

# Citxw Nlaka'pamux Assembly

Ashcroft Indian Band, Boston Bar First Nation, Coldwater Indian Band, Cook's Ferry Indian Band, Nicomen Indian Band, Nooaitch Indian Band, Shackan Indian Band and Siska Indian Band

## Submission to the National Energy Board Modernization Expert Panel

---

### Recommendations for Modernization

Citxw Nlaka'pamux Assembly

March 2017

**Mailing Address: P.O. Box 618 Merritt, British Columbia V1K 1B8**  
**Office Address: 2187-A Coutlee Ave, Merritt, British Columbia**  
**Phone: (250) 378-1864 Fax: (250) 378-2910 Website: <http://www.cna-trust.ca>**

# Citxw Nlaka'pamux Assembly

Ashcroft Indian Band, Boston Bar First Nation, Coldwater Indian Band, Cook's Ferry Indian Band, Nicomen Indian Band, Nooaitch Indian Band, Shackan Indian Band and Siska Indian Band

## **The Citxw Nlaka'pamux Assembly**

The Citxw Nlaka'pamux Assembly (CNA) is an organization that was formed by eight Nlaka'pamux Bands, in 2013, to manage and administer commitments in a Participation Agreement and Economic and Community Development Agreements specific to a major mine located in British Columbia. The participating bands are: Ashcroft, Boston Bar, Coldwater, Cook's Ferry, Nooaitch, Nicomen, Shackan and Siska.

The CNA formed a territorial stewardship department (TSD) in 2015 to provide technical support to the bands in the administration and implementation of commitments in the agreements. TSD also provides advice regarding provincial and federal legislation that pertains to the regulation of the natural environment. The TSD is grounded in Nlaka'pamux knowledge which provides a foundation for its technical review and analysis.

## **Introduction**

This is the TSD's written submission, on behalf of the Citxw Nlaka'pamux Assembly (CNA) on the National Energy Board Modernization Review. This submission is provided on behalf of eight Nlaka'pamux member bands: the Ashcroft, Boston Bar, Coldwater, Cook's Ferry, Nicomen, Nooaitch, Shackan and Siska Indian Bands.

The Nlaka'pamux people have utilized their lands since time immemorial. These lands hold significant cultural, spiritual and economic value and are central to the Nlaka'pamux way of life and worldview. The Nlaka'pamux Nation has managed their lands and waters in order to sustain their traditional practices and culture that existed prior to contact with Europeans. However, use and reliance on these lands and waters is under increased threat as development – including major industrial pipelines – continues to degrade Nlaka'pamux lands and threatens their very ability to live off the land.

# Citxw Nlaka'pamux Assembly

Ashcroft Indian Band, Boston Bar First Nation, Coldwater Indian Band, Cook's Ferry Indian Band, Nicomen Indian Band, Nooaitch Indian Band, Shackan Indian Band and Siska Indian Band

## **Citxw Nlaka'pamux Assembly's Recommendations for Modernization**

### **1. Nlaka'pamux rights need to be respected from the outset**

The NEB Act needs to recognize and respect the rights of Indigenous Peoples to make decisions on the land in an informed way, and to ensure the Crown has all the information it needs to ensure impacts and risks of pipelines and hydro lines are fully understood before decisions are made. For the CNA member bands, a key component of modernizing the Act is that it respects and reflects indigenous authority in decision making to ensure that future generations are able to sustainably carry out cultural practices and that the current generation will not suffer adverse impacts to their wellbeing without those impacts being properly accommodated.

While the NEB Act and review process may attempt to assess and address impacts on First Nations and the environment, they fall well short of this goal. For example the TMX Project was recommended for approval in Nlaka'pamux territory before the project's impacts on the Coldwater Indian Band's sole aquifer and main source of drinking water were known (Coldwater's experience detailed in Appendix I). First Nations have not been included in decision-making nor has the review process meaningfully contributed to fulfilling the federal government's legal duty to consult and accommodate First Nations.

The federal government has purported to endorse UNDRIP, which includes the standard of free, prior and informed consent. This standard is not reflected in the NEB Act, but should be. The modernization of the Act, along with the review of the legislation governing environmental assessment processes, provides an opportunity for the promises of UNDRIP to be embraced by addressing the deficiencies in the legislation and review process.

**Recommendation:** The NEB Act must be modernized to recognize and respect First Nations' inherent and constitutional rights to govern the lands and resources in their territory. This must be the basis for any assessment process and a critical objective of modernizing the NEB Act.

### **2. Early engagement, including required collaboration on routing is required**

The current process is proponent driven with companies deciding when a project is applied for, where it is located and how it will be developed. First Nations are largely excluded from this process, forced to respond to project Descriptions and Applications that have been designed

# Citxw Nlaka'pamux Assembly

Ashcroft Indian Band, Boston Bar First Nation, Coldwater Indian Band, Cook's Ferry Indian Band, Nicomen Indian Band, Nooaitch Indian Band, Shackan Indian Band and Siska Indian Band

without meaningful consideration of their interests. While there is an obligation for proponents to consult with First Nations in the NEB Filing Manual, this obligation has proven to be entirely unsatisfactory. Collaboration should be required, to ensure that First Nations' interests and values inform project design and location.

The CNA's member Bands and the Nlaka'pamux Nation have land management objectives and laws of their own to protect values of importance and maintain appropriate relationships with the land, water and the life they sustain. These need to be respected and adhered to throughout the NEB process, but particularly in the early stages when key decisions like project location and routing are made. Failing to collaborate before submitting a project proposal misses the opportunity to avoid or minimize impacts from the outset. It also means proponents take the risk of a First Nation taking an immediate adversarial position against a proposal. If the NEB then accepts the proposal for review, key aspects of the project are set, and gain significant momentum, without meaningful involvement of the First Nation.

As an example, a lack of meaningful engagement with Coldwater meant that Trans Mountain identified a preferred route through the Coldwater Valley without even being aware of the existence of Coldwater's sole source aquifer. Had Trans Mountain been required to collaborate with Coldwater early on, this critical (and basic) information could have informed routing decisions that would have ensured impacts of each Project route were fully and adequately assessed through the NEB process, ensuring that an informed decision could have been made.

The federal government and project proponents should engage with First Nations well before the review process begins. During this early engagement discussions with First Nations about whether the proposed project should proceed to a formal assessment or not should occur. These discussions must be based on information that is produced by First Nations including land use plans, traditional use studies, socio-economic studies or other available information about key interests and rights impacted. If the information needed to inform these discussions is not available, the federal government and/or project proponent should fund work in order to ensure an initial assessment of the project can occur. This strategic level planning work should be done before the project enters the regulatory process.

A number of tools and procedures are required to ensure that this early engagement occurs. CNA recommends that the NEB Act and the Filing Manual set out clear requirements for collaboration with First Nations and Indigenous groups whose traditional territories and rights

# Citxw Nlaka'pamux Assembly

Ashcroft Indian Band, Boston Bar First Nation, Coldwater Indian Band, Cook's Ferry Indian Band, Nicomen Indian Band, Nooaitch Indian Band, Shackan Indian Band and Siska Indian Band

will be impacted by proposed projects. This collaboration must occur before Project Descriptions and Applications are filed with regulators.

Where a pipeline or power line, or other interprovincial undertaking, will be routed through a First Nations territory the proponent should have to obtain the approval from the First Nation for the location, route options and proposed design. Where this consent cannot be obtained, the proponent should be required to put evidence before the Board of reasonable efforts to accommodate First Nations' concerns, values and objectives on project design. The proponent should also be required to justify why there were no feasible alternatives that would accommodate the concerns.

Where the project is proposed within close proximity of an Indian Reserve or Indigenous community, even if not located within the four corners of the Reserve or community, the NEB Act should impose a heightened onus on the project proponent to prove that consent cannot be obtained.

Finally, the NEB Act should clearly provide the Board with the authority to reject a project proposal on the basis that collaboration requirements have not been adequately met. The NEB Act should also provide the Board with the authority to deny or restrict the use of specified areas for a project right of way whenever it is determined, after notice and opportunity to comment, that a certain project location or proposal would have unacceptable adverse effects on a spiritual or cultural site, community water supplies or food sources, or wildlife or recreational areas.<sup>1</sup> The Board would be required to set forth in writing and make public findings and reasons for making any such determination.

**Recommendation:** The NEB Act and Filing Manual should require early collaboration on project design and routing with the objective of receiving consent for the location, route options and design proposed. Where First Nations' consent is not obtained, the onus should be on companies to demonstrate that reasonable efforts were made to obtain consent. When a project is proposed within close proximity of an Indian Reserve or community a heightened onus should be placed on companies to prove that reasonable efforts have been made to obtain consent but that it can't be obtained. Finally, the NEB should have the authority to reject a project proposal if collaboration requirements are not met and to designate areas where

---

<sup>1</sup> Regulators in other jurisdictions have such pre-emptive powers. See, for example the Environmental Protection Agency's powers under s. 404 of the *Clean Water Act* (Federal Water Pollution Control Act, 33 USC 1251).

# Citxw Nlaka'pamux Assembly

Ashcroft Indian Band, Boston Bar First Nation, Coldwater Indian Band, Cook's Ferry Indian Band, Nicomen Indian Band, Nooaitch Indian Band, Shackan Indian Band and Siska Indian Band

projects cannot be proposed if specific locations would pose unacceptable adverse effects on key interests.

### **3. Decision making based on independent scientific evidence**

Another problem with the proponent driven process under the NEB Act (and CEAA, 2012) is that the onus is on the proponent to evaluate the environmental risks of their own project. Proponents undertake studies for their application with little to no oversight by the NEB. The Board then has the responsibility of assessing the proponent's conclusions. However, the Board's reports often include vague conclusions, such as findings that the proponent's assessment of Project impacts on wildlife or fisheries are "reasonable" without providing a clear explanation of their reasons.

As an example, for the TMX Project the NEB accepted Trans Mountain's assessment of impacts on groundwater and water quality, and accepted commitments by Trans Mountain that areas of high risk would be identified and additional mitigation measures would be developed.<sup>2</sup> These conclusions were drawn generally, about the entire pipeline route, and in the space of a few paragraphs despite the fact that impacts of the TMX Project on Coldwater's sole source aquifer had yet to be assessed. The Board apparently thought such an assessment could wait until after the Project was approved.

Both the NEB Act and CEAA should require that impartial third party consultants undertake the environmental impact assessment, to be paid for by proponents. The importance of seeking and acting on the best available evidence has been repeatedly highlighted, recently by a group of PhD candidates from across Canada:

Making defensible and credible inferences supported by the best available evidence includes knowledge from experiments, theory, observations and/or modeling from multiple disciplines, collected and interpreted without influence from those who stand to gain or lose from the conclusions. We recommend that existing and potential environmental impacts of projects be assessed – with methods, results, and interpretations rigorously peer-reviewed – by parties with arms-length relationships from proponents. Where knowledge gaps impede adequately assessing risk or effects,

---

<sup>2</sup> NEB Report on the TMX Project, at pg. 178.

# Citxw Nlaka'pamux Assembly

Ashcroft Indian Band, Boston Bar First Nation, Coldwater Indian Band, Cook's Ferry Indian Band, Nicomen Indian Band, Nooaitch Indian Band, Shackan Indian Band and Siska Indian Band

information should be generated rather than extrapolated from limited and/or lower quality information; decisions can be adapted considering new, robust evidence.<sup>3</sup>

Problems with heavy reliance on the proponent are further exacerbated by the fact that the NEB, rather than the Canadian Environmental Assessment Agency, is the responsible authority for conducting environmental assessments where required. This shift in responsibility for interprovincial undertakings is the result of extensive gutting of environmental legislation in 2012 by the Harper Government and attempts to streamline approval processes. Unfortunately, this streamlining came at the expense of a thorough and balanced assessment of environmental and indigenous concerns.

The NEB does not have the institutional capacity to ensure thorough and balanced environmental assessments occur. The NEB possesses expertise in energy supply and demand analysis and forecasting, and the economic, technical and logistical aspects of oil and gas pipelines. The responsibility for conducting environmental assessments of NEB regulated projects should be returned to the CEAA, which was the case prior to 2012. Together, the NEB and CEAA could then assess projects through a joint review panel.

**Recommendation:** Responsibility for conducting environmental assessments for NEB regulated projects should be returned to CEAA, and both CEAA and the NEB Act should be amended to require environmental and social impact assessments to be conducted by environmental consultants that are independent of proponents to ensure that decision are made based on the best available information.

## **4. Meaningful involvement of First Nations in assessing impacts**

First Nations are largely excluded from determining the significance of proposed projects on their rights and title interests or even identifying important impacts that should be assessed. While traditional land use studies, socio-economic studies, or even studies about their groundwater are often conducted with funding from proponents or the Crown, these studies are rarely meaningfully incorporated into the assessment of projects.

Meaningful First Nations involvement requires developing values to be assessed, gathering information specific to those values and developing an assessment methodology (including

---

<sup>3</sup> November 15, 2016 letter to Prime Minister Trudeau from A. Jacob et al re: lack of scientific rigour in environmental assessments and regulatory decision-making, pg. 1 (emphasis added, references omitted).

# Citxw Nlaka'pamux Assembly

Ashcroft Indian Band, Boston Bar First Nation, Coldwater Indian Band, Cook's Ferry Indian Band, Nicomen Indian Band, Nooaitch Indian Band, Shackan Indian Band and Siska Indian Band

thresholds of significance) that reflects First Nations' perspectives. Neither the NEB Act nor CEEA, 2012 provide for the involvement of First Nations in the assessment of projects impacts in this meaningful way. The total reliance on assessments undertaken by the proponent as the foundation for the NEB review, with little time and opportunity for First Nations to provide meaningful input, is a key factor that undermines the utility and integrity of the review process.

For the TMX Project, impacts on First Nations were assessed generically, rather than considering the unique fact and circumstances of each group as directed by courts.<sup>4</sup> It is not appropriate for proponents to simply assess potential impacts on rights to harvest and use of lands and resources, or to look at impacts on Aboriginal peoples generally, rather than considering each community's specific right.<sup>5</sup> This generic approach ignores the unique rights and interests of each community. For example, the distinct impacts on Coldwater's sole source aquifer and spiritual beings known as little people and burials along creeks in the Coldwater Valley were not taken into consideration using this generic approach. Impacting and potentially destroying, foundational aspects of the Nlaka'pamux way of life were ignored by the NEB in reviewing the TMX Project, in part because of the generic approach undertaken to assess impacts of the Project.

Modernization of the NEB Act needs to ensure that project impacts on aboriginal rights and interests are meaningfully and accurately addressed. This can only be achieved through the meaningful participation of First Nations. CNA recommends that the NEB Act be revised to achieve this in two ways: 1) to allow First Nations to undertake their own assessment of project impacts, and 2) for those First Nations that do not want to undertake their own assessments, to ensure those First Nations are meaningfully engaged and consulted in the process.

In order for First Nations to undertake their own assessments, the NEB Act needs to be amended to provide the opportunity for First Nations to be recognized as jurisdictions capable of carrying out their own assessments of proposed projects. This could be achieved by amending the NEB Act to require that the responsible authority for making the decision or recommendation with respect to the project (such as a joint panel as we have recommended) to consult and cooperate with respect to assessment of the project with any jurisdiction.<sup>6</sup> The

---

<sup>4</sup> *Gitxaala Nation et al v. HMTQ et al*, 2016 FCA 187, at para 236.

<sup>5</sup> *Gitxaala*, at para 241.

<sup>6</sup> Section 18 of CEEA, 2012 provides a process by which jurisdictions are able to be recognized and a requirement for consultation and cooperation with that jurisdiction by the reasonable authority. The definition of jurisdiction under CEEA should similarly include First Nations and Indian Bands to allow for coordinated assessments for projects caught by those acts.

# Citxw Nlaka'pamux Assembly

Ashcroft Indian Band, Boston Bar First Nation, Coldwater Indian Band, Cook's Ferry Indian Band, Nicomen Indian Band, Nooaitch Indian Band, Shackan Indian Band and Siska Indian Band

definition of a jurisdiction in the NEB Act would then include First Nations, Indian Bands and Aboriginal groups.

By recognizing First Nations governments as capable of assessing project impacts, certain aspects of the assessment could be undertaken directly by the First Nation, or they could direct the third party consultant on the scope of the assessment needed to determine impacts on their unique rights and interests. Decisions made by each jurisdiction could be coordinated so as to comply with timelines set out in the Act, thus providing certainty for proponents.

As an alternative for First Nations that do not want to conduct their own assessments, the NEB Act should be modernized to enable their meaningful participation in assessments. This would be achieved, in part, by recommendations made elsewhere in this submission, such as the need for early engagement, collaboration on issues like project routing and opportunities to provide input into impact statements prepared by the independent consultants. The means by which aboriginal groups participate in the process must also be flexible, and as a minimum should include: notice, full disclosure of information, a scope broad enough to encompass the full range of the group's rights and interests, adequate resources, opportunities to test evidence and explanations of how comments received from First Nations are demonstrably integrated and addressed by the Board (or joint review panel). Sufficient resources must be provided to enable meaningful participation. Limited funding available for projects such as the TMX Project has meant that groups are either precluded from meaningfully participating in the assessment, or they are put in the unfair position of having to expend scarce resources to participate in an attempt to mitigate or minimize the serious threats posed to their constitutional rights.

**Recommendation:** The NEB Act should allow First Nations to undertake their own assessments of projects, as other jurisdictions under the NEB Act and CEAA. As an alternative for First Nations who do not want to conduct their own assessments, the NEB Act should be amended to ensure meaningful participation.

# Citxw Nlaka'pamux Assembly

Ashcroft Indian Band, Boston Bar First Nation, Coldwater Indian Band, Cook's Ferry Indian Band, Nicomen Indian Band, Nooaitch Indian Band, Shackan Indian Band and Siska Indian Band

## **5. Composition and location of the NEB's Board**

Even with CEAA and First Nations taking responsibility for the environmental assessment of NEB regulated projects, impact statements prepared by independent scientists and shared decision making with First Nations (discussed below); the process of appointing members to the NEB needs to be revised to ensure more diverse composition of the Board.

Under the current NEB Act board members are appointed through a political process with the Governor in Council choosing members<sup>7</sup> primarily from the energy industry. This, along with the fact that the Board's head office is in Calgary<sup>8</sup> (where all Board members are required to live<sup>9</sup>) increases the risk of regulatory capture given the oil and gas industry dominates Alberta's economy. The location and composition of the Board also aggravates First Nations' lack of confidence and trust in the Board, which arises in part from having members appointed from the energy industry whose focus is the benefits of the proposed project for industry with little regard for multi-generational impacts to First Nations and the environment.

The composition of the NEB needs to reflect the fact that the Board now regularly deals with issues relating to Aboriginal and treaty rights, and impacts on Indigenous communities and people. Courts have said repeatedly that decision-makers must understand the Aboriginal perspective on rights and title. Appointments to the board should reflect this. Experience in the energy sector may be important part of the Board make-up, but so is experience and perspective from Indigenous communities. Future Board appointments should address this, and there should be at least one Indigenous person on each NEB panel that is appointed to consider an application.

CNA recommends that the NEB Act be amended to require the appointment of members to the Board with diverse backgrounds, experience and expertise.<sup>10</sup> Diversity on the Board will help ensure the effective consideration of the extensive impacts of major energy projects and to ensure appropriate and full information about ongoing operations are shared with the public, even if they raise questions about the safety of operations.

---

<sup>7</sup> NEB Act, s. 3.

<sup>8</sup> NEB Act, s. 7.

<sup>9</sup> NEB Act, s. 3(4)

<sup>10</sup> This would also help fulfill the Prime Minister's mandate letter to the Minister of Natural Resources which requires him to ensure Board composition reflects "regional views and has sufficient expertise in field such as environmental science, community development, and Indigenous traditional knowledge."

# Citxw Nlaka'pamux Assembly

Ashcroft Indian Band, Boston Bar First Nation, Coldwater Indian Band, Cook's Ferry Indian Band, Nicomen Indian Band, Nooaitch Indian Band, Shackan Indian Band and Siska Indian Band

**Recommendation:** The appointment structure for the Board should require the appointment of members with diverse backgrounds, experience and expertise, and specifically Indigenous persons who can bring an essential Aboriginal perspective to the Board. Each NEB panel should include at least one Indigenous person.

## **6. Shared decision making with First Nations**

Both domestic<sup>11</sup> and international law<sup>12</sup> highlight the importance of seeking consent for projects that have impacts on Indigenous rights and interests for many years. Under the NEB Act, the decision to approve or reject a project is made by the NEB or the Governor in Council on the recommendation of the NEB. There is no provision in the Act for shared decision making with First Nations. The NEB Act must be modernized to provide for consensus-based decisions on both the final decision on the project, including appropriate conditions that incorporate the structured scientific review overseen by CEAA or joint review panel and any assessments undertaken by other jurisdictions, including First Nations governments.

A consensus decision making framework under the NEB Act should also provide for government to government engagement to address higher level issues – such as revenue sharing or the permanent protection of land. This engagement would create a forum for addressing those impacts on First Nations that can't be accommodated through changes to the project or conditions on its approval.

Even with early engagement, culturally appropriate assessments and decision making based on independent science, there may still be times when project impacts on First Nations preclude the giving of consent. When consensus cannot be achieved, the NEB Act should provide for a dispute resolution mechanism which can be triggered by First Nations.

All decisions made under the NEB Act should be transparent, accountable and based on explicit decision-making criteria. Explicit criteria should include those considerations that are often ignored or inadequately considered by the NEB, such as impacts on social or economic interests and reconciliation and the multi-generational impacts of a project, rather than short term

---

<sup>11</sup> With *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44 (para. 76) the need for consent received significant attention across Canada, but the Supreme Court of Canada contemplated that in some circumstances the duty to consult would require full consent of the aboriginal nation 10 years ago, in *Delgamuukw v. British Columbia*, 3 SCR 1010 [1997], at para 168.

<sup>12</sup> UNDRIP, Articles 3, 4, 19, 26, 43.

# Citxw Nlaka'pamux Assembly

Ashcroft Indian Band, Boston Bar First Nation, Coldwater Indian Band, Cook's Ferry Indian Band, Nicomen Indian Band, Nooaitch Indian Band, Shackan Indian Band and Siska Indian Band

conceptions of economic development. Decisions should provide a full, transparent and cogent account of evidence considered, risks weighed and alternatives considered. When social or economic factors are prioritized over evidence about the impacts of a project on First Nations and their lands and territories, the metrics and rationales for these trade-offs should be clearly explained, including the spatial and temporary scales considered.<sup>13</sup> Simply making decisions based on vague “public interest” considerations as currently provided for under the NEB Act<sup>14</sup> falls far short of this standard.

**Recommendation:** The NEB Act should be modernized to provide for consensus decision making with First Nations and provide for government to government engagement following the NEB process to address impacts on First Nations that haven't been addressed. The NEB Act should also require that decisions made by the Board or joint review panel be based on explicit decision-making criteria. Where social and economic factors are prioritized over evidence about project impacts the metrics and rationales for these trade-offs must be clearly explained. The broad “public interest” consideration currently provided for under the NEB Act should be removed.

## **7. Stronger involvement in compliance verification**

If projects are approved through a process that adequately and meaningfully assesses impacts on First Nations and the environment and a shared decision is made to approve the project subject to conditions, then meaningful tracking, reporting and compliance needs to take place over the life of the project. In addition to adequately assessing project impacts, a critical precondition to compliance and enforcement is ensuring project conditions are clear, enforceable and science based. Ongoing monitoring, reporting, and enforcement of these conditions should be overseen by both Crown regulators and First Nations that are meaningfully involved in monitoring and compliance verification. First Nations should be given access to an impartial and independent body put in place to ensure compliance with project conditions.

---

<sup>13</sup> November 15, 2016 letter to Prime Minister Trudeau from A. Jacob et al re: lack of scientific rigour in environmental assessments and regulatory decision-making, pg. 1 (emphasis added, references omitted).

<sup>14</sup> NEB Act, s. 52(2).

# Citxw Nlaka'pamux Assembly

Ashcroft Indian Band, Boston Bar First Nation, Coldwater Indian Band, Cook's Ferry Indian Band, Nicomen Indian Band, Nooaitch Indian Band, Shackan Indian Band and Siska Indian Band

In addition to ensuring compliance and enforcement of Project conditions, if the project proponent makes monitoring, reporting or mitigation commitments through their project application, the environmental assessment or a management plan then it is critical that ongoing monitoring, reporting and enforcement provision be in place to ensure compliance with those commitments. This is crucial to maintaining confidence in the overall assessment process.

In order to ensure compliance and enforcement of project conditions and proponent commitments CNA recommends that the NEB Modernization ensure:

- Project conditions must be expressed in an unambiguous and enforceable manner, and any commitments made by the proponent should be included as project conditions;<sup>15</sup>
- Specific tracking requirements and timelines must be attached to each condition;
- Appropriate baseline data relevant to the respective conditions must be collected and assessed before project construction takes place;<sup>16</sup>
- Monitoring and enforcement responsibilities must be explicitly delineated and assigned to ensure accountability;
- Proponents must face strict penalties and remediation requirements for failure to comply with project conditions and follow up activities; and
- The monitoring, reporting and enforcement process must be overseen by an independent impartial body that First Nations have a right to appeal to.

The framework for monitoring and enforcing conditions and commitments must not only be designed in cooperation and consultation with First Nations, but First Nations must play an active role in monitoring, reporting and enforcing conditions. Ensuring First Nations are involved in post construction follow up will help ensure shared governance remains in place over the life of the project. In order to ensure meaningful participation on the part of First Nations in monitoring and compliance activities, any shared governance framework must include training and employment opportunities for First Nations, along with sufficient funding and capacity building to support those opportunities.

In the event that a proponent fails to comply with a condition or commitment and is required to undertake remediation efforts, or in the event that remediation measures are required to

---

<sup>15</sup> Note – to be meaningful conditions that purport to manage or mitigate impacts of a project can only be developed *after* project impacts have been assessed through a rigorous, science based assessment that is developed by and with First Nations. This has not been the case for the TMX Project, with conditions being developed without first knowing impacts of the project (e.g. – on Coldwater's sole source aquifer).

<sup>16</sup> Note – in most cases this baseline data will be needed to conduct the assessment itself.

# Citxw Nlaka'pamux Assembly

Ashcroft Indian Band, Boston Bar First Nation, Coldwater Indian Band, Cook's Ferry Indian Band, Nicomen Indian Band, Nooaitch Indian Band, Shackan Indian Band and Siska Indian Band

address unforeseen or emergency project impacts, affected First Nations must be involved in assessing whether remediation has been satisfactorily implemented. If remediation is required for unforeseen circumstances, Proponents must also be required to conduct a review of why remediation was required, and they must be required to prepare a plan that addresses the causes. The affected First Nation must then have the authority to review and approve such a plan before any project activity can resume. The NEB Act should explicitly require the full remediation of lands either following an accident or malfunction or on decommissioning of a project.

Finally, First Nations should have the right to bring unresolved concerns regarding condition or commitment compliance or the adequacy of remediation to the attention of an independent and impartial adjudicator for review and enforcement. This would help avoid situations such as the one facing Coldwater, where the remediation of pipeline leaks on Coldwater's reserve have been ongoing for years and no plan is in place to monitor for future leaks or determine the adequacy of remediation. Remediation efforts have also failed to respect Coldwater's ongoing use of the reserve.

**Recommendation:** The NEB Act should be modernized to require conditions that provide for meaningful tracking, reporting and compliance mechanisms and provide for First Nations involvement in monitoring and compliance, with funding and employment opportunities in the same. The NEB Act should further establish an independent and impartial adjudicator to review complaints from First Nations regarding non-compliance with project conditions or commitments, and to determine whether adequate remediation has taken place in the event of an accident or malfunction. The independent and impartial adjudicator should be given enforcement authority. Full remediation of lands and waters should be required under the NEB Act in the event of an accident or malfunction or on decommissioning of a project.

## **8. Right to judicially review decisions to approve or dismiss NEB regulated pipelines**

As part of the 2012 amendments to the NEB, meant to streamline the approval of interprovincial undertakings, the federal government imposed a requirement under s. 55 of the NEB Act that First Nations, and other intervenors in NEB hearings seek leave (or permission from the court) to file a judicial review of the NEB's decision to approve projects or dismiss applications for the same. In response, the Federal Court of Appeal has established an onerous

# Citxw Nlaka'pamux Assembly

Ashcroft Indian Band, Boston Bar First Nation, Coldwater Indian Band, Cook's Ferry Indian Band, Nicomen Indian Band, Nooaitch Indian Band, Shackan Indian Band and Siska Indian Band

process requiring First Nations to file extensive affidavit evidence and written argument in seeking leave from the court.<sup>17</sup> In some cases this has blocked access of First Nations seeking to challenge the approval of Projects to the courts, with the court denying First Nations leave altogether.<sup>18</sup> In other cases, such as Coldwater's, it has created an onerous and expensive process that limits access to justice. First Nations should have a right to judicially review approvals under the NEB Act. At this time, s. 55 of the NEB Act can be, and has been, applied in a manner which is inconsistent with the constitutional imperative of reconciliation.<sup>19</sup>

**Recommendation:** Section 55 of the NEB Act should be repealed, removing the requirement that First Nations seek and receive leave before challenging decisions of the NEB to approve or dismiss applications for interprovincial pipelines.

---

<sup>17</sup> Federal Court of Appeal Practice Direction – July 23, 2014: Applications for leave to apply for judicial review under subsection 55(1) of the *National Energy Board Act* of an order of the Governor in Council made under subsection 54(1) of the *National Energy Board Act*.

<sup>18</sup> Note – in 2015 Blueberry River First Nations was denied leave to the Federal Court of Appeal to file a judicial review application of an NEB regulated pipeline that would induce significant development in the core of their territory. The federal government refused to meet with Blueberry following the NEB's recommendation to approve the Project. Blueberry's application for leave to judicially review the Federal Court of Appeal's denial has been before the Supreme Court of Canada for over a year (see: *Blueberry River First Nations v. Attorney General of Canada and Nova Gas Transmission Ltd.*, in the Supreme Court of Canada, on appeal from the Federal Court of Appeal File No. 36676).

<sup>19</sup> Denying leave to a First Nation without reasons and in a summary way (as provided for and enabled by s. 55 of the NEB Act) means that First Nations can have their concerns dismissed by the courts without ever knowing whether their concerns have been properly considered let alone addressed. This is one of the issues raised by Blueberry River First Nations in their application for leave to the Supreme Court of Canada.

# Citxw Nlaka'pamux Assembly

Ashcroft Indian Band, Boston Bar First Nation, Coldwater Indian Band, Cook's Ferry Indian Band, Nicomen Indian Band, Nooaitch Indian Band, Shackan Indian Band and Siska Indian Band

## **Summary of Recommendations**

### **1. Recognition of First Nations' inherent rights to govern as key pillar of the modernization.**

The NEB Act must be modernized to recognize and respect First Nations' inherent and constitutional rights to govern the lands and resources in their territory. This must be the basis for any assessment process and a critical objective of modernizing the NEB Act.

### **2. Early engagement and authority to identify no-go zones.**

The NEB Act and Filing Manual should require early collaboration on project design and routing with the objective of receiving consent for the location, route options and design proposed. Where First Nations' consent is not achieved, the onus should be on companies that reasonable efforts were made to achieve consent. When a project is proposed within close proximity of an Indian Reserve or community a heightened onus will be placed on companies. Finally, the NEB should have the authority to reject a project proposal if collaboration requirements are not met and to identify areas where projects cannot be proposed if specific locations pose unacceptable adverse effects on key interests.

### **3. Evidence based decision making.**

Responsibility for conducting environmental assessments for NEB regulated projects should be returned to CEAA, and both CEAA and the NEB Act should be amended to require environmental and social impact assessments to be conducted by environmental consultants that are independent of proponents, to ensure that decision are made based on the best available information.

### **4. Meaningful involvement in assessing impacts on First Nations.**

The NEB Act should allow First Nations to undertake their own assessments of projects, as other jurisdictions under the NEB Act and CEAA. As an alternative for First Nations who do not want to conduct their own assessments, the NEB Act should be amended to ensure meaningful participation.

# Citxw Nlaka'pamux Assembly

Ashcroft Indian Band, Boston Bar First Nation, Coldwater Indian Band, Cook's Ferry Indian Band, Nicomen Indian Band, Nooaitch Indian Band, Shackan Indian Band and Siska Indian Band

## **5. Composition and location of the Board.**

The appointment structure for the Board should require the appointment of members with diverse backgrounds, experience and expertise, and specifically Indigenous persons who can bring an essential Aboriginal perspective to the Board. Each NEB panel should include at least one Indigenous person. The NEB's head office should be moved from Calgary to Ottawa to reduce the risk and perception of regulatory capture by the oil and gas industry.

## **6. Shared decision making.**

The NEB Act should be modernized to provide for consensus decision making with First Nations and provide for government to government engagement following the NEB process to address impacts on First Nations that haven't been addressed. The NEB Act should also require that decisions made by the Board or joint review panel be based on explicit decision-making criteria. Where social and economic factors are prioritized over evidence about project impacts the metrics and rationales for these trade-offs must be clearly explained. The broad "public interest" consideration currently provided for under the NEB Act should be removed.

## **7. Transparent and strong compliance and enforcement.**

The NEB Act should be modernized to require conditions that provide for meaningful tracking, reporting and compliance mechanisms and provide for First Nations involvement in monitoring and compliance, with funding and employment opportunities in the same. The NEB Act should further establish an independent and impartial adjudicator to review complaints from First Nations regarding non-compliance with project conditions or commitments, and to determine whether adequate remediation has taken place in the event of an accident or malfunction. The independent and impartial adjudicator should be given enforcement authority. Full remediation of lands and waters should be required under the NEB Act in the event of an accident or malfunction or on decommissioning of a project.

# Citxw Nlaka'pamux Assembly

Ashcroft Indian Band, Boston Bar First Nation, Coldwater Indian Band, Cook's Ferry Indian Band, Nicomen Indian Band, Nooaitch Indian Band, Shackan Indian Band and Siska Indian Band

## **8. First Nations should have a right to judicially review decisions to approve or dismiss projects.**

Section 55 of the NEB Act should be repealed, removing the requirement that First Nations seek and receive leave before challenging decisions of the NEB to approve or dismiss applications for interprovincial pipelines.

# Citxw Nlaka'pamux Assembly

Ashcroft Indian Band, Boston Bar First Nation, Coldwater Indian Band, Cook's Ferry Indian Band, Nicomen Indian Band, Nooaitch Indian Band, Shackan Indian Band and Siska Indian Band

# Citxw Nlaka'pamux Assembly

Ashcroft Indian Band, Boston Bar First Nation, Coldwater Indian Band, Cook's Ferry Indian Band, Nicomen Indian Band, Nooaitch Indian Band, Shackan Indian Band and Siska Indian Band

## **Appendix I. A Broken Process: The Coldwater Band Experience**

An example of the experience that some of the CNA Bands have had with the NEB process is the Coldwater Indian Band's experience with the recent National Energy Board ("NEB") hearings on, and subsequent approval of, the Trans Mountain Expansion Project (the "TMX Project"). This is a major pipeline that would run through Nlaka'pamux territory and reserve lands of the Coldwater Indian Band. Throughout this process, time, resources and good will have been wasted, demanding an adversarial and confrontational response. Coldwater is seeking to judicially review the NEB's recommendation and the federal Crown's approval of the TMX Project.

The Coldwater Valley, just south of Merritt, BC is part of Nlaka'pamux territory that Coldwater calls home. They have two reserves in the valley, one of which is their primary residential reserve and home to several hundred members. The existing Trans Mountain pipeline runs directly through their residential reserve, literally in the back yards of Coldwater members and within meters of the community's main drinking water well. Coldwater relies on the water supplied by the aquifer below their reserve for drinking water and other domestic and agricultural purposes.

When Trans Mountain filed its Application with the NEB for the TMX Project they relied on a government database of mapped aquifers that didn't include Coldwater's and as a result, it failed to identify Coldwater's aquifer. The proponent also unilaterally removed from consideration the one alternative route that would have avoided risks to the aquifer without consulting Coldwater, and before knowing about Coldwater's aquifer or the risks of the various routes proposed.

Throughout the multi-year NEB process Coldwater expended significant resources – time and energy of Chief and Council and membership, the presentation of oral traditional evidence by community elders, and costs on legal fees and technical consultants – sharing their concerns with the NEB and requesting a specific assessment of impacts of the TMX Project on Coldwater's rights and interests, and in particular of the impacts and risks of the Project to their drinking water. They also requested that the NEB require Trans Mountain to reanalyze Project routing in light of the fact that the Project put Coldwater's sole source aquifer at risk, and that routine decisions were made unilaterally, and without considering any impacts on Coldwater. Funding provided failed to cover the full costs of meaningful participation – which required reviewing thousands of pages of highly technical material beyond Coldwater's in-house

# Citxw Nlaka'pamux Assembly

Ashcroft Indian Band, Boston Bar First Nation, Coldwater Indian Band, Cook's Ferry Indian Band, Nicomen Indian Band, Nooaitch Indian Band, Shackan Indian Band and Siska Indian Band

capacity. The adversarial and formal nature of the process has meant that Coldwater required the assistance of legal counsel to participate in the hearing.

Coldwater's concerns were largely ignored. The NEB issued a Report recommending approval of the Project without making any findings about impacts of the TMX Project on Coldwater or their water supply. The NEB Report failed to respond to Coldwater's request for a reanalysis of project routing. The NEB did recommend a condition requiring Trans Mountain to undertake a study of Coldwater's aquifer and determine what impact the Project would have on it. However, this study was to be conducted after the project has been given final approval by the Crown, including the current approved route.

Coldwater's engagement with the federal Crown following the NEB Report was similarly frustrating. The Crown acknowledged that if hydrocarbons were accidentally discharged from the pipeline on the route "it may be impossible to remediate a groundwater aquifer to potable standards once it has been contaminated by hydrocarbons" and that the route through the Coldwater Valley that the NEB recommended approval of posed the "greatest risk" of any of the proposed routes. The Crown also acknowledged the lack of information and need for further study of Coldwater's aquifer. Despite the acknowledged risks, the fact that the proposed route posed the "greatest risks" and the need for further study, the Crown (via Governor in Council) nevertheless chose to approve the TMX Project against Coldwater's wishes. The Crown accepted the NEB's condition requiring that Trans Mountain study the impacts of the Project on Coldwater's water supply, after the Project is approved but before construction on it begins.

Due to serious failings with the NEB process, NEB report and federal consultation on the TMX Project Coldwater has challenged the approval of the Project in the Federal Court of Appeal and appealed to Prime Minister Trudeau to select a route that does not pose a threat to the community's sole source of drinking water. In doing so, Coldwater reminded the Prime Minister of his promises to build a new relationship with First Nations, founded upon respect and the principles of the UN Declaration of the Rights of Indigenous Peoples (UNDRIP) and to ensure First Nations have clean drinking water. In approving the TMX Project along the riskiest route to Coldwater's drinking water the Prime Minister broke both of these promises.

The NEB process caused and contributed to the numerous failings in relation to the assessment of the TMX Project. Trans Mountain, then the NEB, and finally the federal cabinet all refused to

# Citxw Nlaka'pamux Assembly

Ashcroft Indian Band, Boston Bar First Nation, Coldwater Indian Band, Cook's Ferry Indian Band, Nicomen Indian Band, Nooaitch Indian Band, Shackan Indian Band and Siska Indian Band

consider Coldwater's unique rights and interests set to be impacted by the Project, and failed to consider the alternative routes through the Coldwater Valley.