

**Taykwa Tagamou Nation Written Submission on the Review of
the National Energy Board's (NEB) Structure, Role and
Mandate under the *National Energy Board Act*
Submitted to the Expert Panel on National Energy Board
Modernization**

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Taykwa Tagamou Nation





1.0 Introduction

Taykwa Tagamou Nation (TTN) is a Mushkegowuk Cree community whose traditional territory and Treaty lands are in the Treaty 9 area of northern Ontario. More specifically, our lands are within the Moose River basin in the southern portion of the James Bay watershed. Pre-European contact, the Mushkegowuk Cree people lived off the land, hunting, trapping, gathering, and fishing for food and furs. The many rivers, streams, and lakes of what is now Northeastern Ontario provided canoe routes for travel and trade, and access to an abundance of fish. In particular, large rivers supported a rich diversity of food fish species including pickerel (also known as Walleye), lake sturgeon, lake whitefish, eastern brook trout, sea-going trout, and northern pike amongst others. Waterfowl were hunted in both the spring and the fall as the birds followed their annual north-south migration routes. The Cree traded amongst themselves and with other communities in Ontario and beyond. Our homelands have several archaeological sites and artifacts dating back 2,000 to 10,000 years indicating that our people were here from time immemorial and have exercised their Inherent rights over these lands long before treaties came into existence. As set out below, despite colonialization, we continue to practice traditional land-use and traditional livelihoods in our territory including hunting, fishing, trapping, and gathering.

As the lifecycle regulator for international and interprovincial transmission lines and pipelines, the National Energy Board and the *National Energy Board Act* must be modernized to be consistent with the UN Declaration on the Rights of Indigenous Peoples (UNDRIP):

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

2. TTN's Use of its Territory

Mushkegowuk Cree people, including former and living members of TTN, participated actively in the fur trade with Europe from the 1700s onward to the mid-20th century, and became associated with some of the important regional fur trading posts of this era including the Frederick House Post, Iroquois Falls Post, Island Falls Post, New Post, McInnis Post, Abitibi Post, Missinabe Rivers and others downstream and on other branches of the Moose and Abitibi Rivers including the Missinaibi River. During this time period we travelled extensively within our territory in the pursuit of furs, travelling up even the smallest tributary waters by canoe during the ice free season to hunt and trap.

In the period since signing Treaty 9 with the Crown in 1905, our lands and our way of life have been under attack in the name of "development" and "progress"- a process which has been aided and abetted by the Crown. Pipelines and transmission lines, mining and mine tailings effluent, forestry, hydroelectric and water control dams, untreated sewage from community sewer systems, effluent from



pulp and paper mills and lumber mills, chemical and hydrocarbon contamination from abandoned Cold War radar sites, and many other developments have impacted the viability of our lands to produce abundant, safe and healthy food and furs, and maintain the plant and animal populations that our traditional livelihood depends on and to which many of our inherent and Treaty rights are associated. The cumulative and legacy effects of this development and contamination continue to affect our First Nation members who hunt and fish for food in our homelands to a point the where Ministries have issued ban on eating fish.

Nevertheless, we continue to practice traditional land-use and traditional livelihoods in our territory- hunting, fishing, trapping, and gathering. The viability and health of fish populations and aquatic ecosystems in our traditional territory and land-use area is critical both to the health and well-being of our community members, but also to our traditional knowledge and our culture. Conservation was a way of live for our people, preserving and protecting the environment to ensure the survival of future generations. The Circle of life was observed to perpetuate lasting existence of all species of life that lived in the water, and animals dependant on water for life. It is also the belief and understanding of our Elders that was never surrendered and that we would share the with the Colonists. Further there Oral Promises that are omitted in the Treaty Documents such the evolution of Trade may include Resources.

We continue to take our stewardship responsibilities over our traditional territory and Treaty lands very seriously. We are currently participating in the MPMO consultation process and NEB process for the Energy East project. We participate in the Moose River Basin Custodial Body and the Detour Lake gold mine Regional Environmental Monitoring Board (REMB) with other First Nations. We have participated actively and in good faith in many major and minor environmental assessments (EAs) and related regulatory permitting processes for resource development and infrastructure within our territory and Treaty area which would include the TEK should be given the weight as western science, including federal EAs for:

- The Detour Lake gold mine
- The DeBeers Victor diamond mine
- The Lower Mattagami hydroelectric and New Post Hydro Projects
- The cleanup of a Mid-Canada Line radar site at Fraserdale
- Working Relationship Agreement with Ontario

We have also participated in forest management planning, harvest management planning processes for animals such as moose, and species-at-risk recovery planning for species such as sturgeon and Woodland Caribou. We have worked tirelessly to negotiate accommodation measures related to environmental protection in relation to hydroelectric, forestry, renewable energy, and mining projects. We have further negotiated related employment positions such as environmental monitors in association with these projects. We have developed a consultation and accommodation protocol to ensure all future project proponents in our territory understand their obligations with respect to engaging with TTN. NEB cannot look at the impacts on our Treaties and limiting narrowly but must take into consideration Business Opportunities including compensation which is unequivocal. We take these stewardship responsibilities for the health of our traditional territory very seriously, and expect the Crown and the NEB to do the same.



3.0 Comments on the National Energy Board Act and Related Requests

We have reviewed the *National Energy Board Act (1985)* (“the Act”) as well as the NEB’s structure, role and mandate, and have made a number of specific comments and requested changes that reflect our rights and interests.

More detailed comments and recommendations are found in Appendix A.

We have four main recommendations for the modernization of the NEB Act:

1. The NEB should retain the responsibility for lifecycle oversight and conducting the “public convenience and needs” assessment (the “needs assessment”), but the CEAA should be the responsible authority for assessing environmental impacts of a project.
2. The NEB mandate and the needs assessment process must reflect modern values including addressing climate change and reconciliation with Indigenous peoples.
3. The roles and responsibilities for the duty to consult in NEB and CEAA projects must be clarified. The CEAA as a Crown agency should be responsible for discharging the duty to consult.
4. The NEB Act, process and procedure in the oversight of the lifecycle of projects should engage and include input from First Nations to further reconciliation and the principles of UNDRIP.

Recommendation #1

The NEB should retain the responsibility for lifecycle oversight and conducting the “public convenience and needs” assessment (the “needs assessment”), but the CEAA should be the responsible authority for assessing environmental impacts of a project.

Currently, if a project requires a certificate of public convenience and necessity and appears on the *Canadian Environmental Assessment Act* designated project list, then the NEB assumes responsibility for conducting an environmental assessment of the project.

We recommend that the NEB retain responsibility for conducting the needs assessment and lifecycle oversight, but should no longer be the responsible authority for assessing environmental impacts of a project. The federal Canadian Environmental Assessment Agency (“CEAA”), renewed consistent with TTN’s recommendations [see http://eareview-examenee.ca/wp-content/uploads/uploaded_files/2016-12-20-ceaa-review-taykwa-tagamou-nation-written-submission-final.pdf] will have full responsibility for conducting environmental assessments (“EA”) of energy projects.

Having the CEAA responsible for all federal EAs will ensure that:

- a) Federal EAs are delivered in a consistent manner across project sectors, and
- b) First Nations rights-bearing communities are provided with consistent environmental assessment experiences and environmental assessment relationship-building with the Crown through a single agency (one-window).
- c) A single Crown agency (CEAA) develops long-term knowledge of First Nations community rights and interests, sustainability objectives, and territorial knowledge
- d) As a lifecycle regulator of federal energy projects, the NEB can develop effective long-term relationships with First Nations focusing on energy issues they face



Recommendation #2

The NEB mandate and the needs assessment process must reflect modern values including addressing climate change and reconciliation with Indigenous peoples.

The factors that the NEB must consider in needs assessments must be updated to reflect modern values and international obligations. The modernized NEB needs assessment should reflect the UNDRIP, the 94 “Calls to Action” of the Truth and Reconciliation Commission of Canada, and the Paris Agreement.

Currently, s 52(2) of the Act states that the NEB shall have regard to all considerations that appear to it to be directly related to the pipeline and to be relevant, and may have regard to the following:

- (a) the availability of oil, gas or any other commodity to the pipeline;
- (b) the existence of markets, actual or potential;
- (c) the economic feasibility of the pipeline;
- (d) the financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity to participate in the financing, engineering and construction of the pipeline; and
- (e) any public interest that in the Board’s opinion may be affected by the issuance of the certificate or the dismissal of the application.

As set out in more detail below, the NEB mandate and the needs assessment also must be conducted in light of:

- a) the Calls to Action for reconciliation, Nation to Nation collaboration, and the principles of UNDRIP and
- b) consideration of climate change.

Recommendation #3

The roles and responsibilities for the duty to consult in NEB and CEEA projects must be clarified. The CEEA as a Crown agency should be responsible for discharging the duty to consult.

The NEB modernization should clarify if, when, and how a project before the NEB triggers the duty to consult. *Chippewas of the Thames River First Nation v Enbridge Pipelines Inc., et al.* (36776) and *Hamlet of Clyde River Inc., et al. v Petroleum Geo-Services Inc., et al.* (36692), the most recent cases on the NEB and the duty to consult to reach the Supreme Court of Canada, demonstrate that the relationship between the NEB and the duty to consult is still unclear. The Supreme Court’s decisions in these cases will provide guidance. Our advice is provided subject to Supreme Court’s anticipated rulings.

With a renewed NEB Act, the duty to consult on energy projects must be clarified and made more transparent and reliable. We suggest that the duty to consult about energy projects is triggered by the Minister’s environmental assessment and that the duty to consult is owed by the Crown.

As an independent regulator, the NEB should consider whether proponents have conducted procedural aspects of consultation for the project. To implement UNDRIP and Canada’s Calls to Action for



reconciliation, the NEB must consider how a project affects Indigenous peoples and must actively engage Indigenous peoples in the needs assessment and the lifecycle oversight.

Recommendation #4

The NEB Act, process and procedure in the oversight of the lifecycle of projects should engage and include input from First Nations to further reconciliation and the principles of UNDRIP.

In order to implement UNDRIP, facilitate meaningful Indigenous community engagement, and support Canada's Calls to Action for reconciliation, we recommend that the new NEB Act, policy and procedure:

- ensure NEB Board membership and staff consists of Indigenous people with expertise in energy, renewable energy, energy conservation, climate change mitigation and adaptation.
- improve funding and other measures to improve Indigenous communities' capacity to have meaningful engagement in the life cycle regulatory process
- require project proponents, and existing project operators, to enter into lifecycle agreements with potentially impacted First Nations communities. This agreement would be similar to an Impact and Benefit Agreement and a project could not proceed without one. The agreement would cover all stages of the project lifecycle including planning/approval, construction, operation (including integrity digs) and decommissioning. The agreement would not stand in for, but be in addition to, NEB inclusion of First Nations in life-cycle regulation.
- enhance notification of TTN and other First Nations communities about compliance breaches and enforcement orders
- adequate funding for participation in EA and in NEB project life cycle regulation
- enhance the participation and input of First Nations in all life cycles of energy projects including monitoring, compliance, enforcement, emergency response, decommissioning
- consider alternative ways of sharing Traditional Ecological Knowledge beyond the current time-limited, adversarial process



Appendix A

Specific Comments on the Modernization of the National Energy Board and the *National Energy Board Act (1987)*



Table 1: The following recommendations are being made by Taykwa Tagamou Nation (TTN) in the interest of modernizing the National Energy Board to create an independent Crown regulatory body that is inclusive of First Nations voices and perspectives, and is equipped to address the unique challenges and opportunities associated with regulating energy infrastructure located in the Traditional Territories of TTN and other First Peoples of Canada.

Area of Concern	Comment/ Recommendations	Legislative Reference	Connection to First Nations Rights and Interests
Governance and Structure - NEB Mandate	<p>The NEB currently holds a mandate to “regulate pipelines, energy development, and trade in the Canadian public interest based on economic, environmental, and social considerations” (National Energy Board, 2014). As part of their mandate, the NEB is responsible for:</p> <ul style="list-style-type: none"> • Efficient processing of applications • Regulation of pipeline traffic, tolls and tariffs • Regulation of traffic, tolls, and tariffs • Export and import of energy • Energy studies and advisory function <p>Consistent with the commitment of Canada to implement UNDRIP, the NEB Mandate should also include the goals of reconciliation and Nation to Nation collaboration.</p> <p>Consistent with the commitment made by Canada in the Paris Agreement to reduce greenhouse gas emissions economy-wide by 30% below 2005 levels by the year 2030 along with the possibility of a shifting energy landscape, the NEB should:</p> <ul style="list-style-type: none"> • Make sure the contributions projects would make to climate change measured in Tonnes of CO₂ Equivalent (tCO₂E) are evaluated and factored into the decision-making criteria for environmental assessments <ul style="list-style-type: none"> ○ More specifically, modelling to indicate the projected GHG emissions associated with a project for its entire lifecycle from construction all the way 	General Comment – Paris Agreement, Canada’s Intended Nationally Determined Contribution (INDC) for COP21	Members of Taykwa Tagamou Nation continue to access and use lands and waters of our homeland for traditional purposes, including hunting, fishing, trapping, and gathering including maintaining strong socio-economic and cultural connections to the lands where energy projects are being planned and proposed. We therefore are being and will continue to be inequitably impacted by the negative effects of climate change. It is critical to us that the contributions energy projects are making to climate change be assessed and appropriate mitigation measures be identified and implemented.



Area of Concern	Comment/ Recommendations	Legislative Reference	Connection to First Nations Rights and Interests
	<p style="text-align: center;">up to decommissioning and post-closure monitoring.</p> <ul style="list-style-type: none"> • Along with evaluating the impacts the project would have on climate change as measured in tCO₂E, have assessments include GHG reduction and mitigation measures identified and incorporated into the conditions of approval for projects moving forward • As part of the energy studies and advisory function the NEB plays, the NEB should commence with conducting studies on the long-term outlook of renewable and low-carbon energy uptake in Canada including identifying the opportunities and barriers to renewable and low-carbon energy uptake within Canada and policies and programs that could facilitate a shift to de-carbonizing Canada's energy system 		
Governance and Structure - NEB Board Members and Staff	<p>Currently the NEB Board members are widely comprised of former corporate professionals from the oil and gas sector. The composition of NEB Board members has limited diversity in demographic components such as race, age, and gender. The NEB must diversify its Board membership and roster of staff, and in particular include Indigenous members and staff who also have experience and knowledge in areas of energy, renewable energy, energy efficiency, climate change mitigation and adaptation.</p>	<p>General Comment – Minister of Natural Resources Ministerial Mandate Letter from Prime Minister Trudeau; Sections 3-10 of the <i>National Energy Board Act</i> (the Act)</p>	<p>Members of Taykwa Tagamou Nation (TTN) continue to access and use lands and waters of our homeland for traditional purposes, including hunting, fishing, trapping, and gathering including maintaining strong socio-economic and cultural connections to the lands where energy projects are being planned and proposed. It is critical that the composition of the NEB Board and review panels memberships can adequately consider Aboriginal rights, interests - including but not limited to issues of jurisdiction, current use of lands and resources for traditional purpose, and First Nations land use</p>



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			planning happening within the project footprint.
Governance and Structure - Board Member Selection Process	<p>A selection process for Board members that ensures diversity and inclusivity for Board appointments, and a transparent and public selection process, is necessary to restore public trust and ensure the Board is serving in the interest of First Nations and the public interest. In practice this would involve the following steps in the Board selection process:</p> <ul style="list-style-type: none"> • Public participation, such as public hearings, on Board member selection. • Having Board selection processes carried out in a more transparent manner – such as having a parliamentary committee with First Nations participation to oversee the selection of Board members. • Have all of the above provisions reflected in legislation via changes to Section 3 of the <i>National Energy Board Act</i>. 	General Comment; Section 3 of the Act	Members of Taykwa Tagamou Nation continue to access and use lands and waters of our homeland for traditional purposes, including hunting, fishing, trapping, and gathering including maintaining strong socio-economic and cultural connections to the lands where energy projects are being planned and proposed. It is critical that the composition of the NEB Board and review panels memberships can adequately consider Aboriginal rights, interests - including but not limited to issues of jurisdiction, current use of lands and resources for traditional purpose, and First Nations land use planning happening within the project footprint.
Governance Structure – NEB Focus on Lifecycle Oversight	<p>The National Energy Board as a regulator is best suited to provide lifecycle oversight of projects in its domain, and the Canadian Environmental Assessment Agency (CEAA) is best suited for the administration of Environmental Assessments (EAs), including those currently under the NEB’s regulatory jurisdiction. Eliminating the substitution of federal EAs to the NEB and having CEAA administer all EAs that are currently under the NEB’s jurisdiction will ensure Federal EAs are delivered in a consistent manner across project sectors, First Nations rights-bearing communities are provided with consistent environmental assessment experiences and environmental assessment relationship-building with the Crown through a single agency (one-window)</p>	General Comment – applicable sections of the act include: Sec 9, 10, 11, 12, 14, 15, 17-24	Members of Taykwa Tagamou Nation continue to access and use lands and waters of our homeland for traditional purposes, including hunting, fishing, trapping, and gathering including maintaining strong socio-economic and cultural connections to the lands where energy projects are being planned and proposed. It is critical that the composition of the NEB Board and review panels memberships can adequately consider Aboriginal rights, interests - including but not limited to issues of jurisdiction, current



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	<p>It will also ensure that a single Crown agency and its staff are able to develop long-term knowledge of First Nations community rights and interests, sustainability objectives, and territorial knowledge.</p> <p>Finally, this will encourage the NEB to develop similar efficiencies and First Nations relationship benefits for its lifecycle oversight of energy projects. We therefore recommend the following:</p> <ul style="list-style-type: none"> • Move the responsibility for conducting the environmental assessment for NEB-regulated projects to the Canadian Environmental Assessment Agency (CEAA); including CEAA maintaining the Crown Consultation role for projects • Make the NEB responsible for lifecycle regulation, including ensuring conditions of approval are met. • Ensure the NEB has appropriate staff capacity and expertise to serve as the lifecycle regulator of federal energy projects, with the ability to develop effective long-term relationships with First Nations rights-bearing communities by building up the staff roster with individuals with diverse subject matter expertise that will ensure projects are safely regulated from pre-construction planning all the way to post-closure monitoring. This includes retaining staff or external experts with expertise in subject areas that reflect a broadened mandate. • Ensure these recommendations are included in legislation. Applicable sections of the NEB Act include sections 9, 10, 11, 12, 14, 15, and 17-24 		<p>use of lands and resources for traditional purpose, and First Nations land use planning happening within the project footprint.</p>
<p>Decision- Making Roles and Authority/ Indigenous</p>	<p>Better, deeper and more robust consultation with First Nations <u>before</u> a project approval decision is finalized, is a necessary improvement to the environmental approvals process of energy projects and applicable legislation and policy. More specifically the following is recommended:</p>	<p>General Comment</p>	<p>Canada has a fiduciary duty to consult and if necessary accommodate First Nations peoples if there is the potential to infringe Section 35 constitutional rights or Treaty Rights.</p>



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Engagement and Consultation	<ul style="list-style-type: none"> • Enhanced, deep and meaningful consultation processes regarding changes to NEB legislation and policy; more specifically conducting consultation including having representation in the groups of people tasked with developing policy and drafting legislative changes. • NEB considers proponent (and Crown if Crown is before it) engagement, makes decisions and applies energy policy that effects Indigenous people in a way to promote reconciliation • CEAA conducts early and deep First Nations engagement and consultation at the screening stage of ESAs and between the release of the Conditions of Approval report and the CEAA issuing of a decision on a project. 		
Decision-Making Roles and Authorities	<p>Due to changes that were instituted via CEAA 2012 and other environmental regulatory amendments that came out of the 2012 Federal Budget Bill, <i>Bill C-38</i>, authority regarding final approvals on projects formerly reviewed and evaluated by the National Energy Board rests with Governor in Council (i.e. Federal Cabinet). This means that regardless of the National Energy Board’s decision regarding a project it has reviewed, the Governor-in-Council (GIC); which is comprised of the sitting government have final say on whether a project proceeds.</p> <p>THE NEB as an independent regulator will make decisions based on the best interest of the public and First Nations as opposed to the mandate of Cabinet which can hold partisan influence in decision-making.</p> <p>We fully expect the Crown to make future decisions regarding the regulatory independence of the NEB. Those future decisions will have tremendous impacts on our rights and interests. We require</p>	CEAA 2012, Sections 30(1) & 30(6)	Due to the longstanding connection to the lands and waters – including a commitment to being stewards of the land, waters, and resources for future generations it is critical that the regulator who has the ultimate decision making power is a truly independent regulator, influenced by the mandate of a project being in the best interest of the public and First Nations Peoples as opposed to the mandate of Cabinet which can hold partisan influence in decision-making.



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	<p>deep and meaningful consultation on all future Crown decisions that will impact the independence of the NEB as a regulator.</p> <p>We must be satisfied that the NEB is not a “captured regulator” and that the members of the Board include First Nations representatives and members with diverse backgrounds from industry, environmental protection, community/ social development, and First Nations Knowledge. We must also be satisfied that Board members have a breadth of subject matter knowledge related to our rights and interests.</p> <p>Restoring the NEB’s independence from partisan influence <u>and</u> energy industry influence is important. Crown consultation on decisions related to the future regulatory independence of the NEB must include consultation on oversight and accountability approaches and procedures that can ensure projects are safe and in the best interest of First Nations peoples of Canada- socially, environmentally, and economically.</p> <p>Canada has a fiduciary Duty to Consult and if necessary accommodate First Nations peoples if there is the potential to infringe Section 35 constitutional rights or Treaty Rights. If the NEB is able to function as an independent regulator, the Duty to Consult rests with the Crown, and not the NEB as a regulatory body. As such, the GIC through the CEAA process may continue to represent the Crown and conduct Crown consultation processes, and where applicable, engage in efforts to accommodate First Nations rights and interests.</p>		
Legislative Tools for Lifecycle Regulation – Compliance,	Currently, as identified in the Fall 2015 Commissioner of the Environment and Sustainable Development Report 2 on <i>Oversight of Federally Regulated Pipelines</i> , the NEB’s tracking of company compliance with pipeline approval conditions is inadequate.	Pipeline Safety Act (an act to amend the National	Members of Taykwa Tagamou Nation continue to access and use lands and waters of our homeland for traditional purposes, including hunting, fishing,



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enforcement, and ongoing monitoring	<p>Although the Board has been taking steps to improve its track record and regulatory changes have occurred such as the <i>Pipeline Safety Act</i> coming into force in June 19, 2016 which enacts the polluter pays principle, clarifies the audit and inspection authority of the NEB, and may ensure companies maintain responsibility for their abandoned pipelines; there is more to be done to fully modernize the practices of the National Energy Board in regards to lifecycle regulation of energy infrastructure and First Nations rights and interests.</p> <p>In regards to compliance, enforcement, and ongoing monitoring, the NEB should strengthen mechanisms that ensure the Conditions of Approval on projects are met, compliance on these conditions is maintained, and First Nations communities are fully engage by the NEB as part of those strengthened mechanisms.</p>	Energy Board Act), section 48.11, 48.12	trapping, and gathering including maintaining strong socio-economic and cultural connections to the lands where energy projects are being planned and proposed. It is critical NEB laws and regulations that provide oversight to pipeline projects can adequately consider Aboriginal rights, interests, ensure projects are carried out and regulated safely and that proper accountability measures are in place to ensure proponents are meeting their commitments and the regulatory requirements of the projects they own and operate.
Legislative Tools for Lifecycle Regulation – Compliance, enforcement, and ongoing monitoring	<p>In regards to compliance, enforcement, and ongoing monitoring the NEB should require project proponents, and existing project operators, to enter into lifecycle agreements with potentially impacted First Nations communities. This agreement would be similar to an Impact and Benefit Agreement and a project could not proceed without one. The agreement would cover all stages of the project lifecycle including planning/approval, construction, operation (including integrity digs) and decommissioning. This will help to implement the principles of UNDRIP. These agreements should include, but not be limited to, the following items:</p> <ul style="list-style-type: none"> • Participation in cultural heritage and archaeological assessments • Participation in environmental monitoring • Participation in facility monitoring (e.g. pipeline or transmission line monitoring) 		



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	<ul style="list-style-type: none"> • Identification and protection of species considered to be at risk by First Nations communities • Environmental, cultural heritage and socio-economic mitigation and follow-on programs • Economic benefits – procurement, supply chain, other • Linear corridor restoration and maintenance with native species, and with attention to pollinator habitat that benefits First Nations foods (e.g. wild blueberries) • Reviews project infrastructure enhancements and improvements that may be available to improve and provide capacity for regional infrastructure and services (e.g. oil pipeline pump stations require transmission reinforcement and/or additional regional power generation that can benefit rural/remote communities and regions; emergency management resources that can be deployed for emergencies beyond the regulated infrastructure) • Spill response capacity and resources, including training, equipment and service contracts • Emergency response capacity and resources, including training, equipment and service contracts • Regulatory compliance monitoring <p>The lifecycle agreements should NOT replace the need for Crown consultation through the CEAA process and should not become a bright line for determining whether adequate consultation occurred.</p>		
Legislative Tools for Lifecycle Regulation – Compliance,	In regards to compliance, enforcement, and ongoing monitoring the NEB should enhance notification of TTN and other First Nations communities about compliance breaches and enforcement orders via the following mechanisms:		



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enforcement, and ongoing monitoring	<ul style="list-style-type: none"> • Release compliance reports on a regular basis (annual, quarterly etc.) • Direct notification of enforcement orders and follow-up action taken by the proponent to the intervenors to the related project NEB approvals processes • During instances of enforcement orders being issued and follow-up actions being undertaken by a given proponent, provide direct notification to First Nations groups whose Traditional Territories or are intersected by the project. 		
Legislative Tools for Lifecycle Regulation – Operations and Maintenance Programs	<p>Currently, as has been identified in the Fall 2015 Commissioner of the Environment and Sustainable Development Report 2 on <i>Oversight of Federally Regulated Pipelines</i> the NEB’s tracking of company compliance with pipeline approval conditions is inadequate.</p> <p>Although the Board has been taking steps to improve its track record and regulatory changes have occurred such as the <i>Pipeline Safety Act</i> coming into force in June 19, 2016 which enacts the polluter pays principle, clarifies the audit and inspection authority of the NEB, and ensures companies maintain responsibility for their abandoned pipelines; there is more to be done to fully modernize the practices of the National Energy Board in regards to lifecycle regulation of energy infrastructure.</p> <p>In regards to compliance, enforcement, and ongoing monitoring the NEB should:</p> <ul style="list-style-type: none"> • As recommended above, require operators to have lifecycle agreements with TTN and other impacted First Nations communities whose Traditional Territories the project intersects, to ensure their direct involvement and 		



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	<p>advance notification when activities are planned pertaining to the company’s operations and maintenance activities. Such direct involvement and notification should include but not be limited to involvement and participation in integrity management programs, facilities maintenance procedures, and any activities that fall outside of the usual day-to-day operations of the facility. This includes providing sufficient advanced notice for the impacted First Nations groups have the ability and capacity to raise any issues or considerations ((e.g. cultural heritage/archaeology, access to harvesting, hunting and fishing areas, environmental issues), so appropriate engagement and accommodation measures can be put in place. Agreements should include provisions and reasonable funding for environmental and archaeological technical expertise on par with the technical expertise available to the proponent and the Board.</p> <ul style="list-style-type: none"> • Ensure proper measures are taken regarding the protection of the natural environment and cultural heritage resources within or upstream of the Traditional Territories of TTN and other indigenous communities, during any operations and maintenance activities. This should include but not be limited to integrity management programs, facilities maintenance procedures, and any operations that fall outside of the usual day-to-day operations of the facility. • Require facility operators to engage First Nations communities in planning, implementing and monitoring all operations and maintenance activities in their traditional territories, including but not limited integrity management 		



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	<p>programs, facilities maintenance procedures, and environmental protection plans.</p> <p>In regards to emergency management and response programs the NEB should:</p> <ul style="list-style-type: none"> • Ensure mandatory notification of First Nations of any accidental spill, release, or malfunction including the response protocol planned and follow-up compliance monitoring regarding spill/ release abatement • Ensure facilities directly involve impacted First Nations groups in the development and/ or oversight of emergency management and response programs • Enhance participation and engagement with impacted First Nations communities through involvement in monitoring programs including but not limited to environmental monitoring, archaeological monitoring, spill and emergency response monitoring, compliance monitoring, and post-closure monitoring <p>In regards to decommissioning and post-closure programs the NEB should:</p> <ul style="list-style-type: none"> • Ensure strong enforcement of measures outlined in the <i>Pipeline Safety Act</i> regarding companies maintaining responsibility for their abandoned pipelines and other abandoned facilities • Engage and seek input from First Nations in the development and/ or oversight of abandoned pipelines - 		



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	<p>including but not limited to environmental monitoring and regular facility inspections</p> <ul style="list-style-type: none"> Enhance First Nations notification and participation in oversight of decommissioning and post-closure monitoring plans via commenting opportunities, implementation of advanced notification systems when a project is nearing the end of its production lifecycle, and engagement in post-closure monitoring opportunities 		
Screening and Scoping Criteria	<p>With respect to screening, scoping, and baseline evaluation criteria the CEAA in the context of the EA, the NEB in the context of a lifecycle regulator, should:</p> <ul style="list-style-type: none"> Develop project screening and scoping criteria that consider the full extent of the project – including but not limited to the electricity requirements of the project, the land requirements of the project, where the project connects to or becomes part of existing or other planned energy infrastructure (i.e. connecting pipeline segments), and any operations and maintenance (e.g. integrity digs) required for existing infrastructure to be redeployed for a new project use (e.g. the integrity digs required to repurpose the TransCanada Mainline natural gas pipeline to bring the pipeline to maximum operating pressure to transport oil) – these types of activities are called “operations and maintenance” and conducted under previous project approvals, but are used by proponents to keep key and relevant construction impacts out of future project approvals and environmental assessments. This is not an appropriate or accepted environmental assessment practice. In particular, this approach must be denied by the NEB and the CEAA when it is clear that a coordinated 	General Comment	



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	<p>set of Operations and Maintenance activities are occurring in a manner that enables an unapproved major pipeline project proposal.</p> <ul style="list-style-type: none"> • Eliminate the 40 km pipeline length for triggering environmental assessments and replace with a consultative project screening and scoping approach that examines the real impacts of a proposed project and assumes that an environmental assessment will be triggered, unless it can be proven that impacts will be negligible and that First Nations communities consent to any project going forward without an environmental assessment. This will eliminate project proponents “gaming” the regulatory system by piecemealing project pipeline lengths into segments under 40 km to avoid environmental assessment requirements • Provide a consultation and accommodation process during the project scoping stage so that First Nations communities can review and comment on a draft of the project scope to ensure that all aspects of the project important to First Nations communities can be reasonable included in the scope of the project to be assessed by the CEAA 		
Needs Assessment	<p>In the needs assessment, the NEB must consider public interest. Public interest should include how a proposed project could contribute to climate change by assessing the projected greenhouse gas emissions associated with the project throughout its lifecycle.</p>	General comment	



Area of Concern	Comment/ Recommendations	Legislative Reference	Connection to First Nations Rights and Interests
	Public interest should also include adequate consideration of the contribution of the project to the reconciliation objectives of Canada and Canadians.		
Indigenous Consultation and Engagement	The NEB and Canada must ensure meaningful and sufficient indigenous consultation, input, and participation throughout the entirety of the review process and the subsequent project lifecycle. Doing so is crucial to achieving Nation-to-Nation relations with First Nations Peoples that the Government of Canada has consistently expressed it would like to improve and strengthen.	General comment	
Indigenous Consultation and Engagement	The CEAA in the context of EA and the NEB in the context of a lifecycle regulator, must follow established principles and best practices regarding the principles articulated in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) including mechanisms that demonstrate a commitment to Free, Prior, and Informed Consent (FPIC)	General comment – UNDRIP	
Indigenous Consultation and Engagement	The Crown should directly engage with First Nations People regarding the development of Consultation Plans for projects before the project description has been filed; in pre-project planning stages. The NEB should be aware of these plans when considering Proponent and Crown engagement with First Nations.	General comment	
Indigenous Consultation and Engagement	<p>The CEAA must require the integration of First Nations’ traditional knowledge, and traditional land use and occupancy information into energy project ESA filing requirements for proponents and its decision-making where First Nations are willing to share this information.</p> <p>It must also ensure integration of other key First Nations planning documents for their traditional lands or communities, including but not limited to Land Use Plans, Environmental Management Plans,</p>		



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	Consultation and Accommodation Protocols, Community Social and Economic Development Plans, and Asset Management Plans amongst others.		
Indigenous Consultation and Engagement/ Public Participation	Currently, the NEB's Participant Funding Program provides a limited amount of funds to First Nations. According to the Participant Funding discussion paper, a maximum of \$80,000 is awarded to groups per hearing however it has been our experience that in projects where funding is in high demand, participants received half that amount (i.e. \$40,000 was the maximum funded per group for the Energy East hearing process). The funding program in its current form does not necessarily reflect nor meet the needs of First Nations to be adequately resourced to participate in decision-making processes that can have major implications on Indigenous land and resource use and overall way-of-life.	General Comment-participant funding program	Members of Taykwa Tagamou Nation continue to access and use lands and waters of our homeland for traditional purposes, including hunting, fishing, trapping, and gathering including maintaining strong socio-economic and cultural connections to the lands where energy projects are being planned and proposed. It is essential for our community to have adequate resources to properly inform our citizens and fully participate in hearing processes
Lifecycle Regulation of the project- Compliance, enforcement and ongoing monitoring	<p>Presently the following components are required as part of a management system for a project:</p> <ul style="list-style-type: none"> • Emergency Management Program • Integrity Management Program • Safety Management Program • Security Management Program • Environmental Protection Program <p>In their current form these management programs have limited requirements to notify affected First Nations of any incidents or activities that will be undertaken.</p> <p>The NEB should ensure that the requirements of these programs be amended to require notification of First Nations about:</p> <ul style="list-style-type: none"> • Opportunities to participate as monitors in these programs, including conditions pertaining to adequate training, contracting, and procurement opportunities 	NEB filing manual – 3.3 Management Systems and Programs under OPR – changes to the Filing Manual	



Area of Concern	Comment/ Recommendations	Legislative Reference	Connection to First Nations Rights and Interests
	<ul style="list-style-type: none"> • Adequate whistleblower protections and accountability mechanisms for reporting instances of non-compliance • Adequate integration of First Nations traditional knowledge, land use, and occupancy based on guidance provided by those First Nations that have the project located within their Traditional Territory • Adequate follow-up conducted by the NEB to ensure the conditions mandated pertaining a company's management system are upheld 		



Area of Concern	Comment/ Recommendations	Legislative Reference	Connection to First Nations Rights and Interests
<p>Indigenous Engagement</p>	<p>In the proposed changes being set forth in the NEB filing guide, the following is said regarding the inclusion of Indigenous Knowledge:</p> <p><i>“Local and Traditional Knowledge</i> Consider augmenting the application with local and traditional knowledge and integrating the information and knowledge, where appropriate, into the design of the project. Where local and traditional knowledge is obtained, provide an opportunity for the individual who provided the information to confirm the interpretation of the information and how it was used in the project design.”</p> <p>Merely “considering” the integration of First Nations’ Traditional Knowledge is not an adequate means to appropriately evaluating the effect a project will have on First Nations rights and interests and ensure the Duty to Consult is upheld.</p> <p>The NEB should replace the word “consider” with the phrase “The application MUST include or demonstrate reasonable effort to include local and traditional knowledge.”</p> <p>Furthermore, traditional knowledge is collective knowledge and the verification of appropriate interpretation should be conducted at the community level while including the individual in such verification.</p>	<p>Changes to the NEB filing manual – Emergency Management, notification of First Nations groups</p>	
<p>Lifecycle Regulation of Projects – Operations and Maintenance</p>	<p>Presently there is limited guidance provided on vegetation management in transmission line and pipeline right-of-ways (ROWs). There is still frequent use of pesticides to manage vegetation despite its environmental and biodiversity impacts. There are also limited allowances for and encouragement of</p>	<p>Operations and Maintenance Activities on Pipelines</p>	



Area of Concern	Comment/ Recommendations	Legislative Reference	Connection to First Nations Rights and Interests
	<p>alternative prescriptions and maintenance practices that maintain wildlife habitat, biodiversity, and water quality protection values. Therefore, we recommend that:</p> <ul style="list-style-type: none"> • The NEB retain experts to develop Operations and Maintenance guidance and best practices that address these issues. • Operations and Maintenance guidance policies and/ or manuals be updated to mandate the elimination of pesticide use where possible and application of an Integrated Pest Management (IPM) approach in other circumstances, with an emphasis on protecting water quality and maintaining biodiversity. • Operations and Maintenance guidance policies and/ or manuals be updated to mandate that project ROWs provide habitat value for wildlife in the project area • Operations and Maintenance guidance policies and/ or manuals be updated to mandate that project ROWs implement the planting of pollinator friendly species and native plant species as a method vegetation management that supports a thriving ecosystem within a project’s footprint. • The NEB can play an important role in supporting and enhancing pollinator habitat along linear corridors. Many of the plants important to First Nations across Canada require healthy pollinator populations – like blueberries for example – but those pollinator populations are threatened and in decline. The NEB should develop pollinator planting requirements for linear corridors in consultation with First Nations. 	<p>under the National Energy Board Act – Requirements and Guidance Notes File-OF-Fac-NOMA 01 01</p>	
<p>Governance Structure and Mandate</p>	<p>In August 2012 the NEB repealed order XG/XO-100-2005 and replaced it with XG/XO-100-2012 including the implementation of a Schedule A flowchart to determine the criteria that would enable</p>	<p>Section 58 exclusions & NEB Order</p>	



Area of Concern	Comment/ Recommendations	Legislative Reference	Connection to First Nations Rights and Interests
	<p>a project to qualify for a Section 58 exception under the NEB Act. Step 2 of the Schedule A flow chart provides the following rules/ criteria that if the answer is no the exception does not apply:</p> <ul style="list-style-type: none"> • 2.1 Directly affected persons or those persons with relevant information or expertise (e.g., might include Aboriginal groups; directly affected landowners; shippers; federal, provincial, municipal agencies) have been consulted on the project and all issues and concerns have been resolved. • 2.2 The project will be located entirely on the existing right-of-way or other property on which the facility is located, including company-owned land, easement, leased or licensed land. • 2.3 The project will not be located on federal lands. • 2.4 The project will not be located within a provincially- or federally-designated environmentally sensitive area. • 2.5 The project will not be located in a wildlife area or migratory bird sanctuary (see the <i>Canadian Environmental Assessment Act, 2012 Regulations Designating Physical Activities</i> for definitions). • 2.6 The project will not impact a water body or wetland. • 2.7 The project will not impact Schedule 1 <i>Species at Risk Act</i> species (plant and/or wildlife) or habitat. • 2.8 The project will not involve an increase in airborne emissions or noise during operations. • 2.9 The project will not involve chemical or contaminant liquid or solid discharges during operations. <p>However, no evaluation criteria have been provided to ensure the above requirements have been met. Therefore, it is recommended that the Board develop, implement, and publicly share its assessment criteria. In the case of item 2.1 the development of</p>	<p>XG/XO-100-2012</p>	



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	evaluation criteria must involve participation and feedback from First Nations as they are directly impacted by the outcomes developed.		
General Comment – Access to Information	<p>Currently project information from NEB-regulated projects is available through an on-line repository called REGDOCS. This on-line system is meant to be a tool to keep proponents, the Board, members of the Canadian public, and First Nations Peoples informed on projects being reviewed and/ or regulated by the NEB. However, this system in its current form is not user-friendly, is very difficult to navigate, and creates a significant barrier for people to remain informed. We acknowledge that the system does hold a high volume of data however there are a number of improvements that if implemented would enable REGDOCS to better serve all interested parties.</p> <p>Specifically, it is recommended that:</p> <ul style="list-style-type: none"> • All project applications follow a consistent filing structure on the REGDOS registry • A simplified file naming convention is created to promote clarity, plain language, and user-friendliness • A function is created in the registry that allows letters of comment for facilities in operation to be filed • Drastically improving the search function within the registry to ensure information can be found quickly and efficiently by laypeople. 	General Comment	