First Nation's land use planning, this must weigh against the Project being in the public interest.

4. *What are your views on the NEB's existing mandate and are there any areas over which the NEB's mandate should be changed?*

As noted earlier, although the NEB should be required to consider environmental effects of a proposed project, it should not be conducting environmental assessments itself. EAs of proposed projects should be conducted by a federal board that specializes in environmental assessments.

The NEB should be required to consider the public interest (as expressed in our answer to question 2 above) for all proposed projects, including the licensing of export and import facilities. The public interest was a factor that was in prior versions of the *NEB Act*, but it was removed in amendments that the Harper Government made to the Act. This has resulted in a situation where the NEB does not consider anything other than economic considerations in relation to export or import facilities, such as LNG terminals. This is completely inappropriate as it results in a narrow and unbalanced consideration of these types of projects, despite their impacts to the environment and to Aboriginal title and rights and Treaty rights.

To the extent that the NEB will be the regulatory body in relation to proposed offshore oil and gas projects, it is essential that it be required to consider public interest considerations – including all of the factors we have identified in answer to question 2 above. Any process that considers offshore oil and gas projects should be jointly undertaken by First Nations on the coast that stand to be impacted by such projects, and full consent of impacted First Nations – consistent with UNDRIP – should be a mandatory requirement before any approval can be issued. Offshore oil and gas development has the potential to adversely affect our Aboriginal title and rights due to the increased marine shipping associated with this development and the increased potential for accidents or spills within our Territory.

C. Decision-making roles, including on major projects

The following issue has been identified for consideration in the review process:

- Whether to maintain or revise the current approach with respect to who is making what decision.

We have the following responses to the discussion questions that have been posed in relation to this question.

1. What principles should determine who should make the final decisions for the projects and why?

Decision-making on all proposed projects being considered by the NEB should be made in a manner that is consistent with UNDRIP principles and Section 35. Accordingly, proponents need to be seeking consent from First Nations that hold Aboriginal rights and title or Treaty rights and are impacted by proposed projects. Where such consent has not been provided, the NEB needs to factor this into its decision-making process as an issue of paramount importance that is directly related to the public interest - in other words, in the absence of First Nation consent, a project may not be in the public interest.

In the exercise of their constitutionally-protected self-government rights, First Nations also have the right to make decisions on whether particular projects should proceed. Ideally, joint decision-making processes should be undertaken by the NEB and an impacted First Nation to reflect that fact and to manage the risk that the First Nation will be forced to legally challenge an NEB approval if it is not involved in the decision-making process. When a joint decision-making process is not undertaken, it is important to note that the NEB and First Nation government may have to "agree to disagree" with respect to whether a particular project should proceed - the NEB cannot unjustifiably infringe First Nations' self-government rights. In that case, litigation may be the result.

It is also critical that the NEB be required to consider whether the Crown has met its duty to consult before issuing any approvals. Currently, Crown consultation is not properly factored into the decision-making process by the NEB, where the NEB has final decision-making authority. Typically, the NEB punts First Nations' issues of concerns to the proponent to "consult" with those First Nations after approvals are issued. This is not an effective approach because consultation is legally required to take place before decisions are made, and it is an obligation of the Crown, not proponents. By deferring issues to post-approval consultation processes undertaken by the proponent, the engagement is invariably token at best. The First Nation has no tools to hold the proponent accountable and no legal recourse if such engagement/consultation is not meaningful because the proponent will already have its approval in hand and the 30-day limitation period for legally challenging the project will already have passed.

2. What is the role of government policy in guiding NEB oversight and decision making?

As noted earlier in our submission, other than in the context of constitutional principles and domestic and international obligations, government policy should not be guiding NEB oversight or decision-making. The NEB needs to be truly independent from government so that it can make

unbiased decisions free from any kind of political influence. The factors that the NEB is required to consider - which should include the constitutional rights of Indigenous peoples and UNDRIP - need to be neutrally applied by the NEB and not influenced by government policies or priorities. Otherwise, there is a serious risk that the NEB will be making its decisions based primarily on political considerations, which has been our experience under the current structure.

The Minister of Natural Resources should have absolutely no influence on, or input into, NEB processes or decisions.

3. *What are your views with respect to the role(s) of other parties in the final decision-making process, such as Indigenous groups, provinces/territories or municipalities? Do you see an enhanced role for some or all of these parties? If so, please describe what these roles should be for each, with a short rationale for why.*

As noted earlier in our submission, First Nations need to be part of the final decision-making process. First Nations have constitutionally-protected rights that are at stake every time the NEB approves a project. They are not stakeholders; rather, they are rights-holders and decision-makers in their own right.

Ideally, joint decision-making processes should be undertaken between the NEB and First Nations with Aboriginal title and rights or Treaty rights that may be impacted by a proposed project. The NEB should have flexibility to design processes that will work with the First Nations who may be impacted by a particular project - a "one size fits all" approach will not work. Such an approach is in keeping with both Section 35 and UNDRIP. It is the best way to try to achieve First Nation consent, in keeping with UNDRIP, and to manage the risk of NEB decisions being challenged in court.

At the very least, the NEB's process needs to expressly acknowledge First Nations as parallel decision-makers, and factor in whether impacted First Nations have consented to a proposed project. As noted above, in cases where consent for a project has not been granted by impacted First Nations, that fact needs to be expressly considered as a key issue in the NEB's decision on whether that project is in the public interest.

4. *What are your views with respect to the current three options available to the GIC when making its decision for pipelines greater than 40 km in length? What can be improved?*

Currently, there is a gap in the decision-making process in relation to First Nation consultation and justification of any infringements on Aboriginal title and rights or Treaty rights. The Act should expressly state that the GIC must be satisfied that: (i) the Crown has met its duty to consult; (ii) that there are not infringements to Aboriginal title or rights or Treaty rights; or (iii) in the event that there are infringements, that those infringements are justified. In the event that the GIC decides to refer the recommendation and/or terms and conditions back to the NEB for reconsideration, it must also be required to ensure there is a consultation process in relation to that reconsideration process.

5. *What are your views with regard to the legislated timelines for project reviews (i.e., 15 months for NEB recommendation and 3 months for a GIC decision)?*

The introduction of these very short legislated timelines is hugely problematic. The Harper Government introduced these short timelines without any consultation with First Nations. They were created without due regard to First Nations' Aboriginal title and rights or Treaty rights, the Crown's duty to consult and UNDRIP. Fifteen months is not an adequate timeline for NEB processes in relation to large infrastructure projects that impact many First Nations. Such a short timeline gives short shrift to the issues of concern to First Nations, as well as their constitutional rights.

The current three-month period of time between the NEB recommendation and the GIC decision is completely inadequate to ensure the Crown meets its duty to consult, particularly since the Crown currently leaves all of its consultation on substantive issues (i.e. impacts to rights, as opposed to regulatory process issues) to after the NEB recommendation is made. Back-end loading consultation in this way means that there are myriad issues that need to be addressed in the consultation process. It is literally impossible for meaningful Crown consultation to take place within three months.

Given the litigation that resulted from the approvals of both the Northern Gateway Pipelines Project and the Trans Mountain Pipeline Expansion Project, history has taught us that one of the consequences of these short legislated timelines is that there is insufficient time for adequate information to be obtained and properly considered, or for the Crown to meet its duty to consult, which leads to legal challenges.

Rather than being required to abide by unrealistic legislated timelines, the NEB needs to be able to exercise its discretion on how much time is required for a particular review process. In some cases, 15 months may be sufficient, but in other cases, a shorter or longer period may be required. For large infrastructure projects that concern many First Nations and stakeholders, it is important to recognize that the process will take considerable time. That is a reality and trying to expedite the hearing process will only result in frustration and potential disengagement of First Nations in the process, which increases the risk of litigation.

Also in terms of timelines, the imposition of incredibly short timelines for filing a judicial review of an approval under the *NEB Act* needs to be reversed. These timelines (15 days for filing a judicial review) are highly prejudicial to First Nations for several reasons, including the following:

- The 15-day deadline is prohibitively short to put together an application of this complexity and magnitude.
- The requirement to seek leave to apply for judicial review is an additional procedure which presents an added barrier to First Nations' seeking to challenge a project approval, particularly in terms of legal costs.
- The discretion of the Court to dismiss a First Nation's application for leave at this preliminary stage is also problematic. First Nations seeking access to justice and to have their voice heard, particularly with respect to constitutionally-protected s. 35 rights, should not face the prospect of having their applications for leave to apply for

judicial review dismissed in a summary manner before a full consideration of their case on its merits.

The requirement to seek leave to apply for judicial review should be repealed, as the Court should not have the authority to dismiss First Nations' applications for leave to judicially review before a full consideration of their case on its merits.

The deadline for filing a judicial review should be at least the standard time for judicial reviews as set out in the *Federal Courts Act*.

6. What are your views with respect to NEB's discretion to hold hearings for export licences?

Consistent with our answer to #7 below, we are of the view that the NEB must be required to hold hearings for export licences. Given the potential impacts if an export licence is issued (including increased marine traffic), a robust process should be followed by the NEB. For the marine traffic component of exporting activities, the NEB process may be the only regulatory process that is undertaken. For that reason, a public hearing is needed to ensure issues are fully canvassed and that First Nations can fully express their views. As noted above, the process should ideally be a joint decision-making process with impacted First Nations.

7. In determining whether an export licence should be issued, what are your views with respect to NEB's obligation to only consider whether the exports would be a surplus to Canadian requirements (see footnote 7)?

Prior to the Harper Government's amendments to the *NEB Act*, the NEB was required to consider more than just the surplus question. Narrowing the NEB's consideration to this sole issue is inappropriate, and was done without consultation with First Nations.

The issuance of an export licence has direct adverse impacts on First Nations. Exporting oil and gas has a physical dimension that creates real risk on the ground to First Nation communities and can adversely affect their Aboriginal title and rights or Treaty rights. The existence of these tankers creates adverse impacts to First Nations' rights as it interferes with navigation of small vessels, creates wakes that cause safety concerns for Aboriginal fishers and other harvesters, interferes with fishing activities, and impacts fish and fish habitat as well as marine mammals. In the event of a marine accident, the consequences can be catastrophic. We refer the Panel to our comments above about impacts in the marine environment.

By limiting the NEB's review mandate to only surplus considerations, none of these issues are ever considered, let alone addressed, because there are no separate regulatory processes currently required for the tanker component of export terminals. As a result, it is critically important for the "public interest" factor to be put back into the export licensing decision-making factors in the *NEB Act*. As noted earlier in the submission, the public interest factor needs to encompass First Nations' constitutional rights as well as UNDRIP.

8. *What are your views with regard to the land acquisition process and dispute resolution? What are your views with respect to the responsibility of the pipeline company to negotiate with landowners regarding the amount of compensation?*

Although we have no comments on private land acquisition provisions, we note with concern that the *NEB Act* does not address Aboriginal title interests that are impacted by a project. This issue needs to be addressed. It is completely inappropriate that private landowners' interests are treated with more seriousness than constitutionally-protected title interests. It is our view that it would be inconsistent with the nature of Aboriginal title for the NEB to issue any project approvals that would result in the acquisition of Aboriginal title lands without the First Nation's consent. This should be expressly set out in the Act.

D. Compliance, enforcement, and ongoing monitoring

The following issues have been identified for consideration in the review process:

- Lifecycle oversight and public engagement tools (e.g., effective legislative tools throughout project planning, regulatory hearings, construction and operation and abandonment);
- Information requirements of regulated companies over the lifecycle of a project, and public access to this information;
- Safety and emergency preparedness tools (e.g., effective compliance monitoring and enforcement legislative tools; safety standards and emergency response requirements); and
- Land acquisition matters and related negotiation proceedings.

We would like to address the following discussion questions.

1. *What are your views with respect to the existing compliance and enforcement tools available to the NEB for safety and environmental protection?*

   (a) What are your views as to adherence to these tools?

   (b) What are your views as to the current use of these tools to advance risk management and any barriers or remedies that would enhance safety?

   (c) What are your views as to the safety and environmental performance reporting that is currently done and areas for improvement?

   (d) Can the process by which the NEB evaluates compliance and adherence to conditions be made more efficient? If so, how?

See below.

2. *Are there additional initiatives the NEB could undertake to help promote a positive culture for safety and environmental protection?*

In response to questions 1 and 2, given that the projects that the NEB regulates are on First Nations' Territories over which they have Aboriginal title and rights or Treaty rights, it is critically important that the NEB involve First Nations in compliance monitoring and enforcement activities. The NEB should be working jointly with First Nations to ensure that all monitoring information is shared with First Nations, that First Nation monitors are engaged by the proponent, and that First Nations have an enforcement role when proponents do not comply with regulatory requirements.

In addition, the NEB needs a process to expressly factor in TEK and Traditional Uses in its monitoring plans.

It is also important for all decisions to reflect and incorporate any co-management or joint decision-making processes that exist between First Nations and government, in post-approval monitoring and enforcement activities.

3. *What are your views on monitoring committees?*

Monitoring committees are one way to involve First Nations in monitoring and compliance activities. If monitoring committees are struck, the First Nations whose Territories are impacted by the project must be on those committees. However, it may not be appropriate to include stakeholders on those committees - again, it should not be a "one size fits all" approach. The NEB should have flexibility to strike monitoring committees that work for the particular situation and cultural context.

4. *In your opinion, are the existing emergency preparedness and response tools and requirements sufficient? If not, what additional tools or requirements are needed?*

With respect to marine emergency response, there is still a huge gap in Canada's capacity to adequately respond. It is critically important that this gap be filled if the NEB is going to be considering oil and gas projects that will include a marine component. It is simply unacceptable for these issues to be largely overlooked in NEB processes, based on a hope that the gaps will be filled at some point in the future. An important factor in the NEB's consideration of the public interest for any project that has a marine component must be whether there is sufficient marine emergency response capacity to deal with an incident. If there isn't sufficient capacity, the public interest should weigh against project approval.

E. Engagement with Indigenous peoples

The Panel has set out the following issues for consideration in the review process:

- 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;

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

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

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

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

We also note that the Terms of Reference specifically mention UNDRIP in the following passage:

> 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 United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP).

We have the following comments on the discussion questions that have been posed.

1. What are your views on the approach the Government of Canada has taken in recent years to engage and consult Indigenous groups on projects regulated by the NEB? Specifically:

(a) *Early engagement of Indigenous groups prior to a formal environmental assessment and regulatory review process by the NEB;*

(b) *Consultations with Indigenous groups on matters that fall both within and outside the NEB's mandate;*

(c) *Adequacy of participant funding to support Indigenous groups' participation in the overall engagement and consultation process;*

(d) *The roles of the NEB and the Crown in considering and addressing potential impacts to Aboriginal or treaty rights on NEB-regulated projects, and how these respective roles are carried out; and*

(e) *Ongoing consultation and engagement of Indigenous groups during the construction, operations, and abandonment phases of projects that are approved.*

Pacheedaht's experience with Canada's approach to consultation on NEB-regulated projects has been a very poor one. The Crown does not engage in early consultation with First Nations on potential project impacts. Rather, the only engagement that takes place prior to the NEB's decision or recommendation, as the case may be, is on the NEB process itself. As a result, there is no opportunity for Crown consultation on information gaps or mitigation measures so that these issues can be addressed before the NEB makes a decision or recommendation. By back-loading the substantive consultation on project impacts to until after the NEB has made a decision or recommendation, the Crown forecloses the opportunity to address a considerable number of issues. It is too late in the process to address information gaps, for example.

When Crown consultation finally does take place on project impacts, the Crown is only interested in talking about the NEB's report and project conditions. It is not willing to discuss the Aboriginal title and rights or Treaty rights at issue, or the potential impacts to those rights, as it views those issues as having been canvassed by the NEB, even though the NEB does not consult with First Nations. It is also not willing to address information gaps (because the NEB process is over at that point).This is an impoverished approach that does not lead to meaningful dialogue, understandings or accommodation.

In addition, the Crown has not been participating in the consultation process with a view to sharing information or perspectives. It is a "one-way street", with First Nations being required to provide information on their rights and project impacts and their views on possible mitigation measures, but with the Crown not sharing similar information with the First Nations. Not only does the Crown not share its strength of claim information (which the Federal Court of Appeal criticized in the Northern Gateway Pipelines Project court cases), it does not share any information. Despite having experts available in its federal departments, such as fisheries biologists and mariners, it does not share those experts' views on the NEB's conclusions or proposed conditions. This makes for a very lopsided dialogue, with First Nations being left largely in the dark in relation to the Crown's thinking on issues of relevance in the consultation process.

In our experience, neither the NEB nor the Crown properly considers or addresses potential impacts to our Aboriginal title and rights. We strongly disagree with the federal Crown's position that it relies on the NEB process, to the extent possible, to fulfill its duty to consult First Nations. That approach is not fulfilling the Crown's duty to consult, as the Federal Court of Appeal found in the Northern Gateway Pipelines litigation. Canada is merely recording or, in its own words, "tracking" the information and concerns that are submitted by First Nations through the NEB process, rather than actively engaging with First Nations on the issues, sharing its information, perspectives and opinions on potential project impacts and attempting to address those impacts through mitigation measures or accommodation. Contrary to its claim, Canada is not "leveraging" environmental assessment and regulatory processes to avoid and mitigate potential project impacts, including impacts on Aboriginal title and rights or Treaty rights. Rather, it is using these processes to avoid having to engage in early and ongoing consultation with First Nations. The NEB process is not currently a consultation-based or consent-based process. As a result, it is inappropriate for Canada to rely on that process as a proxy for meaningful consultation. Meaningful dialogue and consultation cannot possibly take place in a one or two day meeting jammed into a tight schedule of Crown consultation meetings over a three-month period. Such an approach is inconsistent with reconciliation, inconsistent with UNDRIP principles and destined to fail.

We also disagree with Canada's contention that it shares the Crown's analysis to seek feedback from Indigenous groups. In our experience, Canada does not share its analysis with us, despite the need for dialogue and understanding on this fundamental issue. If the Crown does not share its strength of claim assessment or other analyses, the First Nation has no idea whether the Crown is making its decision based on appropriate information. This complete lack of transparency is an impediment to achieving reconciliation.

With respect to the Crown's assessment of the adequacy of consultation in the context of NEB decisions, there is also a complete lack of transparency. It is not clear who makes this adequacy

assessment, or when it is undertaken, and we are not provided with an opportunity to comment on the assessment.

In our experience, the Crown is also unwilling to consider the implementation of any additional measures, beyond what the NEB has recommended, to address potential impacts that are beyond the NEB's mandate to address. For example, the Crown typically relies on the scoping for the NEB process so if issues arise in the consultation process that are outside the NEB's scope of review - for example, the downstream impacts of oil and gas development - the Crown will not engage on those issues in the consultation process. As a result, the issues fall off the table and are not addressed. For those projects where the NEB makes the final decision, there is typically no Crown consultation so there is no vehicle for issues outside the NEB's mandate to be addressed.

A much more proactive and meaningful approach needs to be taken by the Crown to consult with First Nations about potential project impacts from the very beginning of the process. That way, there will be more time for project impacts to be discussed and mitigation or accommodation measures to be explored. In addition, the Crown can lend support to First Nations in requesting that information gaps be filled. The Crown also needs to be required to share its information and opinions on project impacts and mitigation measures with First Nations in the consultation process. Far more transparency is required in the process.

With respect to ongoing consultation and engagement of Indigenous groups by proponents during the construction, operations, and abandonment phases of projects that are approved, this is important, but it cannot be viewed as a replacement for Crown consultation. The courts have been clear that Crown consultation must be meaningfully discharged before a Crown decision is made. As a result, deferring engagement with impacted First Nations to the construction, operations or abandonment phases of a project cannot possibly fulfil the Crown's duty to consult. It is also critically important to ensure that First Nations have the requisite capacity to participate in post-approval engagement processes. Without that capacity, many First Nations will be unable to meaningfully participate in those processes.

Having said all of that, if a joint decision-making process is undertaken with impacted First Nations, as we have recommended earlier in these submissions, the problems with the consultation process will be less of a concern because First Nations' decision-making role will be respected and incorporated into the process. Only in the event that the Crown is contemplating making a decision that is inconsistent with the impacted First Nation's decision, will consultation really be necessary.

2. *How can Indigenous traditional knowledge (including Traditional Ecological Knowledge) and information be further integrated into the NEB application and hearing process? What are the potential benefits and constraints to this integration?*

The incorporation and proper understanding of Indigenous traditional knowledge is critically important to proper NEB decision-making, but it is currently lacking. The NEB's approach is completely western-centric and NEB Panel members do not appear to adequately understand TEK information or how to factor it into decision-making.

One way to help address this problem is to implement the joint decision-making process we are advocating for. Using this approach, the NEB process can be customized together with the impacted

First Nations' decision-making process and TEK can be better incorporated into the process. In addition, providing the NEB with the ability to hire TEK experts, such as community elders or cultural anthropologists, to provide guidance and advice on these issues would be a step in the right direction. NEB panel members should also be required to take cultural awareness training and courses on TEK so that they have a better skill set to consider this type of information. Having Indigenous individuals on panels can also assist in this regard, but it is important that Indigenous Board members be from the project area in question so that they have the requisite knowledge to bring to bear to the process.

It is critical that a holistic approach be taken to project effects. Consideration needs to be given to environmental, economic, social and cultural impacts. In relation to impacts to First Nations and their rights, proponents need to be required to undertake an Aboriginal Impact Assessment ("AIA") that identifies potential adverse effects on Aboriginal title and rights or Treaty rights. Merely studying or reporting on current traditional uses is not comprehensive enough to adequately inform First Nations, proponents, or the NEB/Cabinet on potential impacts. An AIA that assesses the environmental, health, cultural and heritage, and socio-economic impacts of a proposed project on First Nations, including their Aboriginal title and rights and Treaty rights, is more comprehensive. Ideally, AIAs need to be done collaboratively with the impacted First Nations. It also needs to include current and traditional uses, preferred uses and areas to exercise rights, cultural factors, TEK, potential residual and cumulative effects to the rights and other issues raised by impacted First Nations.

The AIA needs to be a stand-alone section in the proponent's application, but needs to be fully integrated with and reflected in other components of the application, such as impacts to biophysical or cultural indicators. The AIA should be a central component of an application with all other components being reflective and consistent with the AIA findings. An AIA can also assist proponents to propose measures, and make commitments, that will prevent, mitigate or accommodate potential adverse impacts and effects, if that is possible, or lead the NEB or Cabinet to decide that a project should not be approved given the impacts to Aboriginal title and rights or Treaty rights.

Furthermore, an AIA needs to provide sufficient information to assess the extent to which the project could potentially affect a First Nation's ability to meaningfully exercise its rights now and in the future in the context of both project residual effects and cumulative effects. As such, the regional study area for an AIA needs to be the entire First Nation territory.

Another issue to be addressed in NEB processes is the western-centric and quasi-judicial nature of NEB hearings. This can be a huge impediment to meaningful involvement of Indigenous groups and proper consideration of TEK. The NEB needs to have the flexibility to design project-specific processes that are culturally appropriate. For example, in some cases, talking circles may be the best way for First Nations to share their perspective. The NEB should be fashioning its processes through engagement with affected First Nations. Again, joint decision-making processes may be the best way to facilitate First Nation participation and consideration of TEK and other information from First Nations.

3. *How can Canada enhance its approach to Indigenous engagement and consultation to inform decision-making on NEB-regulated projects? What should be the role of*

the NEB? The Government of Canada? Project proponents? Indigenous peoples (e.g., specific groups or communities?)

The best approach would be for Canada to adopt a full consent-based approach to the process, with joint decision-making processes being undertaken with affected First Nations whenever reasonably possible. The question should not be limited to just consultation and engagement, but rather how to make decisions in a way that is consistent with UNDRIP and First Nations' rights to make their own decisions about proposed projects. Viewing this as a consultation/engagement issue only is too narrow a lens to bring to bear on the problems. We have provided more details on our proposed approach earlier in this submission.

Whether the NEB or Canada conducts consultation is a legitimate consideration. Currently, the NEB's policy of not consulting with First Nations creates serious gaps in the process. However, these gaps are probably better addressed by Canada undertaking substantive consultation on project impacts with potentially affected First Nations early in the process, before the NEB makes a decision or recommendation, rather than by the NEB undertaking consultation itself. In this way, information gaps and information-sharing can be better addressed. The current approach of leaving substantive consultation to the end of the process is definitely not the right approach, nor is it consistent with the courts' direction that consultation take place early in the process.

Crown consultation should not be delegated to project proponents. However, proponents should be required to engage early with First Nations, before even applying to the NEB, so that First Nations' concerns and information requests can be addressed. Proponents should be required to indicate in their applications what engagement has taken place, and how they have addressed concerns. The NEB needs to have the power to reject applications if insufficient work has been undertaken with First Nations, or if insufficient information has been collected to consider potential impacts on Aboriginal title and rights or Treaty rights.

The onus cannot be on First Nations to fill all of the information gaps to properly assess potential impacts to their Aboriginal rights and title or Treaty rights. Although First Nations will have critically important information contribute to the assessment, the proponent should be required to gather sufficient information to ensure the assessment is complete (such as biophysical studies). In addition, the Crown should be required to share its information and expertise in the process, so that as much information as possible is brought to bear in the decision-making process.

4. *How should the Government of Canada's approach to engaging and consulting Indigenous groups on NEB regulated projects support the Government of Canada's goal of renewing the nation-to nation relationship with Indigenous Peoples and moving towards reconciliation?*

Canada's approach must be founded on reconciliation. Currently, that is not happening. The Crown: (1) does not share information or its expertise with First Nations in the NEB or consultation process; (2) limits consultation to the NEB report and proposed conditions; and (3) refuses to explore accommodation measures. The NEB process itself is adversarial, as a quasi-judicial process, so it is definitely not a vehicle for reconciliation as currently structured. Joint decision-making processes and decision-making factors expressly taking into account First Nation consent are two ways that reconciliation could be realized through the decision-making process.

5. *How can the Government of Canada best consider and address the principles outlined in the United Nations Declaration on the Rights of Indigenous Peoples when undertaking efforts to modernize the NEB and when making decisions on whether NEB-regulated projects are in the public interest?*

We have provided some ideas on how to act consistently with UNDRIP throughout this submission. This issue needs to be fully explored with First Nations in a consultation process before any amendments to the *NEB Act* are made.

6. *What could be done to enhance the involvement of Indigenous peoples in the full life cycle of NEB-regulated projects (e.g., ongoing monitoring of the operation of existing projects, economic development opportunities/participation, or other roles)?*

We have shared some of our thoughts on this issue earlier in our submission. For example, First Nation monitors should be engaged, and First Nations need to have a role in enforcement.

With respect to economic participation, this issue could be at least partially addressed by requiring the NEB to balance project risks and benefits at a local level, rather than at a national level. Where that balance does not exist, the project should not be considered to be in the public interest. This would encourage proponents to take concrete steps to ensure there is an alignment of project risks and benefits to the extent possible.

Ongoing engagement with First Nations throughout the life of the project is critical, and the goal should be for all post-approval decisions to be consent-based. First Nations need to have a real voice and be actively involved in relation to what monitoring is required, and when and how adaptive management strategies are undertaken. However, none of this should take the place of meaningful consultation and accommodation before projects are approved.

7. *What are your views regarding how federal departments and agencies can and should balance and respect the interests and rights of Indigenous peoples with varied societal interests to inform decision-making on NEB-regulated projects?*

Canada needs to respect Aboriginal and Treaty rights. These constitutionally-protected rights cannot be automatically trumped by economic considerations, which is what the effective result has been for most NEB-regulated projects. Federal departments and agencies need to substantively address impacts to these rights, and not merely give lip service to them. We have identified many ways in which that can be done throughout this submission.

F. Public participation

The following issue has been put forward for consideration:

- Identifying legislative changes to support greater stakeholder and public participation in NEB activities (e.g., hearings, developing emergency response plans, etc.) that would enhance the outcomes of these activities.

The following are our responses to the discussion questions on the hearing process.

1. *In your view, what core principles and elements should be reflected in the hearing process?*

NEB hearing processes need to be conducted in a manner that facilitates First Nation participation. Quasi-judicial hearing processes create impediments for full participation by Indigenous groups. As noted earlier in the submission, the NEB needs to have flexibility to design processes that work for the particular circumstances of each project, to ensure that the process facilitates, rather than discourages, First Nation participation. This may require speaking circles or holding portions of the hearing out on the land. Ideally, there should be a joint hearing process with affected First Nations. At the very least, the NEB needs to be fully engaging with impacted First Nations to design an appropriate process for the particular project in question. The process also needs to ensure that panel members have the requisite training and understanding to be in the best position possible to understand TEK and the Indigenous world view being presented by First Nation representatives in the hearing process.

The process also needs to ensure that there is adequate information for the panel to reach a conclusion about project effects. Applications should not go to a hearing until sufficient information has been gathered, and the NEB needs to be diligent in requiring proponents to meaningfully respond to information requests. Adequate and accurate information is critical to ensuring a robust NEB process.

2. *Not all applications currently have to undergo a public hearing process. Which applications do you think should have a public hearing process?*

Any application that has the potential to seriously impact Aboriginal title and rights or Treaty rights needs to go to a hearing if the impacted First Nations request a hearing. However, in some circumstances a full public hearing may not be required. It may only be necessary to have a hearing process in relation to the impacts to Aboriginal title and rights or Treaty rights, rather than on all aspects of the project. As noted repeatedly throughout this submission, the best course would be for hearings on impacts to rights to be undertaken as a joint process with the affected First Nations. At the very least, decisions on whether a public hearing is required should be made collaboratively with the affected First Nations.

3. *What are your views with respect to the basic steps of the public hearing process? What are the areas that can be improved?*

A serious problem in the steps of the current public hearing process is that the NEB allows applications to go to hearing in the absence of sufficient information to adequately understand and assess project impacts. This creates disputes and delays in the hearing process, and hamstrings the ability of participants to fully participate in the process. It also makes it impossible for the NEB to make an informed decision, and results in a lack of public trust in the outcome of the process.

As a general principle, no application should go to a hearing until there is sufficient information. This requires a collaborative approach with impacted First Nations to ensure their information requests are taken seriously and addressed before an application goes to hearing.

4. *How could the NEB enable public participation in hearings in a less formal way?*

Earlier in this submission, we have made some suggestions such as having speaking circles or holding aspects of the hearing out on the land. The key to enabling First Nation participation is to provide the NEB with enough flexibility so that it can co-design hearing processes with the affected First Nations. This can be done in a way that still maintains procedural fairness. Further exploration and dialogue between the federal government and First Nations are required to explore this issue.

5. *What are your views on the NEB's Participant Funding Program?*

Insufficient funding is provided to First Nations. In our experience, the funding provided does not even come close to covering the costs associated with participating in a review. This means First Nations end up having to use money that could otherwise go into education, housing or social programs to participate in the process in order to try to protect their lands, waters and resources. First Nations should not be put in this untenable position. Government needs to ensure that there is sufficient funding for full First Nation participation. This may require a levy on proponents. Given that proponents spend millions of dollars on consultants and experts, it is not inappropriate for them to bear the cost of ensuring the Indigenous perspective is fully presented at the hearing. Ensuring there is adequate information from First Nations in the hearing process is as critical to a robust and reliable process as ensuring there is adequate western science information.

6. *How could the participant funding process, administered by the NEB, be more efficient and effective in enabling public participation and Indigenous engagement in the hearing process?*

In our experience, the participant funding process administered by the NEB is not working. The very limited funding we have received has been completely insufficient to support the activities we need to undertake in order to meaningfully participate in the NEB's reviews. Participating in NEB processes is very demanding for our community, including our staff, our members, elders, and knowledge holders, and not a process anyone is familiar with. It requires specific training, practice sessions, and coordination for many of our staff members. We take our participation in these processes very seriously, and given the effort and expense required for this participation, it is incredibly disheartening when we see our rights and interests not being fully considered.

Of particular concern is the expense imposed on our community to attend NEB hearings, which are not held in locations that are easily accessible for us. We believe that implementation of the recommendations we have cited earlier, such as including Aboriginal representative to the Board with familiarity of the region, would help to ensure that NEB hearings are more accessible for First Nations.

7. *What could be improved regarding public participation:*

   (i) *Prior to the hearing process;*

   (ii) *In NEB hearings (including the criteria outlined in section 55.2 of the NEB Act);*

   (iii) *In the development of emergency response manuals/plans;*

(iv) *Outside the hearing process, including opportunities related to:*

(A) *The project life cycle;*

(B) *Specific issues; and*

(C) *Development of regulations.*

As noted above, potentially impacted First Nations need to be involved in the design of the hearing process. It is important for the process to be designed in a way that facilitates First Nation participation and First Nations are in the best position to determine what process will work best. One size does not fit all.

Proponents also need to be required to sufficiently engage with First Nations prior to applying for an NEB review. In their applications, proponents need to report on that engagement, including identifying issues of concern and how those issues have, or have not, been addressed through proposed mitigation measures. The First Nations' perspectives on the issues need to be presented in the application, not just the proponents' take on them.

The panel should not be given the discretion to hold a hearing only in writing where a First Nation requests an oral hearing. Such an approach would effectively silence many First Nations, given their oral traditions. The panel should also not have the discretion to exclude any First Nations from participating in the process if the project is located within, or could impact, those First Nations' Territories. It is also important for the panel to have the ability to treat information received from a First Nation as confidential. This will help ensure that First Nations feel comfortable in sharing sensitive traditional use or TEK information in the hearing process.

In addition, as also noted above, First Nations need to have a strong voice in relation to whether there is sufficient information for a project to proceed to a hearing. Ideally, all decisions on the readiness of an application for hearing should be made collaboratively between the NEB and impacted First Nations, with disputes going to dispute resolution as required.

We have made suggestions throughout this submission on how to improve the hearing process to better address impacts to First Nations, decrease conflict and distrust in the process, and improve process outcomes. This includes joint NEB-First Nation hearing processes, and expressly including in the *NEB Act* a requirement that the panel must consider impacts to Aboriginal title and rights and Treaty rights as well as the alignment of project risks and benefits in making a determination on the "public interest". Application requirements also need to include an AIA that meaningfully analyzes potential project impacts on Aboriginal title and rights and Treaty rights.

Strict timelines for hearing processes also need to be removed from the *NEB Act*. For some projects, more than 18 months will be required to do all of the work that is necessary for the panel and First Nations to properly assess project impacts and reach reliable conclusions.

With respect to emergency response plans/manuals, First Nation participation is absolutely critical. The health and safety, as well as the lands, waters and resources, of First Nations are at risk when there is an oil or gas spill, or some other incident. With every project that is approved by the NEB,

the risks increase, yet no capacity funding is provided to First Nations to update and supplement their own emergency response plans or capacity (on reserve or otherwise). In most cases, there is also no requirement for the proponent to work with First Nations to develop emergency response plans or even to advise First Nations when an incident occurs. First Nations need to be fully involved as collaborative decision-makers on all aspects of emergency response planning, training and actual responses. Sufficient funding needs to be made available to First Nations to allow them to be full participants in relation to emergency response planning. First Nations should not be forced to take funds from other programs in order to respond to the risks imposed upon them by NEB project approvals.

8. *What additional opportunities could be provided for the public and Indigenous peoples to provide input over the course of the entire lifecycle of NEB regulated facilities (i.e., from application to abandonment)?*

First Nations need to be fully involved throughout the lifecycle of NEB regulated projects. We have provided suggestions earlier in this submission about having First Nations involved in post-approval monitoring and enforcement activities. Government should also be involving First Nations in the drafting of regulations under the *NEB Act*.

V. CONCLUDING REMARKS

We have attempted to spell out how Canada can implement Reconciliation and UNDRIP in the context of NEB processes. We look forward to participating in further opportunities for engagement on this important topic.

FEDERAL ENVIRONMENTAL ASSESSMENT PROCESSES

PACHEEDAHT FIRST NATION'S SUBMISSIONS TO ENVIRONMENTAL ASSESSMENT REVIEW PANEL

A. INTRODUCTION

Pacheedaht First Nation ("Pacheedaht") welcomes the opportunity to make these submissions to the federal Environmental Assessment Review Panel. Having been involved in various environmental assessment processes, including in relation to the Trans Mountain Pipeline Expansion Project, we have important insights and suggestions to share with the Panel.

B. THE PACHEEDAHT FIRST NATION - PEOPLE OF THE SEA FOAM

Our Territory is located on the southwest coast of Vancouver Island between Bonilla Point and Sheringham Point, near the communities of Jordan River and Port Renfrew. We hold unextinguished Aboriginal title and other Aboriginal rights in our Territory. We are in the process of negotiating a modern-day Treaty in the British Columbia Treaty Process in order to finally reconcile our title and rights with the Crown's assertion of title, and to obtain recognition of our right to govern our Territory.

Our name means "People of the Sea Foam", which is linked to our origin story at the head of Port San Juan on Vancouver Island. Our lands, waters, terrestrial and marine resources are essential to maintaining our culture, our way of life and our community. We rely heavily on the resources in our territory to feed our families, and to maintain our cultural connection.

Unfortunately, development has taken a huge toll on our lands, waters and resources, as well as our ability to exercise our Aboriginal rights. Our Territory has been heavily impacted by forestry, mining and hydro-electric projects. This development has taken place without our consent, and without due consideration for our title interests and other Aboriginal rights. We suffer the impacts of all of this development, yet reap very few benefits.

In recent years, we have made significant strides to restore the ecosystem in our Territory, to help it recover from the impacts of development. For example, we have been doing a significant amount of fisheries rehabilitation work in the rivers in our Territory. Unfortunately, with each new project that is approved in our Territory, the successes we have achieved in our rehabilitation work are compromised, and further degradation of the lands, waters and resources ensues.

We are hopeful that a robust environmental assessment process will result from the important work that the Panel is undertaking so that impacts from development in our Territory are properly assessed and addressed. It is critical that environmental assessments adequately assess and address impacts to the environment as well as Aboriginal rights, including title; mitigate or otherwise address those impacts; and achieve the goals of both sustainability and reconciliation. In our view, sustainability and reconciliation go hand-in-hand.

C. SUMMARY OF PROBLEMS IN CURRENT FEDERAL ENVIRONMENTAL ASSESSMENTS

In our experience, current federal environmental assessments do a poor job of adequately assessing environmental effects, particularly cumulative effects. They do an even poorer job of assessing impacts to our constitutionally-protected Aboriginal rights. Given the level and extent of development in our Territory, our ability to exercise our Aboriginal rights and to continue to live as Pacheedaht people are seriously threatened.

One of the serious problems in the current approach under *CEAA, 2012* is that so few projects being proposed in our Traditional Territory actually trigger a federal environmental assessment. Most development is taking place without any environmental assessment, or consideration for cumulative effects.

Even for projects that do trigger a federal environmental assessment, cumulative effects are not being properly considered or addressed. In our experience, the approach to cumulative effects in current environmental assessment processes is fundamentally flawed and is completely ineffective in addressing, let alone assessing, cumulative effects.

Under the current approach, environmental assessments focus primarily on residual impacts only from the project being reviewed which, on their own, may not appear to be significant. However,

when these residual effects are considered in the broader context of all the other development which is impacting the environment and our Aboriginal rights, they are often quite significant and require appropriate consideration and mitigation.

One of the current problems with cumulative effects assessment is inappropriate baselines. Rather than use a pre-industrial baseline, proponents often attempt to assess cumulative effects by comparing the situation at the time they filed their EA applications with the post-project situation. Such an approach ignores the already serious impacts of development in an area. Proponents are not doing a good job with cumulative effects assessments, and the Agency is not requiring the proponents to do a better job.

Another serious problem in current environmental assessments is the analysis of potential impacts to Aboriginal rights. There are also problems and confusion stemming from the lack of clarity in *CEAA, 2012* with respect to the need to consider project effects to Aboriginal and Treaty rights, and not just current uses. Government and proponents appear to be under a misapprehension that current uses are the equivalent of Aboriginal and Treaty rights. This is not the case. Our current uses of an area are just one element of our Aboriginal rights. We also have historical and cultural connections to areas. Our uses are also not static. We need to move around to different areas in our Territory as circumstances require - either because wildlife have moved from a particular area, hunting pressures have increased in an area, particular species no longer grow in the same areas, or we are pushed out of harvesting areas because of development.

It is also important that as the holders of Aboriginal title in our Territory, we have the right to determine how our lands and resources will be used, and to reap economic benefits from those uses. These legal incidents of our Aboriginal title interests are not reflected in current environmental assessment or other regulatory processes.

In addition, proponents often use biophysical indicators as proxies for Aboriginal rights. That is, if the proponent finds there were no significant effects expected to a certain species, such as elk, it automatically concludes that there would be no significant effects to the exercise of rights to hunt that species. This approach completely ignores that there are preferred locations for the exercise of our rights, cultural and spiritual connections to particular places, access requirements and

aesthetic considerations that affect where we harvest. As a result, even if a species population as a whole may not be significantly affected by a project, our rights may nonetheless be adversely affected if the project is located in an important harvesting area, takes away key habitat, blocks access to another area, or results in noise, smells or sights that create disincentives for our members to harvest in the area. The taking up of lands for project development is also fundamentally inconsistent with our Aboriginal title interests.

There is a critical need for criteria and thresholds to be identified for the assessment of impacts to Aboriginal rights. Currently, there is little guidance, which has resulted in a lack of meaningful assessment. In many environmental assessment processes, data about Aboriginal rights is merely collected and treated as a stand-alone repository of information. There is no incorporation or integration of that data into the overall assessment of project effects.

Another failing in current environmental assessment processes is that the proponent often assumes that we can "go elsewhere" to exercise our Aboriginal rights even if there is a finding that our ability to exercise our rights at the project site would be adversely affected. This assumption is made without any analysis of the number of "elsewheres" left in our Territory. Given the level of development in our Territory, there are fewer and fewer intact habitats left in which we can exercise our rights. However, because no proper cumulative effects assessment is ever required, each project is assessed in isolation and without any regard for the broader impacts of development to the environment or our rights.

In addition, there are often critical information gaps or unaddressed issues in proponents' applications. When we have identified these gaps, our concerns are not addressed and the proponent is permitted to file inadequate terms of reference or applications. These create conflicts later on in the environmental assessment process. In addition, by the time we are brought into the process, critical decisions have already been made in relation to the project location, types of studies to be undertaken, and timelines for filing materials. Early and more collaboration with First Nations throughout the environmental assessment process is needed to address these concerns.

D. A BETTER APPROACH TO ENVIRONMENTAL ASSESSMENT

For the purposes of this submission, we would like to highlight four areas which we think need to be addressed in new federal environmental assessment legislation:

1. Strategic, regional and cumulative effects assessments
2. Aboriginal rights impact assessments
3. Full participation of impacted First Nations
4. Independent Canadian Environmental Assessment Board

(1) Strategic, Regional and Cumulative Effects Assessments

A critical part of a robust environmental assessment process is an effective approach to cumulative effects. First Nations' relationships with the land and resources, and their ability to exercise their Aboriginal and Treaty rights, are at stake. Cumulative effects are not easily addressed in project-specific environmental assessments. As a result, dealing with these broader effects only in the context of a project-specific environmental assessment creates frustrations for First Nations and other participants, as well as proponents, and can lead to conflict and increased controversy in relation to a proposed project. For First Nations, these strategic, higher level issues are often the essential first questions that need to be addressed, but project-specific environmental assessments are not a good place to address them. The limits and constraints in relation to cumulative effects assessments is one of the biggest and most troubling flaws in the current environmental assessment process - the broader and very real threats to First Nations' rights, culture and way of life are not addressed in project-specific environmental assessments.

One of the best ways to address this flaw is to mandate strategic (sector-based - for example, for mining) or regional (geographically-based, for all sectors) environmental assessments, with full First Nation (and, ideally, provincial/territorial) participation. These types of broad scale environmental assessments are better suited to assess cumulative effects and to inform land-use planning as well as project-specific environmental assessment processes. These types of environmental assessments can take into account a more comprehensive set of sustainability considerations than project-specific environmental assessments. They could be used by the government to determine the

suitability of types of projects or broader impacts from projects, such as from increased marine traffic which is a serious concern in our Territory. These higher level types of environmental assessments are better suited to assess and address cumulative effects, as they can set the stage and parameters for a long-term understanding of environmental effects within a region or sector, consider broad alternatives for development, and identify protective measures to ensure sustainable development.

This approach would result in a "tiered" approach to environmental assessments that will result in better information, more stream-lined project-specific environmental assessments where strategic or regional environmental assessments have been conducted, better balancing of interests, fewer conflicts and ultimately more informed decision-making. For example, they could lead to the abandonment of a proposed project before considerable time, money and energy are spent on a project-specific environmental assessment, the relocation of a project which will result in a less controversial project-specific environmental assessment, or the identification of overarching issues that need to be addressed before a project can be considered for approval. The results of strategic or regional environmental assessments would inform project-specific environmental assessment processes, and would be very helpful in considering projects in which several First Nations have interests, such as recent pipeline proposals. With strategic or regional environmental assessment results available, project-level decision-making can be more efficient with the more contentious issues being worked out at the broader-scale level. It is also a useful mechanism to help achieve reconciliation - through those processes, First Nations' visions for their lands and resources can be fully considered and incorporated into recommendations and land use planning initiatives.

To the extent the federal government is concerned about potential jurisdictional issues around conducting strategic or regional environmental assessments, the new legislation could create incentives for provinces or territories to participate in, or undertake, strategic or regional environmental assessments. For example, statutory provisions could provide that where a strategic or regional environmental assessment has been conducted, and the proposed project is not inconsistent with the results of that strategic or regional environmental assessment, a more stream-lined federal environmental assessment process for that project could be undertaken. In cases where no strategic or regional environmental assessment has been conducted, the stream-lined process would not be utilized for projects in the absence of First Nation consent to the project.

In our view, cumulative effects assessment should still be required in project-specific environmental assessments, but where a strategic or regional environmental assessment has been undertaken, it could be more steam-lined at the project-specific level. For project-specific environmental assessments, clearer statutory requirements related to cumulative effects assessments methodology are needed. For example:

(a) pre-industrial baselines should be required in a cumulative effects assessment, with exceptions only being permitted where pre-industrial data, including from Traditional Ecological Knowledge ("TEK"), is unavailable or cannot be gathered;

(b) with respect to the assessment of cumulative effects on First Nations, "go elsewhere" assumptions should not be permitted; proponents cannot be permitted to assume that First Nations can go somewhere else to exercise their rights when they are displaced by a project, and must be legislatively required to gather information to inform an assessment of the true cumulative effect of development on First Nations and the availability and suitability of other places for the exercise of rights, considered from the Aboriginal perspective;

(c) the Aboriginal perspective, including TEK, must be given equal weight to the non-Aboriginal/western perspective in all aspects of environmental assessment, including cumulative effects assessments.

(2) Aboriginal Impact Assessment

Potential project impacts to Aboriginal and Treaty rights should be expressly included in the factors that are legislatively-mandated to be considered in the environmental assessment. As noted earlier in this submission, the current legislation does not expressly reference impacts to Aboriginal or Treaty rights as "environmental effects," which has created confusion in environmental assessments and lack of proper assessments of impacts to these constitutionally-protected rights in environmental assessments. This is a critical defect in the current approach to environmental assessments that must be addressed. Otherwise, parallel Crown consultation processes will need to address this significant gap, in order to fulfil the Crown's duty to consult. In consultation processes, the Crown cannot continue to rely blindly on ineffective environmental assessment processes that

do not expressly assess impacts to constitutionally-protected rights. A requirement for project effects to Aboriginal and Treaty rights to be analyzed would also encourage proponents to undertake early engagement with potentially affected First Nations.

It is also critical that the Aboriginal perspective be a required consideration in relation to all stages of an environmental assessment. TEK must also be required information to be collected and assessed, and given as much weight in assessing Project effects as western science. For example, there are specific provisions in the *Mackenzie Valley Resource and Management Act* that require TEK to be taken into account. TEK should also inform the type, design and scope of other environmental assessment-related studies.

There should be statutory provisions for environmental assessment applications to include a stand-alone section containing an Aboriginal Impact Assessment ("AIA"). Considering current uses for traditional purposes is not sufficient to adequately inform First Nations, proponents or governments of potential project effects. An AIA that assesses the environmental, health, cultural and heritage, and socio-economic impacts of a proposed project on First Nations is more comprehensive. An AIA can also assist proponents to propose measures, and make commitments, that will prevent, mitigate or compensate for potential adverse impacts and effects to Aboriginal or Treaty rights, where possible, thereby reducing conflict in environmental assessment processes.

The legislative provisions need to require that AIAs provide sufficient information to assess the extent to which the project could potentially affect a First Nation's ability to meaningfully exercise its rights now and in the future. As such, the regional study area needs to be the entire First Nation traditional territory.

In addition, there need to be statutory or regulatory requirements in relation to the methodology to be used in the AIA. Appropriate criteria and thresholds that take into account all aspects of Aboriginal and Treaty rights, including historical connections to areas, harvesting activities, access needs, aesthetic considerations and other indicators of "usability" of harvesting sites, future potential uses, constraints to the exercise of rights elsewhere, and cultural and spiritual elements of the rights.

The types of information to be studied in an AIA also needs to include: (a) quantitative information on impacted First Nations' Traditional Territories; (b) socio-economic information on impacted First Nations; (c) health information on First Nations; and (d) quantitative and qualitative information on current and historical traditional uses (hunting, fishing, plants and medicines, spiritual use) in the project area.

It goes without saying that First Nations need to be fully involved in the undertaking of an AIA, with sufficient capacity funding being provided to permit them to do so. The collection of information for an AIA should not be treated as less important from the collection of biophysical and other data that proponents are required to pay for and collect. The onus cannot be on First Nations to pay the costs associated with work that the proponent requires.

(3) Collaboration with Impacted First Nations

One of the fundamental principles underlying the federal environmental assessment regime needs to be reconciliation with First Nations. First Nations' rights and interests - including their right to have a voice in what transpires in their respective Traditional Territories - needs to be respected and reflected in environmental assessment processes. In addition, incentives need to be created for proponents to involve and engage with impacted First Nations early and meaningfully so that issues can be addressed whenever possible, and conflicts reduced. The consent of impacted First Nations needs to be a primary consideration in government's decision-making process on a project. Accordingly, mechanisms and incentives need to be included in the new environmental assessment process to increase the chances that consent will be granted.

To achieve a goal of reconciliation, potentially impacted First Nations need to be involved at each and every step of the environmental assessment process, including prior to the proponent filing an application. However, the fulfillment of Canada's constitutional duties needs to be de-linked from the environmental assessment process itself. If the environmental assessment process is undertaken in a collaborative manner with First Nations, the process can inform concurrent consultation processes and First Nation and Canada decisions. That consultation needs to be undertaken throughout the process, and not just at the end of the process when it is too late to

change information requirements for the environmental assessment process, explore mitigation measures or identify accommodation measures that require alterations to the project design.

The best way to ensure that projects do not become mired in regulatory and legal conflict is to create as collaborative a process as possible. First Nation participation needs to be legislatively mandated as part of the environmental assessment process, with First Nation collaboration or engagement happening at each stage.

First Nations must have a role at each step of the environmental assessment process, including:

- Need for an environmental assessment. Potentially affected First Nations should be involved in the decision on whether a federal environmental assessment on a proposed project is required. This would both ensure that projects potentially adversely impacting Aboriginal or Treaty rights are subject to an environmental assessment and would provide an incentive for proponents to consult with First Nations to identify and address concerns before they decide to proceed with their project. This would permit considerations such as whether a proposed project is located in an environmentally or culturally sensitive area, and whether environmental or cultural values are at stake, to be identified early and addressed where possible. Such an approach would also help ensure that the Aboriginal perspective and TEK are properly considered in determining whether an environmental assessment is required.

- Scope of the Project. The new Act should expressly require projects to be scoped to include all project components and corollary or related projects, in consultation with potentially affected First Nations. This will help ensure that the entire project's overall impacts to the environment and to Aboriginal and Treaty rights are taken into account.

- Type of Assessment. The previous approach in *CEAA* to have three types of environmental assessments should be adopted: screenings, comprehensive studies and review panels. The decision on the type of assessment should include potentially affected First Nations and be determined in light of the potential adverse

impacts to Aboriginal and Treaty rights. Where strategic or regional environmental assessments have been undertaken and the proposed project is consistent with those, and where potentially impacted First Nations consent to a project, a more streamlined environmental assessment process could be undertaken. This would provide an incentive both for strategic and regional assessments, and for proponents to work collaboratively with First Nations as early as possible in their project planning. Provisions should also be included in the Act to require coordination with First Nations who conduct their own environmental assessments (similar to s. 41(4) of the current Act, requiring coordination with assessments conducted under the *Mackenzie Valley Resource Management Act*). Further, the Act should include a provision allowing for the nomination of Joint Review Panel members by affected First Nations.

- Scope of Assessment. There need to be statutory provisions requiring collaboration with potentially affected First Nations on the spatial scoping for the environmental assessment. This will help ensure that proponents collect sufficient information in appropriate geographical areas for each valued component and that the assessment of all project effects is comprehensive. Otherwise, the environmental assessment can end up being restricted to an area arbitrarily chosen by a proponent, rather than the complete geographical area potentially affected by a project.

- Completeness of EIS Guidelines and EIS. Potentially-affected First Nations also need to have a voice in relation to the adequacy of the EIS Guidelines and the draft EIS. Guidelines and applications that do not include adequate information or address key issues result in review participants spending more resources re-reviewing materials that are filed later, longer reviews, pressures to meet government timelines and conflict.

- Recommendations on approval. First Nations' views on whether a project should be approved need to be seriously taken into account. If First Nations do not consent to a project, the federal government needs to be mandated to justify any approval,

based on specified considerations and criteria. Otherwise, litigation is likely to continue to arise.

- Dispute Resolution. Where disputes arise at any of these stages, there needs to be a dispute resolution process that must be undertaken so that *bona fide* attempts are made to resolve contentious process-related issues prior to the formal review of the EIS begins.

(4) Independent Canadian Environmental Assessment Board

There needs to be a single "expert" agency responsible for conducting environmental assessments in all sectors. Agencies like the National Energy Board ("NEB") should not be conducting environmental assessments as it does not have the requisite expertise to conduct environmental assessments. Having a single environmental assessment agency will help ensure that individuals with the requisite expertise and competence in relation to the types of issues and concerns arising in environmental assessments are presiding over environmental assessment processes, rather than individuals who may have a skill-set more attune to sector-specific agencies.

In order to restore confidence in the environmental assessment process, a "Canadian Environmental Assessment Board" needs to be established. It is critical that this new Board be truly independent - i.e., manifestly impartial and free of any executive branch influences over appointments of Board members (i.e., no patronage appointments). There should be an open and transparent process for appointing Board members. Legislation should also require panel independence, neutrality and objectivity. There can be no potential for "retaliation" from government for Board members' recommendations in environmental assessments so as to avoid political influence on those recommendations. Members cannot be concerned about whether they will be able to preside over future EA processes if they do not make the recommendation that government may be hoping to receive. There also need to be mechanism for First Nations to nominate individuals to sit on the Board.

To ensure the Board is truly independent, the criteria, rules and factors that must guide environmental assessments need to be legislated, including explicit trade-off rules and factors to

guide both Board recommendations and Cabinet decisions in the event the project will have residual adverse effects.

In addition, the Board needs to have the means to deal with conflicting expert opinions in a robust and transparent manner, including through referring the issue to an independent board, taking the issue to mediation or hiring its own experts, including cultural anthropologists or First Nation elders where appropriate to help understand the Aboriginal perspective.

E. CONCLUDING REMARKS

Federal environmental assessment processes are not working. Not only are they ineffective in assessing project effects to the environment, especially cumulative effects, they are not addressing impacts to Aboriginal rights. They are creating conflicts with First Nations, rather than advancing reconciliation.

There are effective means to address these problems in a new environmental assessment regime. By creating incentives for strategic and regional environmental assessments to be undertaken, explicitly requiring potential project effects to Aboriginal and Treaty rights to be analyzed and assessed, and creating a process that requires collaboration with potentially affected First Nations at every step, a new independent Canadian Environmental Assessment Board can do a better job of assessing project effects and advancing reconciliation, for the benefit of government, proponents and First Nations.