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March 31st, 2017

Attention: National Energy Board Modernization, Expert Panel
Natural Resource Canada's NEB Modernization Secretariat
580 Booth Street, 17th Floor
Ottawa, Ontario K1A 0E4
Canada
Sent via electronic form on: [<http://www.neb-modernization.ca>]

Dear NEB Modernization Expert Panel Members:

RE: YA'THI NÉNÉ WRITTEN SUBMISSION TO THE NATIONAL ENERGY BOARD MODERNIZATION EXPERT PANEL

Please accept this written submission from the Ya'thi Néné Lands & Resource Office on the topic of the modernization of the National Energy Board. The Ya'thi Néné Lands and Resource Office is the main point of contact between the Athabasca Denesuline First Nation communities, government and industry. This written submission is put forward on behalf of the Athabasca Denesuline First Nations of Hatchet Lake, Black Lake, and Fond du Lac.

The Ya'thi Néné Lands & Resource Office will be happy to further discuss the contents provided in this written submission to the Panel with reference to the National Energy Board throughout 2017. Please contact Diane McDonald, Executive Director, Ya'thi Néné Lands & Resource Office at (306) 686-2550 or (306) 686-7647 if you have any questions or require clarification regarding this written submission.

Sincerely,

ORIGINAL SIGNED

Diane McDonald

Executive Director, Ya'thi Néné Lands & Resource Office

CC: Chief Rudy Adam of Fond du Lac Denesuline
CC: Chief Coreen Sayazie of Black Lake Denesuline First Nation
CC: Chief Bart Tsannie of Hatchet Lake Denesuline First Nation

Table of Contents

Introduction	2
Comments on the NEB Modernization Process Itself	3
Aboriginal and Treaty Rights	3
Athabasca Basin Communities Must be involved in NEB Mandates Decisions	4
Consultation	5
Shared Decision-Making	5
Protecting Land in our Territory for Traditional Use	6
Required Changes to the NEB Filing Manual.....	6
Integration of Traditional Knowledge and Community Processes.....	7
Consideration and Assessment of Cumulative Effects.....	7
First Nation Baseline Studies and Monitoring.....	8
Conclusion	8
References	10
Summary of Recommendations	11

Introduction

This written submission has been prepared for the National Energy Board Modernization Expert Panel (Expert Panel) by the Ya'thi Néné Land and Resource Office on behalf of the Athabasca Denesuline First Nation communities of Black Lake Denesuline First Nation, Fond du Lac Denesuline First Nation, and Hatchet Lake Denesuline First Nation.

The Ya'thi Néné Lands and Resource Office works to promote and enhance the environmental, social, cultural and economic health and well-being of the Athabasca Basin Communities (Black Lake First Nation, Fond du Lac First Nation, Hatchet Lake First Nation, Stony Rapids, Wollaston Lake, Uranium City and Camsell Portage) and their residents. Ya'thi Néné Lands and Resource Office is the first point of contact between industry, government and the local residents of the Athabasca Region.

Although the Denesuline communities of the Athabasca have limited experience with the National Energy Board (NEB) process, they have extensive experience working on energy-related projects assessed under the Canadian Environmental Assessment Agency (CEAA) and the Canadian Nuclear Safety Commission (CNSC). Through these projects, the limitations within current federal environmental assessment processes in protecting Aboriginal Treaty rights and interests, and the environment overall, that apply equally to the NEB process which is also meant to adhere to the *Canadian Environmental Assessment Act*.

In this submission, the Ya'thi Néné Land and Resource Office focuses on the following community-identified issues, and provides recommendations to the Expert Panel that we believe are the best means to remedy the current gaps in the NEB process and incorporate modern safeguards in the interests of our communities. We also request the Expert Panel consider Ms. Diane McDonald's presentation and comments on our behalf at the Edmonton Expert Panel hearing of March 8, 2017 alongside these written comments; any recommendations made therein apply equally to the written ones provided herein.

Comments on the NEB Modernization Review Process Itself

Within environmental assessment processes, consultation should aim to allow for maximum participation, with opportunities for First Nations to be involved in as many steps as possible. Logically, and in keeping with the federal government's commitment to developing Nation-to-Nation relationships with indigenous groups, the same requirement should be in place for processes like the ongoing NEB Modernization process.

In keeping with this principle, we respectfully request that we be provided with a response to the concerns raised in this document. Due to the high level of involvement our people have in energy-related projects, we take the position that collaboration and consent from affected First Nations should be sought before policy or the Crown makes legislative changes. Therefore, we expect to have greater involvement in the next steps for changes within the National Energy Board. In addition, we also recommend:

- 1. A regular periodic review with full provisions for extensive Aboriginal involvement be established within the NEB's guiding legislation.**

Aboriginal and Treaty Rights

A healthy and well-functioning environment is fundamental to our way of life, and the protection of our lands during development is a core part of our treaty rights. We, the Athabasca Denesuline, possess Aboriginal and Treaty rights (including Aboriginal Title) throughout our traditional territories that we have used and occupied as our homeland since time immemorial. We entered into a Treaty relationship with Canada in which the Crown promised that our way of life would be protected. That promise has not been honoured.

The current NEB environmental assessment process has serious gaps in adherence to international law adopted by Canada, and expectations of Crown consultation with affected Aboriginal groups. Federal legislation, such as the *National Energy Board Act*, that includes the decision-making process of natural resources currently does not endorse the United Nations Declaration on the Rights on Indigenous Peoples (UNDRIP) and its associated Free, Prior and Informed Consent (FPIC) requirements. Specifically, UNDRIP requires the FPIC of Indigenous peoples in regards to:

- Relocation (Article 10);
- Law and tradition violations (Article 11);
- Acquisition of Indigenous cultural, intellectual, religious and spiritual property (Article 11);
- Implementation of legislative measures (Article 19); and
- The Storage of hazardous materials on traditional territories (Article 29). (United Nations 2008)

As outlined in s. 35 of the *Constitution Act* and the United Nations Declaration, the inherent and substantive rights of Indigenous peoples needs to be explicitly recognized within a renewed NEB environmental assessment process. This means updating the parent legislation, both the *National Energy Board Act* and the *Canadian Environmental Assessment Act*, to require that all actions conducted

by the Board during the environmental assessments will adhere to the requirements of UNDRIP and acknowledge Aboriginal and Treaty rights.

- 2. We recommend that NEB formally adopts the principles of the United Nations Declaration on the Rights of Indigenous Peoples into its mandate;**
- 3. We recommend that NEB only approve projects that affect and impact Indigenous communities where they were given Free, Prior, and Informed Consent in a way that respects the procedures and protocols that are unique to that Nation.**

We take issue with the current flawed and narrowly defined definition of “public interest” within NEB’s current mandate. This definition will require revision in order to afford higher weighting to Constitutionally prioritized rights of Canadian Indigenous peoples within assessments, recommendations and decision-making processes.

- 4. We recommend that NEB work with Aboriginal groups to redefine “public interest” within the legislation to be inclusive of Indigenous perspectives, spiritual, and philosophical frameworks; this revision should include both the broad public interest, as well as, the duty to consult and accommodate Indigenous communities.**

On previous energy projects, we have found that Proponents and board members are often unaware of our Aboriginal and Treaty rights.

- 5. We recommend that the NEB incorporate a training component to ensure that Proponents, NEB board members, and NEB staff better understand our Aboriginal rights and title;**
- 6. We recommend that the current “List of Issues” prepared by the NEB for a Hearing Order, which recognized the need to assess Aboriginal and Treaty rights but provide little guidance on this can be accomplished, be replaced by Project-specific Terms of Reference and guidance developed in consultation with Canadian indigenous groups on how rights and title impact assessments need to be conducted.**

Athabasca Basin Communities Must be Involved in NEB Mandated Decisions

Previous Ya’thi Néné Lands and Resource Office community engagement workshops have highlighted the importance of community stewardship and community members want to see greater engagement of land-users. In order to foster a Nation-to-Nation relationship, as promised by the federal government, communication must be improved with our leadership and, more importantly, at the community level.

Our community members expect the NEB and other related federal legislation to be amended to foster better consultation with First Nations, promote shared decision-making, and to achieve real and meaningful co-management over the development of energy resources.

- 7. In the event that an NEB mandated process occur, community members expect more workshops, meetings, and materials made available through multiple, accessible media outlets.**

Consultation

Consultation with Indigenous peoples is necessary to address project uncertainty and to proactively prepare for the future. The *Haida Nation vs. British Columbia, 2004* case clearly articulates the duty of the Crown to consult with Indigenous communities for developments on their traditional territories. Meaningful consultation with Aboriginal parties must be included prior to, during, and after NEB environmental assessments. This will require a more dedicated effort by the Crown to enable a better equipped and staffed Crown Consultation team to offset NEB's limited consultation mandate; this effort will help minimize the views of Indigenous peoples being represented through an industry lens.

Developing and implementing steps required for the Federal government, as part of consultation practice, would be beneficial within the NEB process to ensure that meaningful consultation occurs void of pressure from Project economic activities.

- 8. We recommend that the federal government develop in deep consultation with indigenous groups, indigenous engagement guidelines for Proponents in the NEB environmental assessment process, which clearly articulate expectations, roles and overall process and to ensure culturally appropriate and respectful consultation, and that a Crown Consultation Unit be developed to work alongside the NEB environmental assessment process, to arbitrate on the effectiveness/adequacy of this engagement (not the NEB).**

Transparency in NEB and Ministerial decision-making is also vital to effective consultation and the building of Nation-to-Nation relationships. Lack of transparency questions whether adequate actions have been taken to address Aboriginal interests and rights.

- 9. We recommend that the NEB be required to provide more detail for estimations of significance/insignificance, including use of defensible thresholds for all VCs, in its Report of Environmental Assessment or Environmental Screening Report;**
- 10. We recommend that the Ministers be required to provide detailed and publicly distributed reasons for decision for decisions made on NEB recommendations.**

Shared Decision-Making

Canada has long disregarded Aboriginal participation in decision-making in energy projects and often decision-making powers are not shared with Aboriginal groups. In particular, Aboriginal communities are rarely involved in the scoping, characterization, or assessment of residual effects of a project.

This needs to change. Our communities want assurances that decisions affecting our lands are based upon the best information and take into account our knowledge and perspectives. This requires community knowledge and traditional knowledge (TK) as well as the most up-to-date science.

Decisions need to include our decision makers, and incorporate input from our traditional users. Our communities need to be engaged well in advance of a decision, much earlier than occurs at present.

Ideally, affected Aboriginal communities would co-develop and agree on the level of review and engagement, and in every instance must be adequately resourced to engage and/or participate in the decision-making process.

Capacity is an ongoing concern and a real barrier for meaningful Aboriginal community participation in the federal environmental assessment. The NEB modernization should require proponents to provide resources for community-based projects and studies, as well as, the federal government providing funds for environmental assessment and monitoring training for our members. In order to support the Athabasca Denesuline communities' involvement in decision-making, we recommend the following changes to NEB policy:

- 11. Increase the level of expectation for Aboriginal involvement in socio-economic, cultural, and traditional land use assessments for Project-specific EAs to maximize the involvement of Aboriginal communities in the development of project environment impact statements;**
- 12. NEB or other agents of the Crown (e.g., the Crown Consultation Unit) to increase funding for Aboriginal communities to allow for meaningful EA and parallel consultations participation, as well as, provide capacity and resources to communities for training and mentoring to build skill and experience for enabling meaningful participation and job advancement.**

Protecting Land in Our Territory for Traditional Use

The Athabasca Denesuline recognize the interconnectedness of the land and healthy ecosystems are needed to support our rights and traditional practices, we want to safeguard lands for the continuation of traditional practices that have occurred on our territory since time immemorial. The modernization of the NEB should reflect these values and increase their priority level for assessment and conditioning of proposed Projects.

Required Changes to NEB Filing Manual

The current NEB Filing Manual is generic in content and has large limitations in the detail it provides. This deficiency creates a problem in allowing Proponents to submit inadequate Applications that are subsequently accepted by the Board.

- 13. We recommend a revision of the NEB Filing Manual that increases the overall level of detail and is inclusive of Aboriginal interests and rights, as well as the aforementioned development of Project-specific Terms of Reference/Information Requirements which are tied to the context in which the Project is proposed;**
- 14. As a means to safeguard our lands, we recommend that the NEB Filing Manual be updated to include more detail on the following:**
 - a. How effects on Aboriginal rights and title will be assessed in its process, and associated information requirements;**
 - b. Minimum information requirements on traditional use by Aboriginal peoples, including past, present and desired future uses of Project-affected areas; and**
 - c. How traditional knowledge will be considered alongside western science equally, in keeping with the federal government's commitments of January 2016.**

Integration of Traditional Knowledge and Community Processes

As stewards and traditional users of our lands, the Athabasca Denesuline possess unique TK that needs to be integrated within all stages of project development. Within current federal processes, this TK does not receive the weighting granted to western science and is not recognized as legitimate.

- 15. We recommend that explicit reference to equal weighting between traditional knowledge and western scientific knowledge be built into all federal environmental assessment legislation.**

In addition to the greater inclusion of TK, there must also be a push for greater understanding of Aboriginal communities' preferred assessment process and the Indigenous laws in place for accessing, utilizing, managing and retaining TK that is unique to the Nations. The concepts of "consent" apply equally to the redistribution of the intellectual and cultural property of Canadian indigenous groups.

- 16. We recommend that protocols be set in within NEB and all other federal environmental assessment legislation and policy that requires Proponents show evidence that they have adhered to Aboriginal group specific TK protocols and only shared TK information explicitly agreed to by the Aboriginal community.**

Consideration and Assessment of Cumulative Effects

The Athabasca Denesuline communities are concerned about cumulative effects in our territory as a result from multiple energy projects occurring on our lands. Further investment in science and support for traditional knowledge and Aboriginal participation through shared-decision making are proactive and precautionary approaches to ensure our lands are able to adapt to changing ecological conditions. Both the *National Energy Board Act* and the *Canadian Environmental Assessment Act* must do a better job of addressing cumulative effects, with first priority given to avoidance of cumulative effects, followed by mitigation and compensation. We recommend:

- 17. The strengthening of both the *National Energy Board Act* and the *Canadian Environmental Assessment Act* to ensure that the cumulative effects of development and activities are understood, avoided, or where necessary, mitigated or compensated.**

In addition to these recommendations for assessing and managing cumulative effects, we recommend the following:

- 18. Participation from the Board in Strategic or Regional EAs to establish broad baseline information over the affected region that includes meaningful engagement with Aboriginal governments and shared decision-making.**

First Nation Baseline Studies and Monitoring

In community engagement workshops, our members indicated they want to have greater involvement in both baseline studies and life-of-project monitoring, with an emphasis on the need for long-term data collection. The inclusion of Aboriginal perspectives is required in terms of long-term data collection and ongoing monitoring to ensure that there is continued practice of rights and consultation.

For example, initiatives like the Eastern Athabasca Regional Monitoring Program help to address gaps in long-range environment information through the combination of community and technical programs.

By emphasizing long-term monitoring, the protection of traditional lands can be sustained for future generations for traditional rights-based practices. We recommend:

- 19. The NEB always build into project approval recommendations enforceable Conditions for First Nations environmental and compliance monitoring;**
- 20. Where the environmental assessment identifies substantial information deficits in the biophysical or human environmental conditions, the NEB build in Conditions requiring specified additional baseline data collection;**
- 21. Aboriginal communities be provided direct, full access of all monitoring and baseline data.**

Damage, contamination, spills, and any harm resulting from energy projects in our territory is a concern for us. Athabasca residents want transparency when harm occurs and Denesuline community involvement in remediation programs to heal the land; this is both our right and our responsibility to the land and future generations. Financial compensation, habitat reconstruction, public notification and continual site monitoring should be available. Previous community engagement workshops have revealed that not only do members want immediate notification when an incident occurs but also regular follow-up reporting so that they can know clearly what has happened. Residents also want to see clean-up programs with local involvement in both assessing the damage and in the clean-up itself. We recommend:

- 22. Legislation and/or regulations be strengthened to ensure Aboriginal community participation in management, rehabilitation, and restoration when any harm is caused to the environment.**

Conclusion

In our limited experience with NEB processes, and more extensive experience with the NEB's sister assessment bodies of the Canadian Environmental Assessment Agency (CEAA) and the Canadian Nuclear Safety Commission (CNSC), the Athabasca Denesuline have found that environmental assessment tends to focus on the opinions, findings and estimations of Proponents and scientists. This leaves the most sensitive receptors – Aboriginal peoples reliant of the land and waters within our traditional territories – to be treated as an afterthought. The NEB, along with all agents of the federal Crown, needs to fundamentally shift focus onto the existing and future burden of effects placed on our people.

The Ya'thi Néné Land and Resource Office and the Athabasca Denesuline communities we represent, desire a modernized NEB that more closely **reflects and protects** the interests and rights of Aboriginal

peoples. As First Nations, we have longstanding traditional knowledge systems, laws, values and practices which must be given due consideration and be respected in conjunction with legislation and the practices of the NEB.

We trust that the Expert Panel will seriously consider and endorse our recommendations, and that this process is just the first step in making positive changes through meaningful and effective consultation with First Nations.

References

Constitution Act, 1982, Being Schedule B to the Canada Act 1982 (UK), 1982, c 11. n.d.

Haida Nation v. British Columbia (Minister of Forests), [2004] 3 S.C.R. 511, 2004 SCC 73. 2004.

United Nations. 2008. "United Nations Declaration on the Rights of Indigenous Peoples." United Nations.

Summary of Ya'thi Néné Lands and Resource Office Recommendations

For your convenience, please find the summary of all the recommendations from the Ya'thi Néné Lands and Resource Office made throughout the report below.

1. A regular periodic review with full provisions for extensive Aboriginal involvement be established within the NEB's guiding legislation.
2. We recommend that NEB formally adopt the principles of the United Nations Declaration on the Rights of Indigenous Peoples into its mandate.
3. We recommend that NEB only approve projects that affect and impact Indigenous communities where they were given Free, Prior, and Informed Consent in a way that respects the procedures and protocols that are unique to that Nation.
4. We recommend that NEB work with Aboriginal groups to redefine "public interest" within the legislation to be inclusive of Indigenous perspectives, spiritual, and philosophical frameworks; this revision should include both the broad public interest, as well as, the duty to consult and accommodate Indigenous communities.
5. We recommend that the NEB incorporate a training component to ensure that Proponents, NEB board members, and NEB staff better understand our Aboriginal rights and title;
6. We recommend that the current "List of Issues" prepared by the NEB for a Hearing Order, which recognized the need to assess Aboriginal and Treaty rights but provide little guidance on this can be accomplished, be replaced by Project-specific Terms of Reference and guidance developed in consultation with Canadian indigenous groups on how rights and title impact assessments need to be conducted.
7. In the event that an NEB mandated process occur, community members expect more workshops, meetings, and materials made available through multiple, accessible media outlets.
8. We recommend that the federal government develop in deep consultation with indigenous groups, indigenous engagement guidelines for Proponents in the NEB environmental assessment process, which clearly articulate expectations, roles and overall process and to ensure culturally appropriate and respectful consultation, and that a Crown Consultation Unit be developed to work alongside the NEB environmental assessment process, to arbitrate on the effectiveness/adequacy of this engagement (not the NEB).
9. We recommend that the NEB be required to provide more detail for estimations of significance/insignificance, including use of defensible thresholds for all VCs, in its Report of Environmental Assessment or Environmental Screening Report.
10. We recommend that the Ministers be required to provide detailed and publicly distributed reasons for decision for decisions made on NEB recommendations.
11. Increase the level of expectation for Aboriginal involvement in socio-economic, cultural, and traditional land use assessments for Project-specific EAs to maximize the involvement of Aboriginal communities in the development of project environment impact statements.
12. NEB or other agents of the Crown (e.g., the Crown Consultation Unit) to increase funding for Aboriginal communities to allow for meaningful EA and parallel consultations participation, as well as, provide capacity and resources to communities for training and mentoring to build skill and experience for enabling meaningful participation and job advancement.
13. We recommend a revision of the NEB Filing Manual that increases the overall level of detail and is inclusive of Aboriginal interests and rights, as well as the aforementioned development of Project-specific Terms of Reference/Information Requirements which are tied to the context in which the Project is proposed.

- 14.** As a means to safeguard our lands, we recommend that the NEB Filing Manual be updated to include more detail on the following:
 - a. How effects on Aboriginal rights and title will be assessed in its process, and associated information requirements;
 - b. Minimum information requirements on traditional use by Aboriginal peoples, including past, present and desired future uses of Project-affected areas; and
 - c. How traditional knowledge will be considered alongside western science equally, in keeping with the federal government's commitments of January 2016.
- 15.** We recommend that explicit reference to equal weighting between traditional knowledge and western scientific knowledge be built into all federal environmental assessment legislation.
- 16.** We recommend that protocols be set in within NEB and all other federal environmental assessment legislation and policy that requires Proponents show evidence that they have adhered to Aboriginal group specific TK protocols and only shared TK information explicitly agreed to the Aboriginal community.
- 17.** The strengthening of both the *National Energy Board Act* and the *Canadian Environmental Assessment Act* to ensure that the cumulative effects of development and activities are understood, avoided, or where necessary, mitigated or compensated.
- 18.** Participation from the Board in Strategic or Regional EAs to establish broad baseline information over the affected region that includes meaningful engagement with Aboriginal governments and shared decision-making.
- 19.** The NEB always build into project approval recommendations enforceable Conditions for First Nations environmental and compliance monitoring.
- 20.** Where the environmental assessment identifies substantial information deficits in the biophysical or human environmental conditions, the NEB build in Conditions requiring specified additional baseline data collection.
- 21.** Aboriginal communities be provided direct, full access of all monitoring and baseline data.
- 22.** Legislation and/or regulations be strengthened to ensure Aboriginal community participation in management, rehabilitation, and restoration when any harm is caused to the environment.