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March 31, 2017

SUBMITTED ONLINE

Expert Panel
National Energy Board Modernization
NRCan's NEB Modernization Secretariat
580 Booth Street, 17th floor
Ottawa, Ontario K1A 0E4

Dear Expert Panel Members,

Mushkegowuk Council: Respecting and implementing the rights of the Mushkegowuk First Nations as full partners in the National Energy Board's processes

I am writing on behalf of Mushkegowuk Council, a Tribal Council of seven First Nations in Northern Ontario, to provide our submissions for the Expert Panel's consideration in relation to the federal government's efforts to modernize the National Energy Board ("NEB") and the *National Energy Board Act* ("*Act*").

These submissions are similar to those already provided to the Standing Committees that are conducting reviews of the *Navigation Protection Act* and the *Fisheries Act*, as well as the Expert Panel which is reviewing potential changes to the *Canadian Environmental Assessment Act*.

Mushkegowuk Council's central submission to each of these processes is that Canadian environmental laws and procedures must be revised and amended to recognize, respect and implement the legal and constitutional rights of the seven First Nations communities of Mushkegowuk Council with respect to our traditional territories, and how protection and development of our lands is to occur in the future. Some of these submissions may also be of importance and relevance to recognizing and affirming the rights of other Indigenous People and communities across Canada. This is further detailed below.

1. About Mushkegowuk Council

1.1 Mushkegowuk Council is a Tribal Council that is comprised of seven First Nations in Northern Ontario (Attawapiskat First Nation, Taykwa Tagamou First Nation,

Kashechewan First Nation, Fort Albany First Nation, Moose Cree First Nation, Chapleau Cree First Nation, and Missanabie Cree First Nation).[1]

1.2 The seven First Nations that make up Mushkegowuk Council are the occupants and stewards, since long before the arrival of Europeans, of our ancestral lands. These territorial lands comprise a vast area of Northern Ontario and are ecologically sensitive (including as unique ecosystems, lands and waterways) and culturally critical to the Mushkegowuk First Nations. Our territorial lands include the world's third largest wetlands, which make up the second largest carbon sink in the world (the Hudson/James Bay lowlands), the coastal waters of James Bay, important Boreal forests, and several major rivers including the Attawapiskat River, the Albany River and the Moose River.

1.3 For generations upon generations our families and members of our communities have hunted the lands and fished the lakes and waterways in our traditional territories for our livelihood and for other traditional purposes. These uses continue to this day, with many youth learning our traditions from our Elders. Indeed, our studies have shown that the vast majority of the meat consumed in our communities comes from local food harvested in our traditional territories.

2. Summary: Our Treaty rights are much broader and more substantial than what has been recognized and understood by government in the past

2.1 Over 100 years ago, the government Treaty commissioners came to our lands to negotiate Treaty No. 9 with our leaders, including my great grandfather. Ever since these discussions, our Elders, through our oral traditions, have told us that the Treaty that we made with Canada and Ontario **protected** our traditional way of life, our relationship with our lands and waters, and our right to hunt and fish in our customary ways, as we always have.

2.2 As is more detailed below, very recently we have discovered that what our Elders have been telling us about the Treaty, that it protected our way of life, was also recorded by the government - in the personal diaries of the government Treaty commissioners. When these commissioners negotiated the Treaty, they promised our leaders that our unique and culturally important rights to the environment in our traditional territory, including our right to the lands and waters to hunt and fish, would be forever protected. The Treaty commissioners recorded the promises they made to our leaders in their personal diaries.

2.3 Mushkegowuk Council submits that these oral promises made by the Treaty commissioners, which have been increasingly clarified by recently found historical evidence, dramatically expand the scope and strength of the rights of the Mushkegowuk First Nations under the Treaty to use our lands and waters to hunt and fish, compared to what has been recognized (and understood by the government) in the past. This is mainly because governments in the past have based their positions on the wording of the signed,

[1] I note that other Mushkegowuk Council First Nations may, or have already made, submissions to the Expert Panel. We support and endorse those submissions.

written, English language Treaty "document", which, it turns out, does not correspond to the real Treaty as orally agreed to.

2.4 Our people, who are called the Omushkego, have always viewed the Treaty as an agreement between Nations, based on our Nation-to-Nation relationship. The diaries of the Treaty commissioners clearly confirm what we have long understood to be the case - that the Treaty is an agreement that protects and affirms our way of life, including our legal rights to a healthy environment that allows us to hunt and fish in all of our traditional territories, as our people have always done.

3. Primary Recommendation: The NEB processes and the *Act* must be amended to require <u>consent</u> of our First Nations

3.1 Mushkegowuk Council submits that the *National Energy Board Act*, and the NEB's processes and procedures must be revised to ensure that our constitutionally protected Treaty rights are respected and implemented. In order to accomplish this within the *Act*, Mushkegowuk Council submits that **consent** of the Mushkegowuk First Nations must be obtained **before** any projects are commenced that have the potential to impact our Treaty rights. Recognition and respect for our Treaty-based legal rights is only obtained through working with the Mushkegowuk First Nations as **partners** in the environmental assessment process.

3.2 Our rights under the Treaty protect not only our right to hunt and fish, but also our right to a healthy, sustainable environment that can sustain the moose, geese, and other animals and fish that our people have relied on and continue to rely on for our food and for our traditions. Accordingly, if a project <u>has the potential to</u> impact the environment or the habitat for these animals in our traditional territories, then it <u>could</u> impact our Treaty rights, **and, therefore, the government must obtain our consent before the project can proceed**.

3.3 The Mushkegowuk First Nations are not opposed to development. In other words, the Mushkegowuk First Nations are not automatically opposed to projects or development either on our traditional territories, or which could result in environmental impacts on our traditional territories. However, the Mushkegowuk First Nations are opposed to these projects proceeding without our informed consent. Our vision is that the Mushkegowuk First Nations will work with Canada, Ontario and the project proponents as partners to ensure that when this type of development does occur, it happens in a way that appropriately respects our traditional territories and our legal rights.

3.4 The following section details additional important information about both the oral Treaty promises and the impact this critical new evidence should have on the Expert Panel's review of the *Act* and the NEB's processes and procedures. More specific and detailed recommendations of Mushkegowuk Council are set out in section 6, below.

4. Respect for and implementation of the legal rights of the Mushkegowuk First Nations

Mushkegowuk First Nations' legal rights to use and control our lands as set out in the oral Treaty promises

4.1 The traditional territories of the Mushkegowuk First Nations are generally covered by Treaty No. 9. However, as set out above, based on recently found and identified historical evidence, it is now clear that the legal rights of the Mushkegowuk First Nation communities to hunt and fish in our traditional territories, and to control and manage the use of our lands and waters, are much broader and more substantial than what is contained in the written Treaty 9 document, which governments have relied on in the past to purport to limit those rights.

4.2 Specifically, when the government Treaty commissioners explained and presented Treaty 9 to our ancestors, the Treaty commissioners made important (and, according to the Supreme Court of Canada legally-binding)[2] oral promises and assurances to our First Nation leaders and representatives (as recorded in evidence described below).

4.3 Critically, the Treaty 9 government commissioners repeatedly promised that after signing the Treaty, our First Nation members could continue to hunt and fish anywhere we had traditionally carried on those activities, that our traditional means of livelihood would continue after the Treaty as it was before the Treaty, and that this livelihood would not be interfered with in any way. Further, and importantly, the commissioners did not discuss the key "taken up" clause which occurs in the written document, and which the governments have always relied on to purport to limit those rights.

4.4 These oral promises made by the Treaty commissioners were contemporaneously recorded in their diaries and reports. Most importantly, one of these diaries, of commissioner Daniel MacMartin, was recently discovered – almost 100 years after it was created. Mr. MacMartin's diary provides crucial new evidence and information – in the form of an eyewitness, contemporaneous, detailed account from an official government representative - regarding the actual Treaty terms that were presented by the government of Canada and Ontario to Treaty 9 First Nations, and that were agreed to by the signatories. To cite just one example (there are many), Mr. MacMartin's diary states:

- "[the First Nation] had terms of treaty explained to them … that they were … allowed *as of yore* to hunt and fish *where they pleased*" [emphasis added] (1905, D. MacMartin diary of treaty discussions at New Post [Taykwa Tagamou] First Nation).

4.5 This is one example of many legally-binding promises made to our ancestors at the time of the Treaty signing, backed up by the eyewitness recorded testimony of a government representative, which recognize and affirm that the Mushkegowuk First Nations have the permanent right to continue to hunt and fish in all of our traditional waters, lands and

[2] *R v. Morris*, [2006] 2 S.C.R. 915 at para. 24: "oral promises made when the treaty was agreed to are as much a part of the treaty as the written words". See also *R. v. Sundown*, [1999] 1 S.C.R. 393 at para. 24: "In many if not most treaty negotiations, members of the First Nations could not read or write English and relied completely on the oral promises made by the Canadian negotiators. There is a sound historical basis for interpreting treaties in the manner summarized in *Badger*. Anything else would amount to be a denial of fair dealing and justice between the parties."

territories in our customary manner, as our Elders have told us for generations. An important part of this promise is our right to use and have control over the environment in our traditional territories, lands and waters, in order to exercise these rights.

4.6 Mushkegowuk Council submits that these oral promises dramatically expand the scope and strength of the rights of the Mushkegowuk First Nations under the Treaty to hunt and fish and use the land, compared to what has been recognized (and understood by the government) in the past. Mushkegowuk Council submits that these promises should have very major effects on how and to what extent the federal government makes decision about the land, water and environment in the Mushkegowuk territory and, in contrast, how many of those decisions are rightfully and legally ***within the jurisdiction of the Mushkegowuk First Nations***. Therefore, Mushkegowuk Council submits that these recently-uncovered promises and new evidence regarding the real treaty as orally agreed-to should also have major impact on how this Expert Panel reviews and makes decisions regarding how to modernize the NEB.

4.7 The reality is that there are two very different understandings of Treaty 9 – one now clearly supported by the weight of evidence. On one side, the federal government relies solely on the written Treaty document to purportedly extinguish or diminish our First Nations rights to use and control our lands (using the "taken up" clause); on the other side, the Mushkegowuk First Nations rely on the actual terms agreed to according to current and solid evidence, which preserve the Mushkegowuk First Nations' jurisdiction and control over our waters, lands and resources.

4.8 What this means in the context of the federal government's review of the *National Energy Board Act* and the NEB's processes and procedures is that the Mushkegowuk First Nations have legally protected rights (as contained in the Treaty – properly constituted to include the oral promises) to jurisdiction and control over the lands, waters and resources in our traditional territories, including to protect our environment to hunt, fish and carry on other traditional pursuits.

4.9 Accordingly, Mushkegowuk Council submits that the federal government must obtain approval and consent of the Mushkegowuk First Nations before taking any action that could potentially infringe these rights. In other words, any violation or infringement of these oral promises (for example environmental impacts or effects on the lands or waters in our traditional territories from a project that is subject to the *Act*) is an infringement of the Mushkegowuk First Nations' Treaty rights and, therefore, can only proceed with prior informed approval (that is, consent) of the Mushkegowuk First Nations.

Towards respect and implementation of the legal rights of the Mushkegowuk First Nations

4.10 Mushkegowuk Council submits that the *Act* and the NEB's processes and procedures must be revised and amended in order to recognize and affirm the legal rights of the Mushkegowuk First Nation communities, based on the oral and legally and constitutionally binding promises of the government Treaty Commissioners detailed above. In other words, Mushkegowuk Council submits that the Government of Canada is legally required to revise the *Act* and the NEB's processes because these are not presently in accordance with, and in fact infringe upon, the legal and constitutionally protected rights of the Mushkegowuk First Nations to hunt and fish in our traditional territories and in our customary manner.

4.11 As the Expert Panel members may be aware, a lawsuit against both Canada and Ontario has been commenced in relation to these oral promises.[3] However, this modernization process provides an opportunity for the federal government to begin to take steps to address these issues outside the courtroom, as Ontario is already doing.[4] In other words, Mushkegowuk Council submits that the Expert Panel and the federal government, through this review, have an opportunity to take a "big picture" view of these issues and start making real, practical and recognizable progress towards respecting and implementing the rights of Indigenous People and communities in Canada.

4.12 In this process to modernize the *Act* and the NEB, Mushkegowuk Council submits that the recognition, respect and implementation of the legal rights of its member communities can be accomplished by amending the legislation and the NEB's procedures to specifically allow and provide for Mushkegowuk First Nation-led control and jurisdiction over the environment in the Mushkegowuk traditional territories. In a practical sense this would mean that the NEB, governments and the proponents would work with the Mushkegowuk First Nations or their designated departments to determine the potential impact of the proposed project and to identify if the First Nation would consent to the project, recognizing the need to protect the environment in the Mushkegowuk traditional territories for continued traditional uses. This would be done through both the provisions of the *Act* as well as through the Mushkegowuk First Nation's traditional laws and customs.

4.13 Mushkegowuk Council submits that not only is a Mushkegowuk First Nation-led approach necessary (and legally required) to recognize, respect and implement the rights of the Mushkegowuk First Nation members in relation our traditional territories (as set out in the oral promises), but it also would provide for better and more appropriate protection of the environments in our territory, and a sound basis for appropriate economic development in our lands, because it would incorporate the Mushkegowuk First Nations' important

[3] Ontario Superior Court of Justice File No. CV 13 488403.

[4] Ontario and Mushkegowuk Council have developed a Treaty Roundtable based on the willingness to move forward on practical initiatives that recognize the contrasting views of the Treaty understanding by the parties. Canada has been invited and encouraged to join this Treaty Roundtable many times and is encouraged to become a signatory to the Memorandum of Understanding in that regard.

traditional knowledge of, responsibility and respect for, and relationship with these lands and waters.

4.14 Further, and importantly, amending the *Act* to recognize and implement Mushkegowuk First Nations' jurisdiction and control over our traditional territories would also be an immediately recognizable step towards, as Prime Minister Trudeau has stated, "reconciliation" with First Nations in Canada and would also be a way of implementing the Federal government's stated goal of implementing the United Nations Declaration on Indigenous Peoples ("UNDRIP") in Canada. This particular point is further discussed and detailed below. However, we note that our legal rights to jurisdiction and control of our lands (and, therefore, our right to require consent for any projects that could impact our homelands), are based on current Canadian laws, legal principles and evidence. Accordingly, our legal rights based on the real Treaty as orally agreed-to, are in many ways, much broader and stronger than the legal rights of the Mushkegowuk First Nations based solely on the government's stated commitment to implement UNDRIP.

The Federal and Provincial governments both have a legal obligation to respect and implement our Treaty rights

4.15 As is noted above, the government usually uses the "taken up" clause in the written Treaty 9 document to justify infringements on our Treaty-protected rights to use our traditional territories to hunt and fish. The recent Supreme Court of Canada ruling in *Grassy Narrows First Nation v. Ontario* ("*Keewatin*"),[5] interpreted the Federal government's role with respect to "taking up" Provincial lands under Treaty No. 3, to be limited. However, and importantly with in the context of this modernization process, Mushkegowuk Council submits that this ruling does not mean that the Federal government has any less of an obligation to ensure that it fulfills and honours its legal obligations and responsibilities to the Mushkegowuk First Nations under Treaty No. 9.

4.16 There are several reasons for this, including (and perhaps most importantly) that the Treaty rights of Mushkegowuk First Nations detailed above **are much broader and more substantial** than what was analyzed by the courts in *Keewatin*. Mushkegowuk Council submits that, based on the Treaty commissioners' personal diaries and oral promises made, the lands in the Mushkegowuk traditional territories **cannot be "taken up" without the informed consent of the Mushkegowuk First Nations**. In other words, the issues raised by possible adverse environmental effects on our lands and waters from a project (for example, a pipeline) go directly to the heart of what both Canada and Ontario promised our ancestors that the Treaty would protect: our sources of food, culture and livelihood. Accordingly, in our submission, this is an area of federal or possibly shared federal-provincial jurisdiction.

[5] 2014 SCC 48.

5. Recommendations of Mushkegowuk Council

Central Recommendation – consent of the Mushkegowuk First Nations is required

5.1 As detailed above, in order to respect and implement our Treaty rights, Mushkegowuk Council submits that the *Act* and the NEB's processes and procedures must be revised and amended so that the informed **consent** of our First Nation communities is obtained **before** any projects are commenced that have the potential to impact our Treaty rights to the lands and waters in our traditional territories. This would include both projects within our traditional territories, as well as projects that could impact our lands and waters, such as projects for which our traditional territories are downstream or down muskeg. Further, in order for consent to be informed, our First Nation communities would need our own independent experts, access to, or completion of, regional "baseline studies" of the environment, and the opportunity to test other evidence (including evidence of the proponent), for example through cross-examination. This is further detailed in the next section.

5.2 Mushkegowuk Council submits that what is required is a fundamental "re-set" of thinking about the nature and extent of the Treaty rights of the Mushkegowuk First Nations. We need to stop focusing on mere "consultation", and instead move towards full, informed consent from the Mushkegowuk First Nations, as Nation-to-Nation partners with Canada for the reviews and assessment processes that could impact the environment, and accordingly, our rights, in our traditional territories.

Recommendations to modernize the Act *and the NEB's processes*

5.3 Based on Mushkegowuk Council's overall submission (that the *Act* and the NEB's processes must be significantly revised in order to respect and implement our Treaty rights, by requiring our **consent** to projects that could impact our Treaty rights) it may be necessary to consider large-scale revisions to the *Act* and the NEB's processes (that is, even beyond what is being contemplated through this "modernization" process).

5.4 However, to assist the Expert Panel, we have identified several areas that we submit must be revised in order to begin to move towards protecting and affirming our legal rights, as detailed above. In other words, we have reviewed the *Act*, the NEB's processes, and some of the historical challenges and significant issues with respect to the NEB. Based on this we have identified some of (though by no means all of) the ways that the *Act* and the NEB could and should be changed to take steps toward implementing our primary submission.

5.5 In summary, the Mushkegowuk First Nations submit that the modernization of the NEB must include, at a minimum, that:

a. no projects will proceed without the prior consent of the Mushkegowuk First Nations, due to the legal rights to jurisdiction and control of our homelands based on the oral Treaty promises;

b. the Mushkegowuk First Nations be informed about any potential projects as early as possible in the process, so that we can begin to work with the government and the proponents as necessary and required;

c. detailed "baseline" studies must be conducted to understand the current state of the environment, to allow for an informed evaluation of any potential impacts of the project and to also enable accurate monitoring and enforcement. Mushkegowuk member First Nations must be involved at all stages of this process. For example, any baseline studies must include and be informed by our traditional knowledge of our lands and waters;

d. any and all project reviews and assessments must include detailed consideration of regional, cumulative impacts, including any potential impacts based on climate change – a factor which disproportionately impacts our communities and lands in Northern Ontario;[6]

e. a robust funding mechanism must be implemented, either from the government or the proponent or some combination thereof, to meaningfully implement the above-noted recommendations;

5.6 Below we have provided further details about each of these above-noted areas, and also made further recommendations to assist the NEB with moving towards respecting and implementing our legal rights.

A. Consent of the Mushkegowuk First Nations is required

- Before any projects can be approved by the NEB, the consent of any Mushkegowuk First Nation that could be impacted by the project must be obtained. The consent of all of the Mushkegowuk First Nations whose legal rights could be impacted must be obtained. In other words, the NEB would require significant changes to its legislation and practices to ensure that any of our First Nations that could be impacted (both directly or indirectly) must be obtained.
- This would provide more certainty for the proponents, the government and the First Nations. There would no longer be the need to evaluate the "depth" of the consultation required, or who would "conduct" the consultation or at what "point" in the process consultation must take place. This would all be replaced by obtaining the informed consent of the Mushkegowuk First Nation.
- The consent must be obtained by the Crown, however, this would be based on evidence from the proponent (so the proponent would need to be involved in some

[6] The Mushkegowuk First Nations are situated in Northern Ontario and, accordingly, we are particularly impacted by our changing climate. The changing climate has a major impact on our traditional way of life, including hunting and fishing. It also makes it increasingly difficult (and expensive) for many of our communities to obtain much needed food and other supplies because, among other challenges, the time that the Winter Road is operational is shorter and shorter each year.

way), as well as from baseline studies, and all other available information (which is further detailed below).

- As is detailed above, obtaining consent is the only way to respect and implement the rights of the Mushkegowuk First Nations, and would also be a way for the Federal Government to implement its stated goal of complying with UNDRIP.
- We note that obtaining the consent of the Mushkegowuk First Nations Consent is not an "objective" to be sought as part of a consultation process, as some have argued. Consent is our legal right, as contained in the real Treaty as orally agreed-to, which is legally and constitutionally protected, and which is supported by the weight of evidence of the oral promises made by the government and recorded by the government commissioners.

B. All project reviews or assessments must consider regional, cumulative impacts including, for example, potential impacts with respect to climate change

- This is a key issue. The livelihood of our communities and our traditional way of life is threatened by climate change and by changes to our environments that are not properly managed and monitored. Accordingly, it is essential that any assessments done of projects under the NEB's jurisdiction properly consider the regional, cumulative impacts of the project.
- Downstream, and "down-muskeg", impacts, if any must be considered.
- Considering these important factors – regional, cumulative, climate is not only part of the "public interest" considerations, but also a key aspect of our First Nations' considerations of whether or not they will consent.

C. Information and evidence relied on for all projects must be made available and must be subject to scrutiny and testing

- Studies must be conducted of the lands and waters that could be impacted by a project **before** the project is commenced in order to reasonably assess the scope of the potential impacts of the project, to allow for informed decision making for the First Nations that could be impacted (regarding whether or not to consent to the project) and the NEB, and also to allow for informed and appropriate monitoring and enforcement.
- Our People have a deep knowledge and connection with our lands. Accordingly, these "baseline" studies must include and account for of our Traditional Knowledge of the lands.
- In addition, during the course of any review or assessment, the information of the proponent must be made available to the Mushkegowuk First Nations, and must be subject to scrutiny, including through cross-examination of experts, where appropriate.
- Further, a robust funding mechanism must allow and account for hiring of our own independent experts if required and appropriate.

D. Mushkegowuk First Nations must become "partners" in the process

- As stated above, the Mushkegowuk First Nations must become full partners in this process with the federal government and the NEB to fully and appropriately review the potential impacts and benefits of any proposed project.
- This would mean:
    - notification to all First Nations that could be impacted, as soon as possible in the process;
    - the involvement of the Mushkegowuk First Nations in developing and setting the conditions for any project based both on our detailed and deep historical knowledge and connections with the land (that is, the monitoring and conditions developed would be improved by accounting for and relying on our traditional knowledge of our homelands), and also based on our legal rights to jurisdiction and control over our lands as detailed above.
- In other words, the involvement of the Mushkegowuk First Nations should begin before the hearing process is designed and the decision-making panel is chosen, and continue right through project approval, construction, oversight, compliance, abandonment, etc.
- In a practical sense this would mean that the NEB, the project proponents, and the government would work directly with the Mushkegowuk First Nations and their appropriate departments throughout this process.
- In order to effectively implement this requirement, the timelines in the *Act* would need to be significantly amended to remove the "hard" deadlines and allow for sufficient flexibility in this process.

E. The "Public Interest" considerations cannot subsume our Indigenous rights

- It seems to us that the "public interest," which the NEB is require to consider, often appears to "subsume" the rights and interests of the First Nation communities. This is wrong.
- Both the NEB and our Mushkegowuk First Nation communities need to make informed decisions for all projects. For the NEB, the decision is whether or not the project is in the "public interest". For the Mushkegowuk First Nation communities, we need to make a similar determination-whether or not the project is in the interest of our communities and community members.
- While these considerations will overlap and be in accordance in some situations (and will also likely rely in part on the same information, such as the baseline and impact studies), these are two **separate** determinations that must be made.
- The NEB is not equipped, nor is it legally able, to make a decision about whether or not a proposed project is in the interest of our First Nations. That is something that our First Nations must decide for ourselves, after carefully considering the studies, our own traditional knowledge, and having consultations within our own communities.

- We are not saying that we want a "veto" on development on our lands. What we are saying is that our legal rights (based on the oral promises contained in the real Treaty) protect our right to make a full, fair, and informed decision about whether or not we want a project infringing on our livelihood and traditional way of life – a life that we have been living since time immemorial. In other words, we are not automatically against development, however, we must ensure that any development that could infringe and impact our rights is responsible and any impacts are mitigated to the extent possible.

F. All decisions must be reasoned and accountable

- If the NEB or the Governor in Council ("GIC") makes a decision about a project, that decision must be accompanied by informed reasons for the decision (we note that the GIC and NEB would not be able to "override" a decision of the Mushkegowuk First Nations to deny a project, or to place conditions on the approval of a project).
- This would allow all parties that could be impacted by the decision to understand the rationale and basis for the decision.

G. The NEB should no longer conduct Environmental Assessments

- Environmental Assessments should be completed by one organization to allow that organization to develop expertise in this important area, and to allow for consistency in process and decision-making for these important reviews.
- There is a substantial amount of work to be done to overhaul the Environmental Assessment process in Canada to ensure that these processes respect and implement our legal rights. Accordingly, it would be an unnecessary use of valuable resources to have two separate organizations make these major changes. It also creates unnecessary duplication to have two separate agencies that have the capacity to conduct exactly the same processes and procedures.
- We have enclosed our submissions to the Expert Review Panel on the *Canadian Environmental Assessment Act* with these submissions so that you can better understand of the breadth and depth of the changes required, in our view.
- In addition, any environmental assessments should be conducted by one agency, such as the Canadian Environmental Assessment Agency ("CEAA"), in partnership with the Mushkegowuk First Nations, so that the agency can create and maintain an expertise in conducting these assessments.

6. Conclusion: This is a unique and timely opportunity to take a major constructive step towards reconciliation, and towards respect for and implement of our rights as protected by the real Treaty as orally agreed-to

6.1 In summary, the above-detailed framework is the only way that the Mushkegowuk First Nations would be able to properly consider a proposed project and determine whether or not to provide our informed consent.

6.2 We request that the Expert Panel take this opportunity to make meaningful, long-term and critically important changes in order to modernize the *National Energy Board Act* as well as the procedures and processes of the National Energy Board. If the Expert Panel decides to recommend changes that move towards reconciliation with us and respect for and implementation of our legal rights, this may well create a path to begin true reconciliation with us and with other Indigenous People across Canada.

6.3 My people, the Omushkego, have lived, and will continue to live, in our traditional territories and carry on our customary ways of life - including our deep connection, respect and relationship with the lands, waters, animals, and plant life - forever. That will not change. What can change is the federal government's commitment to us and relationship with us, the Mushkegowuk First Nations, as Nations within Canada – so that we can begin to work as partners in protecting, respecting and appropriately developing our lands and waters.

6.4 We appreciate this opportunity to have a discussion with our Treaty Partners, the Federal government, about these critically important issues. Meeg wetch.

Respectfully,

Grand Chief Jonathan Solomon

Attachment:

Submissions of Mushkegowuk Council
to Expert Panel re Environmental Assessment Act

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December 23, 2016

SUBMITTED VIA ONLINE TOOL

Expert Panel
Review of Environmental Assessment Processes
c/o Secretariat
160 Elgin Street, 8th Floor
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Dear Expert Panel Members,

Mushkegowuk Council: Respecting and implementing the rights of the Mushkegowuk First Nations as full partners in the environmental assessment processes

I am writing on behalf of Mushkegowuk Council, a Tribal Council of seven First Nations in Northern Ontario, to provide our submissions for the Expert Panel's consideration in relation to the federal government's review of the *Canadian Environmental Assessment Act* ("*Act*").

These submissions are similar to those already provided to the Standing Committees that are conducting reviews of the *Navigation Protection Act* and the *Fisheries Act*. Mushkegowuk Council's central submission to each of these review processes is that Canadian environmental laws must be revised and amended to recognize, respect and implement the legal and constitutional rights of the seven First Nations communities of Mushkegowuk Council regarding our traditional territories, and how protection and development of those lands is to occur in the future. Some of these submissions may also be of importance and relevance to recognizing and affirming the rights of other Indigenous People and communities across Canada. This is further detailed below.

1. About Mushkegowuk Council

1.1 Mushkegowuk Council is a Tribal Council that is comprised of seven First Nations in Northern Ontario (Attawapiskat First Nation, Taykwa Tagamou First Nation,

Kashechewan First Nation, Fort Albany First Nation, Moose Cree First Nation, Chapleau Cree First Nation, and Missanabie Cree First Nation).[1]

1.2 The seven First Nations that make up Mushkegowuk Council are the occupants and stewards, since long before the arrival of Europeans, of our ancestral lands. These territorial lands comprise a vast area of Northern Ontario and are ecologically sensitive (including as unique ecosystems, lands and waterways) and culturally critical to the Mushkegowuk First Nations. Our territorial lands include the world's third largest wetlands, which make up the second largest carbon sink in the world (the Hudson/James Bay lowlands), the coastal waters of James Bay, important Boreal forests, and several major rivers including the Attawapiskat River, the Albany River and the Moose River.

1.3 For generations upon generations our families and members of our communities have hunted the lands and fished the lakes and waterways in our traditional territories for our livelihood and for other traditional purposes. These uses continue to this day, with many youth learning our traditions from our Elders. Indeed, our studies have shown that the vast majority of the meat consumed in our communities comes from local harvested food.

2. Summary: Our Treaty rights are much broader and more substantial than what has been recognized and understood by government in the past

2.1 Over 100 years ago, the government Treaty commissioners came to our lands to negotiate Treaty No. 9 with our leaders, including my grandfather. Ever since these discussions, our Elders, through our oral traditions, have told us that the Treaty that we signed with Canada and Ontario **protected** our traditional way of life, our relationship with our lands and waters, and our right to hunt and fish in our customary ways, as we always have.

2.2 As is more detailed below, very recently we have discovered that what our Elders have been telling us about the Treaty, that it protected our way of life, was also recorded by the government - in the personal diaries of the government Treaty commissioners. When these commissioners negotiated the Treaty, they promised our leaders that our unique and culturally important rights to the environment in our traditional territory, including our right to the lands and waters to hunt and fish, would be forever protected. The Treaty commissioners recorded the promises they made to our leaders in their personal diaries.

2.3 Mushkegowuk Council submits that these oral promises made by the Treaty commissioners, which have been increasingly clarified by recently found historical evidence, dramatically expand the scope and strength of the rights of the Mushkegowuk First Nations under the Treaty to use our lands and waters to hunt and fish, compared to what has been recognized (and understood by the government) in the past. This is mainly because governments in the past have based their positions on the wording of the signed, written, English language Treaty "document", which, it turns out, does not correspond to the real Treaty as orally agreed to.

[1] I note that other Mushkegowuk Council First Nations may, or have already made, submissions to the Expert Panel. We support and endorse those submissions.

2.4 Our people, who are called the Omushkego, have always viewed the Treaty as an agreement between Nations, based on our Nation-to-Nation relationship. The diaries of the Treaty commissioners clearly confirm what we have long understood to be the case - that the Treaty is an agreement that protects and affirms our way of life, including our legal rights to a healthy environment that allows us to hunt and fish in all of our traditional territories, as our people have always done.

3. Primary Recommendation: The *Act* must be amended to require <u>consent</u> of our First Nations

3.1 Mushkegowuk Council submits that the *Canadian Environmental Assessment Act* must be revised to ensure that our constitutionally protected Treaty rights are respected and implemented. In order to accomplish this within the *Act*, Mushkegowuk Council submits that **consent** of the Mushkegowuk First Nations must be obtained **before** any projects are commenced that have the potential to impact our Treaty rights. Recognition and respect for our Treaty-based legal rights is only obtained through working with the Mushkegowuk First Nations as **partners** in the environmental assessment process.

3.2 Our rights under the Treaty protect not only our right to hunt and fish, but also our right to a healthy, sustainable environment that can sustain the moose, geese, and other animals that our people have relied on and continue to rely on for our food and for our traditions. Accordingly, if a project could impact the environment or the habitat for these animals in our traditional territories, then it could impact our Treaty rights, **and the government must obtain our consent before the project can proceed**.

3.3 The Mushkegowuk First Nations are not opposed to development. In other words, the Mushkegowuk First Nations are not automatically opposed to projects or development either on our traditional territories, or which could result in environmental impacts on our traditional territories. However, the Mushkegowuk First Nations are opposed to these projects proceeding without our informed consent. Our vision is that the Mushkegowuk First Nations will work with Canada and Ontario as partners to ensure that when this type of development does occur, it happens in a way that appropriately respects our traditional territories and our legal rights.

3.4 Further more specific and detailed recommendations of Mushkegowuk Council are set out in section 6, below. However, the following sections first detail additional important information about both the oral Treaty promises and the impact this critical new evidence should have on the Expert Panel's review of the *Act*.

4. Respect for and implementation of the legal rights of the Mushkegowuk First Nations

<u>Mushkegowuk First Nations' legal rights to use and control of our lands as set out in the oral Treaty promises</u>

4.1 The traditional territories of the Mushkegowuk First Nations are generally covered by Treaty No. 9. However, as set out above, based on recently found and identified historical evidence, it is now clear that the legal rights of the Mushkegowuk First Nation

communities to hunt and fish in our traditional territories, and to control and manage the use of our lands and waters, are much broader and more substantial than what is contained in the written Treaty 9 document, which governments have relied on in the past to purport to limit those rights.

4.2 Specifically, when the government Treaty commissioners explained and presented Treaty 9 to our ancestors, the Treaty commissioners made important (and, according to the Supreme Court of Canada legally-binding)[2] oral promises and assurances to our First Nation leaders and representatives (as recorded in evidence described below).

4.3 Critically, the Treaty 9 government commissioners repeatedly promised that after signing the Treaty, our First Nation members could **continue to hunt and fish <u>anywhere they pleased</u>**, that our **traditional means of livelihood would continue** after the Treaty as it was before the Treaty, and that this **livelihood would not be interfered with in any way**. Further, and importantly, the commissioners **did <u>not</u> discuss the key "taken up" clause** which occurs in the written document, and which purports to limit those rights.

4.4 These oral promises made by the Treaty commissioners were contemporaneously recorded in their diaries and reports. One of these diaries, of commissioner Daniel MacMartin, was recently discovered – almost 100 years after it was created. Mr. MacMartin's diary provides crucial new evidence and information regarding the actual Treaty terms that were presented by the government of Canada and Ontario to Treaty 9 First Nations, and that were agreed to by the signatories. To cite just one example (there are many), Mr. MacMartin's diary states:

- "[the First Nation] had terms of treaty explained to them … that they were … allowed *as of yore* to hunt and fish *where they pleased*" [emphasis added] (1905, D. MacMartin diary of treaty discussions at New Post [Taykwa Tagamou] First Nation).

4.5 This is a legally-binding promise made to our ancestors at the time of the Treaty signing which recognizes and affirms that the Mushkegowuk First Nations have the permanent right to continue to hunt and fish in all of our traditional waters, lands and territories in our customary manner, as our Elders have told us for generations. An important part of this promise is our right to use, and have control over, the environment in our traditional territories, lands and waters, in order to exercise these rights.

4.6 Mushkegowuk Council submits that these oral promises dramatically expand the scope and strength of the rights of the Mushkegowuk First Nations under the Treaty to hunt and fish, compared to what has been recognized (and understood by the government) in the past. Mushkegowuk Council submits that these promises should have very major effects on how and to what extent the federal government makes decision about the land, water and

[2] *R v. Morris*, [2006] 2 S.C.R. 915 at para. 24: "oral promises made when the treaty was agreed to are as much a part of the treaty as the written words". See also *R. v. Sundown*, [1999] 1 S.C.R. 393 at para. 24: "In many if not most treaty negotiations, members of the First Nations could not read or write English and relied completely on the oral promises made by the Canadian negotiators. There is a sound historical basis for interpreting treaties in the manner summarized in *Badger*. Anything else would amount to be a denial of fair dealing and justice between the parties."

environment in the Mushkegowuk territory and, in contrast, how many of those decisions are rightfully and legally ***within the jurisdiction of the Mushkegowuk First Nations***.

4.7 The reality is that there are two very different understandings of Treaty 9 – one now clearly supported by the weight of evidence. On one side, the federal government relies solely on the written Treaty document to purportedly extinguish or diminish First Nation rights to use and control land (using the "taken up" clause); on the other side, the Mushkegowuk First Nations rely on the actual terms agreed to according to current evidence, which preserve First Nations jurisdiction and control over our waters, lands and resources.

4.8 What this means in the context of the federal government's review of the *Canadian Environmental Protection Act*, is that the Mushkegowuk First Nations have legally protected rights (as contained in the Treaty – properly constituted to include the oral promises) to jurisdiction and control over the lands, waters and resources in our traditional territories, including to protect our environment to hunt, fish and for other traditional purposes.

4.9 Accordingly, Mushkegowuk Council submits that the federal government must obtain approval and consent of the Mushkegowuk First Nations before taking any action that could potentially infringe these rights. In other words, any violation or infringement of these oral promises (for example environmental impacts or effects on the lands or waters in our traditional territories from a project that is subject to the *Act*) is an infringement of the Mushkegowuk First Nations' Treaty rights and, therefore, can only proceed with prior informed approval (that is, consent) of the Mushkegowuk First Nations.

Towards respect and implementation of the legal rights of the Mushkegowuk First Nations

4.10 Mushkegowuk Council submits that the *Act* must be revised and amended in order to recognize and affirm the legal rights of the Mushkegowuk First Nation communities, based on the oral and legally and constitutionally binding promises of the government Treaty Commissioners detailed above. In other words, Mushkegowuk Council submits that the Government of Canada is legally required to revise the *Act* because it is not in accordance with, and infringes on, the legal rights of the Mushkegowuk First Nations to hunt and fish in our traditional territories and in our customary manner.

4.11 As the Expert Panel members may be aware, a lawsuit against both Canada and Ontario has been commenced in relation to these oral promises.[3] However, this review process provides an opportunity for the federal government to begin to take steps to address these issues outside the courtroom, as Ontario is already doing.[4] In other words, Mushkegowuk Council submits that the Expert Panel and the federal government, through this review, have an opportunity to take a "big picture" view of these issues and start making real,

[3] Ontario Superior Court of Justice File No. CV 13 488403.

[4] Ontario and Mushkegowuk Council have developed a Treaty Roundtable based on the willingness to move forward on practical initiatives that recognize the contrasting views of the Treaty understanding by the parties. Canada has been invited and encouraged to join this Treaty Roundtable many times and is encouraged to become a signatory to the Memorandum of Understanding in that regard.

practical and recognizable progress towards respecting and implementing the rights of Indigenous People and communities in Canada.

4.12 In this review of the *Canadian Environmental Assessment Act*, Mushkegowuk Council submits that the recognition, respect and implementation of the legal rights of its member communities can be accomplished by amending the legislation to specifically allow and provide for Mushkegowuk First Nation-led control and jurisdiction over the environment in the Mushkegowuk traditional territories. In a practical sense this would mean that the Responsible Authority would work with the Mushkegowuk First Nations or their designated departments to appropriately protect the environment in the Mushkegowuk traditional territories. This would be done through both the provisions of the *Act* as well as through the Mushkegowuk First Nation's traditional laws and customs.

4.13 Mushkegowuk Council submits that not only is a Mushkegowuk First Nation-led approach necessary (and legally required) to recognize, respect and implement the rights of the Mushkegowuk First Nation members in relation our traditional territories (as set out in the oral promises), but it also would provide for better and more appropriate protection of the environments in our territory because it would incorporate the Mushkegowuk First Nations' important traditional knowledge of, responsibility and respect for, and relationship with these lands and waters.

4.14 Further, and importantly, amending the *Act* to recognize and implement Mushkegowuk First Nations' jurisdiction and control over our traditional territories would also be an immediately recognizable step towards, as Prime Minister Trudeau has stated, "reconciliation" with First Nations in Canada and would also be consistent with the Federal government's stated goal of implementing the United Nations Declaration on Indigenous Peoples ("UNDRIP") in Canada.

The Federal and Provincial governments both have a legal obligation to respect and implement our Treaty rights

4.15 As is noted above, the government usually uses the "taken up" clause in the written Treaty 9 document to justify infringements on our Treaty-protected rights to use our traditional territories to hunt and fish. The recent Supreme Court of Canada ruling in *Grassy Narrows First Nation v. Ontario* ("*Keewatin*"),[5] interpreted the Federal government's role with respect to "taking up" Provincial lands under Treaty No. 3, to be limited. However, and importantly with in the context of this review, Mushkegowuk Council submits that this ruling does not mean that the Federal government has any less of an obligation to ensure that it fulfills and honours its legal obligations and responsibilities to the Mushkegowuk First Nations under Treaty No. 9. In other words, Mushkegowuk Council submits that this court ruling does not mean that the *Canadian Environmental Assessment Act* should not apply when a project has the potential to impact our constitutionally protected Treaty rights.

[5] 2014 SCC 48.

4.16 There are several reasons for this, including (and perhaps most importantly) that the Treaty rights of Mushkegowuk First Nations detailed above **are much broader and more substantial** than what was analyzed by the courts in *Keewatin*. Mushkegowuk Council submits that, based on the Treaty commissioners' personal diaries and oral promises made, the lands in the Mushkegowuk traditional territories **cannot be "taken up" without the full and informed consent of the Mushkegowuk First Nations**. In other words, the issues raised by possible adverse environmental effects on our lands and waters from a project go directly to the heart of what both Canada and Ontario promised my grandfather and other ancestors that the Treaty would protect: our sources of food, culture and livelihood. Accordingly, in our submission, this is an area of federal or possibly shared jurisdiction.

4.17 Further, Mushkegowuk Council submits that, in any case, if a project could impact our Treaty rights to use of our traditional territories, Canada cannot delegate an environmental assessment to the province under s. 32 of the *Act*, unless and until the province formally agrees to respect and implement our Treaty No. 9 rights as orally agreed to (by requiring the informed consent of the Mushkegowuk First Nations at all stages of environmental assessment process). While we are working closely and well with Ontario on these issues, it has yet to formally recognize the extent of our Treaty rights in this way.

5. Recommendations of Mushkegowuk Council

Central Recommendation – consent of the Mushkegowuk First Nations is required

5.1 As detailed above, in order to respect and implement our Treaty rights, Mushkegowuk Council submits that the *Act* must be revised and amended so that the informed **consent** of our First Nation communities is obtained before any projects are commenced that have the potential to impact our Treaty rights to the lands and waters in our traditional territories. This would include both projects within our traditional territories, as well as projects that could impact our lands and waters, such as projects for which our traditional territories are downstream or down muskeg. Further, in order for consent to be informed, as part of the environmental assessment processes, our First Nation communities would need our own independent experts, access to or completion of regional "baseline studies" of the environment, access to the evidence of the proponent, and the opportunity test such evidence, for example through cross examination.

5.2 Mushkegowuk Council submits that what is required is a fundamental "re-set" of thinking about the nature and extent of the Treaty rights of the Mushkegowuk First Nations. We need to end "consultation", and instead move towards full, informed consent from the Mushkegowuk First Nations, as Nation-to-Nation partners with Canada for the environmental assessments processes that may impact the environment, and accordingly, our rights, in our traditional territories.

Specific Recommendations in relation to the Act

5.3 Based on Mushkegowuk Council's overall submission (that the *Act* should be revised in order to respect and implement our Treaty rights by requiring our **consent** to projects that

could impact our Treaty rights) it may be necessary to consider large-scale revisions to the *Act*.

5.4 However, to assist the Expert Panel, we have identified several areas of the existing *Act* that we submit must be revised in order to begin to move towards protecting and affirming our legal rights, as detailed above. In other words, we have reviewed the *Act* and identified some of (though by no means all of) the ways that the *Act* could be changed to take steps toward implementing our primary submission. These could be used by the Expert Panel to revise the *Act*, or for inclusion in a "new" *Act*.

A. **The purposes of the *Act* under s. 4 must be expanded to include:**

- "to protect, respect, affirm and implement the Treaty-based and other legal rights of Indigenous Peoples in Canada to a healthy environment in order to continue their traditional ways of life";
- "to ensure that the consent of Indigenous Peoples whose Treaty-based and other legal rights could be impacted by projects that are subject to this *Act*[6] is obtained before the project proceeds";
- "to ensure that environmental impact assessments are conducted and analyzed based on cumulative, regional data and information, specifically including the traditional knowledge of Indigenous Peoples in Canada"; and
- "to ensure that the projects that are subject to the *Act* create a net positive impact on sustainability and Canada's climate change targets".[7]

B. **The projects that are screened for a possible environmental assessment should be broadened and expanded to specifically include projects that have the *potential to impact* the Treaty-based or other legal rights of First Nations.**

- This would require substantial revisions to the designated project regulations.

C. **First Nations whose rights may be impacted should be informed and engaged with as early as possible in the process under the *Act*.**

- For example, s. 9 of the *Act* should be amended to ensure that any First Nations whose Treaty-based and other legal rights may be impacted be specifically notified and provided information about the possible project as soon as possible (i.e. within a certain timeline after the government is aware of the project);
- Similarly, s. 17 should be amended to provide direct notification to First Nations that may be affected by the project within a certain timeline; and
- Consistent with regional, cumulative impact assessments as noted above, this notification must specifically include that First Nations are notified and engaged

[6] Specifically including projects that are screened to determine if an environmental assessment should be completed.
[7] The Mushkegowuk First Nations are situated in Northern Ontario and, accordingly, we are particularly impacted by our changing climate. The changing climate has a major impact on our traditional way of life, including hunting and fishing. It also makes it increasingly difficult (and expensive) for many of our communities to obtain much needed food and other supplies because, among other challenges, the time that the Winter Road is operational is shorter and shorter each year.

in the process *if their legal rights in relation their traditional territories could be impacted*. This would include, for example, notification if the project could impact a First Nation's territories or lands downstream or down muskeg from the project location, as detailed in our previous submissions, dated July 20, 2016.[8]

D. **Mushkegowuk First Nation <u>consent</u> means the right to require an environmental assessment (and the type of assessment) if the project could impact our Treaty-based legal rights**.

- For example, s. 10(b), s. 38(1) and 40 of the *Act* should be amended to require that the agreement (consent) of the affected First Nation must be obtained before making a decision about whether or not an environmental assessment is required or whether the assessment should or should not be referred to a panel or to a joint panel, respectively.

E. **The environmental effects and factors to be considered during an assessment must be expanded to include potential impacts on our Treaty-based legal rights.**

- For example, s. 5(1)(c) and 5(2)(b) should be amended to add the consideration of impacts from a change in the environment on the exercise of Indigenous Peoples' Treaty-based or other legal rights;
- Similarly, s. 19(1) should be amended to require that environmental effects that *could* impact Treaty-protected rights to a healthy environment that supports fish, waters, animals and birds are specifically taken into account; and
- Section 19(3) should be amended to *require* that traditional knowledge provided by Indigenous Peoples whose rights could be impacted by the project be taken into account.

F. **Mushkegowuk Council First Nations should be full <u>partners</u> in the environmental assessment process.**

- Throughout the process for any project subject to the *Act*, that could impact our Treaty-based or other legal rights, Mushkegowuk First Nations must be provided with all of the relevant information such that the First Nations can provide **informed** consent, if they choose to do so;
- In addition, the rights of the Mushkegowuk First Nations with respect to the engaging in the assessment process must be strengthened, including by allowing for testing of the evidence of the proponent (such as through cross-examination), as well as increased capacity funding under s. 57 (and the associated policies), in order to, for example, obtain regional "baseline" studies to inform decisions about the project and subsequent monitoring; and
- Similarly, s. 28 should be amended to include full participation rights for Mushkegowuk First Nations, as detailed above.

[8] A copy of these submissions is enclosed.

G. **The rules regarding a Review Panel must be revised to recognize and implement our rights as <u>partners</u> in these assessments.**

- Sections 42 of the *Act* should be amended to require consent of the impacted Mushkegowuk First Nations with respect to both the terms of reference for, and members of, a review panel;
- Section 43 of the *Act* should be amended to specifically require any review panel to include analysis of environmental impacts that could impact Indigenous Peoples' Treaty-based or other legal rights;
- In addition, section 44(2) should specifically require the review panel to obtain studies commissioned by Indigenous People whose rights could be impacted by a project; and
- Section 45(1) should be amended to require the review panel to allow impacted First Nations to summons and cross-examine witnesses.

H. **The Agency must work directly with the Mushkegowuk First Nations.**

- Section 105(e) of the *Act* should be amended to require the Agency to work with the affected Mushkegowuk First Nations with respect to monitoring and enforcement of projects that could impact our Treaty-based and other legal rights; and
- Section 105(g) of the *Act* should be changed to reflect the requirement of **consent** rather than consultation (both as set out above for the Mushkegowuk First Nations, and also to be consistent with the Federal governments stated commitments with respect to UNDRIP and reconciliation with First Nations in Canada).

6. Conclusion: This is a unique and timely opportunity to take a major constructive step towards reconciliation, and towards respect for and implement of our rights as protected by the Treaty

6.1 In summary, we request that the Expert Panel take this opportunity to make meaningful, long-term and critically important changes to the federal environmental law. Changes recommended and made to the *Canadian Environmental Assessment Act* can be replicated in other federal environmental legislation. If the Expert Panel decides to recommend changes that move towards reconciliation with us and respect for and implementation of our legal rights, this may well create a path for important and much-needed changes to other environmental legislation across Canada.

6.2 My people, the Omushkego, have lived, and will continue to live, in our traditional territories and carry on our customary ways of life - including our deep connection, respect and relationship with our lands, waters and animals - forever. That will not change. What can change is the federal government's commitment to us and relationship with us, the Mushkegowuk First Nations, as Nations within Canada – so that we can begin to work as partners in protecting and respecting our lands and waters.

6.3 We appreciate this opportunity to have a discussion with our Treaty Partners, the Federal government, about these critically important issues. Meeg wetch.

Respectfully,

Grand Chief Jonathan Solomon

Comments – The Review of Environmental Assessment Processes - Aboriginal Participation in Environmental Assessment

Submitted to:
Review of Environmental Assessment Processes
Canadian Environmental Assessment Agency via email

Date: July 20th, 2016
By:
Vern Cheechoo, Director of Lands and Resources for Mushkegowuk and assisted by Suzanne Leclair, Legal and Technical Advisor – Ring of Fire Project for Mushkegowuk Council

Introduction

The Ministry of Environment and Climate Change, supported by the Ministry of Fisheries, Oceans and the Canadian Coast Guard, Ministry of Natural Resources, Ministry of Indigenous and Northern Affairs and Ministry of Science, is reviewing Canada's environmental assessment processes.

Mushkegowuk Council is a representative council for 7 First Nations in Hudson and James Bay lowlands and waterways. They include Attawapiskat First Nation, Taykwa Tagamou First Nation, Kashechewan First Nation, Fort Albany First Nation, Moose Cree First Nation, Chapleau Cree First Nation and Missanabie Cree First Nation.

Proponents rely on the environmental assessment (EA) process to engage with potentially impacted indigenous groups. Canada's Environmental Assessment (EA) process should be designed to provide certainty for investors, proponents, decision makers and especially, indigenous groups impacted by projects.

Unfortunately, the federal EA process is woefully inadequate because it lacks the credibility and clarity to provide a predictable process to ensure aboriginal consultation. Mushkegowuk Council's experience with Noront Resources' Eagle's Nest Project (also known as the Ring of Fire development) illustrates the procedural issues with Canada's EA and possible consequences of such procedural shortcomings.

The Hudson James Bay Lowlands and River ways and the Mushkegowuk People

As Mushkegowuk people, we call ourselves Illiluwuk or Ininiwuk, also known as the Omushkego people. Our First Nations are located in the waterways and western shores of Hudson and James Bay Lowlands, the world's third largest wetlands.

As Omushkegowuk, we live together in small kin-based groups and we respect and help one another. We have a sacred Treaty agreement between our people, the province of Ontario and Canada, which protects our right to hunt, fish, harvest and gather. Our constitutionally protected Treaty rights does not provide to Ontario and Canada the right to proceed with development or other action which would impact our Treaty protected rights, including the area called the Ring of Fire, without our consent.

The wetlands located in the Hudson and James Bay lowlands are the world's great storehouse of carbon. The wetlands are known as the "2nd largest contiguous peatland complex in the world, where more than half (of 208 billion tonnes of carbon) of Canada's terrestrial soil carbon is sequestered" representing a total of 20% of the world's sequestered carbon. We have an important responsibility as the stewards of our wetlands.

The wetlands located in the Hudson and James Bay lowlands are an efficient carbon storage system and provides critical ecosystem services such as:

- Clean water and clean air
- Nutrient storage and medicinal plants
- Flood control and habitat & birds
- Erosion and salinity control
- Carbon sequestration
- Ecosystem stability
- Climatic stabilization

Mushkegowuk's Experience with the Ring of Fire and the Canadian Environmental Assessment Process

Noront's proposed Eagle's Nest project is subject to both the *Canadian Environmental Assessment Act* and *Ontario's Environmental Assessment Act* processes. We have repeatedly raised concerns about direct and cumulative adverse impacts of development on our Aboriginal Treaty rights.

Our experience with Canada's Environmental Assessment process with Noront Resource's Eagle's Nest Project provides an excellent case study to assist this Minister of Environment and Climate Change If approved, the Ring of Fire development led by junior mining company, Noront Resources, will open the gates to more than 20 other exploration companies in Canada's most ecologically sensitive area.

Our Mushkegowuk First Nations are located directly downstream and down muskeg to this proposed Ring of Fire development. Noront's Ring of Fire mining assets are located at the headwaters of two of the last major undeveloped rivers in Ontario, namely the Attawapiskat and Ekwan Rivers. Our people continue to travel these rivers. We harvest fish, moose, geese, caribou to name a few, from these rivers and wetlands. They are an important source of food for our people. Our research indicates that 95% of the meat consumed by the people comes from local harvested food.

Despite our downstream and down muskeg location, CEAA approved Noront's Resources Project Description without any obligation to file any consultation plans for our impacted downstream and down muskeg First Nations.

Canada's EA review process for the Ring of Fire project identified potentially impacted First Nations based on their geographical proximity to Noront's Eagle's Nest project. There was no consideration for downstream and down muskeg indigenous groups.

As a result of not being identified as potentially impacted, our Mushkegowuk First Nations have no input into any of the area of studies and the potential for impacts. Furthermore, we have been excluded from any financial, technical, scientific and environmental review of information.

Mushkegowuk's experience with Eagle's Nest Project uncovers one of the most important flaw in Canada's EA review process: the failure to consider the downstream and down muskeg impacts, a feature that must be readdressed immediately if the EA process is to provide process certainty. **The current ongoing EA process is limited to "upstream impacts**".

Impacts of Climate Change on Region

The lack of independent studies regarding climate change and downstream and down muskeg impacts are not available in the Hudson and James Bay Lowlands.

Eagle's Nest application is proceeding with no opportunity to assess the socio and environmental risks to the downstream / down muskeg First Nations.

Required studies include:

- Regional wetland, aquatic and terrestrial studies
- Comprehensive socioeconomic studies
- Cumulative and climate change impacts studies
- invasive species
- impacts of development on the water tables and the ability to regulate methyl mercury transport from wetlands

The Ring of Fire is subject to a cocktail of complex governmental policies and regulations such as the Paris Agreement, Species at Risk Act, Northern Growth Plan, Far North Land Use Planning, *Green Energy Act* and *Mining Act*. These emerging regulations are impacting Aboriginal Treaty rights and title. In approving Noront's project description, CEAA did not consider the cumulative impacts of development and climate change on the Hudson Bay and James Bay wetland systems.

Commentary on gaps of the federal consultation process

Our independent third party review has identified the following gaps in the EA ongoing process:

- Failure to consult all impacted First Nations, including downstream Mushkegowuk's First Nations communities and trapline holders. The EIS/EA Report limits Mushkegowuk's "*interests*" to the Eagle's Nest Project because "*Attawapiskat First Nation is located 250 kilometers downstream of the mine site without mention of traditional territory of Mushkegowuk near the mine*."
- Require further analysis to comprehend Noront proposed "innovative" approach.
- No information to properly assess the impact of a proposed all weather road to the Ring of Fire region.
- Questions about the Project's approved EIS federal guidelines. No cumulative effects assessments were carried out in accordance with federal guidelines. Review also highlights inadequate and nominal EIS commitments (7 commitments), contrary to the usual practices of tracking over 100+ commitments.
- **Standards not applicable or appropriate to an ecological sensitive region.**
- **No information to show interconnectivity of wetlands outside of watershed boundaries**. More information will be required to understand the interaction of underground rivers, tunnels and surface waters during spring and high water seasons.
- More studies and independent review will be required to establish acceptable standards / guidelines appropriate for ecological sensitive areas such as the Hudson and James Bay.
- The significant impact of an all-weather road to the Far North region and new influx of non-aboriginal hunters and anglers and introduction of invasive species. No planning or mitigation plans are provided in the EIS / EA Report.
- Unclear on how Project be "permitted" given the lack of completed land use designations under the *Far North Act*
- No identification of Mushkegowuk furbearers or registered traplines to EIS Report
- No identification of impact on plant collections and medicinal plants
- Important cumulative effects issues and lack of direction are underscored. Notable projected projects related to mining development in the Far North region include: Black Thor project, all weather road, transmission line development, Noront's additional mineral mining claims, and hydroelectric projects on the Winisk and Attawapiskat rivers.
- The lack of coordinated planning and long-term direction of related development in the Ring of Fire region is underscored and requires consultation, input and planning strategies as part of an adequate consultation process

Conclusion and Recommendations

1. The creation of a Hudson and James Bay Environmental Advisory Committee comprised of representatives from First Nations, Ontario and Canada to participate in

the policy discussions on areas of environmental stewardship and review of potential downstream impacts;

2. Formally integrate Traditional Ecological Knowledge (TEK) to the EA process;
3. Establish indigenous advisory committee based on ecological boundaries as opposed to national and provincial indigenous structures;
4. Establish regional governance / structures to coordinate cumulative impacts research and priorities
5. Establish regional governance / structure to plan for environmental stewardship and sustainable development
6. Establish a framework to co-develop with indigenous groups on a regional strategic environmental assessment (RSEA) process based on ecological regions so to benefit from local indigenous expertise
7. Establish a framework to begin a regional environmental monitoring and management of protected ecological regions;
8. Identify the mitigation potential of wetland conservation and enhancement as a means to offset the environmental impacts of proposed new projects.