



# **AROLAND FIRST NATION FEDERAL REGULATORY REVIEW OF THE NATIONAL ENERGY BOARD**

**WRITTEN SUBMISSION TO THE NEB MODERNIZATION EXPERT PANEL**

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## **AROLAND FIRST NATION**

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## REGULATORY REVIEW OF THE *NATIONAL ENERGY BOARD MODERNIZATION*

### 1.0 AROLAND FIRST NATION

Aroland First Nation is an Anishinaabe First Nation located 60 km north of Geraldton and 20 km west of Nakina on Hwy 643 in Northern Ontario. Aroland has 741 Members, approximately 400 live in the community. Aroland First Nation has a deep connection to the lands and waters of our Traditional Territory and strong reliance on traditional activities such as hunting, fishing, trapping and gathering

Aroland is currently involved in the environmental assessment process for Greenstone Gold Mines, TransCanada Energy East, and Noront's Eagle's Nest Mine. Aroland is a signatory to the Ring of Fire Regional Framework Agreement with Province of Ontario and several other First Nation communities. Aroland is working towards sovereignty and jurisdiction of our Traditional Territory through governance, economic development initiatives, land use planning and Ontario's *Far North Act*.

Prior to European contact, the ancestors of Aroland First Nation hunted and fished meats, as well as both cultivated and gathered vegetation from the land. Along with European settlers, however, came the imposition of external knowledge and management systems (including Forest Management Units, parks and protected areas, Wildlife Management Units, mineral claims, registered traplines, and Reserves) often without Aroland peoples' input or consent.

The settlement of Aroland First Nation occurred circa 1900 by community members engaged in the fur trade with the Hudson's Bay Company. Aroland First Nation [Aroland 83 reserve] is comprised of an amalgamation of members with ties to Eabametoong, Marten Falls, Ginoogaming, Long Lake 58 and Fort William First Nations. Aroland is part of the Robinson-Superior Treaty of 1850. Aroland formally acquired band status in 1985. Aroland First Nation is a member of the Matawa Tribal Council and the Nishnawbe Aski Nation.

Although the settlement is not yet formally a reserve, it should be designated as such in the near future and due to an agreement with the Crown is recognized as a reserve under the Indian Act. Following multiple negotiations, Aroland First Nation gained certain reserve status under the Indian Act on April 15, 1985. Reserve lands have recently been dedicated to the First Nation by both Provincial and Federal governments, however, a final formal designation of reserve lands is not yet in place. Current reserve lands contain 19,599 hectares (79.0 square miles) and extend northward from Highway 643 to encompass lands along the western and northern shores of Esnagami Lake. At present, these lands are generally undeveloped, however due to Aroland's close proximity with the Ring of Fire and the proposed Energy East Pipeline, Aroland's Traditional Territory is likely to experience unprecedented levels of development in coming years.

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Provincial and Federal governments, however, a final determination of reserve lands is not yet in place. Current reserve lands contain 19,599 hectares (79.0 square miles) and extend northward from Highway 643 to encompass lands along the western and northern shores of Esnagami Lake. At present, these lands are generally undeveloped, with the exception of a single small community straddling on Highway 643 near the reserve's southern boundary. Aroland First Nation is a member of the Matawa First Nations Management and the Nishnawbe Aski Nation.

In reference to the population of Aroland First Nation, Leblanc et al. (2011) state that:

“According to the records of Nishnawbe Aski Nation (Aroland's Treaty Organization), there are 300 people living on-reserve and 400 others living off-reserve, but we feel an unaccounted number exist. We have a long history with the surrounding area, and in our traditions, maintain a complexity of mutually beneficial relationships with other beings using this land as home. As a result, our community members include all humans and non-humans with whom we are interdependent.” (Leblanc et al., 2011 p. 164)

Aroland holds interests in both stewardship of its traditional lands and in fostering the social and economic well-being and resilience of its members. Comments in this submission as well as the following information regarding Aroland's land use and environmental values speak further to these interests.

## 2.0 NATIONAL ENERGY BOARD MODERNIZATION & INDIGENOUS RIGHTS

A review of the *Environmental Regulatory Processes* was announced by the Canadian Government on October 18<sup>th</sup>, 2016. One component of this process was a Review of the *National Energy Board (NEB)*. Aroland First Nation has a direct interest in the Federal Regulatory Review of the NEB, as numerous NEB regulated energy projects are occurring within our Territory. These projects including the Canadian Mainline, the proposed Energy East pipeline and various transmission projects pose serious environmental risks to our community and cultural well-being. Aroland members rely on hunting, fishing, trapping and gathering for food security, income and cultural practices. As stewards of the land Aroland members have the jurisdictional right responsibility to protect the lands and waters and ensure ecosystem function. Adverse impacts would negatively impact the ability of Aroland members to collect these resources and exercise their Inherent, Aboriginal and Treaty Rights. For these reasons, Aroland First Nation has a vested interest in protecting the lands and waters within their Traditional Territory and contributing to an NEB that is focused on long-term sustainability and conservation.

Traditional Land Use has been an important aspect of Aroland First Nation culture since time immemorial. Aroland members continue to hunt, fish, trap and gather on a regular basis to provide food for their family and community, earn income and exercise their Aboriginal and Treaty Rights. Our Traditional Territory includes forests, lakes and rivers populated with numerous fish and wildlife species. These ecosystems, and the resources they produce, help support economic, social and cultural practices



of Aroland members. The people of Aroland have the right to access and harvest resources in their traditional territory. Aroland First Nation also has the jurisdictional right, and responsibility, to ensure and secure the health of these ecosystems.

All facets of the environment are culturally important to Aroland members. We believe in the interconnectedness of ecosystems and aim to achieve sustainability and balance in our use of the lands and waters. For our First Nation, many wildlife species provide lessons that are important for the community. Beyond these culturally important roles, all that are consumed are considered sacred by the community. Therefore, any impacts to wildlife species will have consequences on peoples' culture, spiritual/emotional health, and way of life.

### 3.0 ISSUES AND RECOMMENDATIONS

The following recommendations are being made by Aroland First Nation in the interest of modernizing the National Energy Board to create an independent Crown regulatory body that is inclusive of Indigenous voices and is equipped to address the unique challenges and opportunities associated with regulating energy infrastructure located on the Traditional Territories of the First Peoples of Canada.

The issues and recommendations fall under the following categories:

- Governance Structure and Mandate
- Decision-making roles and authorities
- Legislative Tools for Lifecycle Regulation:
- Screening, Scoping, and Baseline Evaluation
- Effects Assessment/ Mitigation Measures
- Indigenous Consultation and Engagement

#### 3.1 NEB Governance Structure and Mandate

1. Currently the NEB board members are widely comprised of former corporate professionals from the oil and gas sector. The composition of NEB board members has limited diversity in demographic components such as race, age, and gender.

The NEB must modernize its board membership and roster of staff to advise the board in the following ways:

- Ensure Board membership that consists of Indigenous people.
- Hire board staff with knowledge and experience in subject areas such as: community development, socio-economics, Indigenous Knowledge/ Aboriginal Traditional Knowledge,



Indigenous rights, Indigenous law, Indigenous fisheries, Indigenous business, Indigenous spirituality, Indigenous ecology and water resources, Indigenous approaches to environmental assessment, and other sectors such as renewable energy, energy efficiency, fisheries and aquatic ecology, terrestrial ecology, and climate change mitigation/ adaptation

- Ensure better representation of Indigenous peoples in decision making and oversight roles such as membership on project review panels
- Ensure project review panels consist of a diverse range of background experiences to provide a well-rounded assessment and determination on whether a project is in the best interest of Canadians
- Ensuring diverse project review panel membership that consists of individuals from industry, environmental, community/ social development, and Indigenous Knowledge backgrounds as part of the panel composition and not having the panel biased to one specific expertise or interest area.

2. The National Energy Board currently holds a mandate to “regulate pipelines, energy development, and trade in the Canadian public interest based on economic, environmental, and social considerations” (National Energy Board, 2014). As part of their mandate, the NEB is responsible for:

- Efficient processing of applications
- Regulation of pipeline traffic, tolls and tariffs
- Regulation of traffic, tolls, and tariffs
- Export and import of energy
- Energy studies and advisory function

Given the commitment made by Canada in the Paris Agreement to reduce greenhouse gas emissions economy-wide by 30% below 2005 levels by the year 2030 along with the possibility of a shifting energy landscape, the NEB should:

- Make sure the contributions projects would make to climate change measured in tCO<sub>2</sub>E are evaluated and factored into the decision-making criteria for environmental assessments
  - More specifically, modelling to indicate the projected GHG emissions associated with a project for its entire lifecycle from construction all the way up to decommissioning and post-closure monitoring.
- Along with evaluating the impacts the project would have on climate change as measured in tCO<sub>2</sub>E, have assessments include GHG reduction and mitigation measures identified and incorporated into the conditions of approval for projects moving forward.
- As part of the energy studies and advisory function the NEB plays, the NEB should commence with conducting studies on the long-term outlook of renewable and low-carbon energy uptake in Canada including identifying the opportunities and barriers to renewable and low-carbon energy uptake within Canada and policies and programs that could facilitate a shift to de-carbonizing Canada’s energy system.



3. A selection process for Board members that ensures diversity and inclusivity for Board appointments, and transparent and public selection process is necessary to restore public trust and ensure the board is serving in the public interest. In practice this would involve the following steps in the Board selection process:

- Public participation, such as public hearings, on Board member selection
- Having Board selection processes carried out in a more transparent manner – such as having a parliamentary committee with Indigenous participation to oversee the selection of board members

Have all of the above provisions reflected in legislation via changes to Section 3 of the *National Energy Board Act*.

4. The National Energy Board as a regulator is best suited to provide lifecycle oversight of projects in its domain, and the Canadian Environmental Assessment Agency is best suited for the administration of Environmental Assessments (EAs), including those currently under the NEB's regulatory jurisdiction. This will ensure Federal EAs are delivered in a consistent manner across project sectors, provides Indigenous rights-bearing communities with consistent environmental assessment experiences and environmental assessment relationship building with the Crown through a single agency (one-window), and ensures that a single Crown agency, and its staff, are able to develop long-term knowledge of Indigenous community rights and interests, sustainability objectives, and territorial knowledge. This will also ensure that the NEB will develop similar efficiencies and Indigenous relationship benefits for its lifecycle oversight of energy projects. Considering this we recommend the following:

- Have the responsibility for conducting the environmental assessment for NEB-regulated projects move to the Canadian Environmental Assessment Agency (CEAA); including CEAA maintaining the Crown Consultation role for projects
- Have the responsibility of lifecycle regulation, including ensuring conditions of approval are met, fall to the authority of the National Energy Board
- Ensure the NEB has appropriate staff capacity and expertise to serve as the lifecycle regulator of federal energy projects with the ability to develop effective long-term relationships with Indigenous rights-bearing communities by building up the staff roster with individuals with diverse subject matter expertise that will ensure projects are safely regulated from pre-construction planning all the way to post-closure monitoring. This includes retaining staff or external experts with expertise in subject areas such as: engineering, community development, socio-economics, Indigenous Knowledge/ Aboriginal Traditional Knowledge, Indigenous rights, Indigenous law, Indigenous fisheries, Indigenous business, Indigenous spirituality, Indigenous ecology and water resources, fisheries and aquatic ecology, terrestrial ecology, and climate change mitigation/ adaptation



- Have all the above recommendations adequately reflected in the legislation. Applicable sections of the NEB Act include sections 9, 10, 11, 12, 14, 15, and 17-24

5. In August 2012 the NEB repealed order XG/XO-100-2005 and replaced it with XG/XO-100-2012 including the implementation of a Schedule A flowchart to determine the criteria that would enable a project to qualify for a Section 58 exception under the NEB Act. Step 2 of the Schedule A flow chart provides the following rules/ criteria that if the answer is no the exception does not apply:

- 2.1 Directly affected persons or those persons with relevant information or expertise (e.g., might include Aboriginal groups; directly affected landowners; shippers; federal, provincial, municipal agencies) have been consulted on the project and all issues and concerns have been resolved.
- 2.2 The project will be located entirely on the existing right-of-way or other property on which the facility is located, including company-owned land, easement, leased or licensed land.
- 2.3 The project will not be located on federal lands.
- 2.4 The project will not be located within a provincially- or federally-designated environmentally sensitive area.
- 2.5 The project will not be located in a wildlife area or migratory bird sanctuary (see the *Canadian Environmental Assessment Act, 2012 Regulations Designating Physical Activities* for definitions).
- 2.6 The project will not impact a water body or wetland.
- 2.7 The project will not impact Schedule 1 *Species at Risk Act* species (plant and/or wildlife) or habitat.
- 2.8 The project will not involve an increase in airborne emissions or noise during operations.
- 2.9 The project will not involve chemical or contaminant liquid or solid discharges during operations.

However, no evaluation criteria have been provided to ensure the above requirements have been met. Therefore, it is recommended that the Board develop, implement, and publicly share its assessment criteria. In the case of item 2.1 the development of evaluation criteria must involve participation and feedback from Indigenous groups as they are directly impacted by the outcomes developed..

### 3.2 Decision-Making Roles and Authorities

1. Regulatory decisions should be made on an objective and impartial basis, without conflict of interest, bias or improper influence (OECD, 2013). [The Standing Senate Committee on Transport and Communications](#) cites that because NEB decisions are subject to final approval from the Governor in Council (the Governor General, acting on the advice of Cabinet), this “erodes the Board’s authority and virtually ensures the approvals process is highly politicized” (Senate of Canada, 2016).



2. Due to changes that were instituted via CEAA 2012 and other environmental regulatory amendments that came out of the 2012 Federal Budget Bill, *Bill C-38*, authority regarding final approvals on projects formerly reviewed and evaluated by the National Energy Board rests with Governor in Council (i.e. Federal Cabinet). This means that regardless of the National Energy Board's decision regarding a project it has reviewed, the Governor in Council; which is comprised of the sitting government have final say on whether a project proceeds.

An independent regulator will make decisions based on the best interest of the public and Indigenous Peoples as opposed to the mandate of Cabinet which can hold partisan influence in decision-making.

We fully expect the Crown to make future decisions regarding the regulatory independence of the NEB. Those future decisions will have tremendous impacts on our rights and interests. We require deep and meaningful Indigenous consultation on all future Crown decisions that will impact the independence of the NEB as a regulator.

We must be satisfied that the NEB is not a "captured regulator" and that the members of the Board include Indigenous representatives and members with diverse backgrounds from industry, environmental protection, community/ social development, and Indigenous Knowledge. We must also be satisfied that Board members have a breadth of subject matter knowledge related to our rights and interests.

Restoring the NEB's independence from partisan influence and energy industry influence is important. Crown consultation on decisions related to the future regulatory independence of the NEB must include consultation on oversight and accountability approaches and procedures that can ensure projects are safe and in the best interest of Indigenous peoples of Canada, socially, environmentally, and economically.

Canada has a fiduciary duty to consult and if necessary accommodate Indigenous peoples if there is the potential to infringe Section 35 constitutional rights or Treaty Rights. Even if the NEB is able to function as an independent regulator, the duty to consult rests with the Crown, and not a regulatory body. As such, Governor in Council may continue to represent the Crown and conduct Crown consultation processes, and where applicable, engage in efforts to accommodate Indigenous rights and interests

3. Better, deeper and more robust consultation with Indigenous Peoples before a project decision is finalized is a necessary improvement to the environmental approvals process of NEB-regulated projects and applicable legislation and policy. More specifically the following is recommended:

- Early and deep Indigenous engagement and consultation by the NEB at the screening stage of ESAs and Section 58 exception decisions to determine potential Indigenous rights impacts.
- An additional round of Board consultation with impacted Indigenous groups between the release of the Conditions of Approval report and the NEB issuing of a decision on a project.



- This must be integrated into the process for ALL projects under review and not decided upon on a project-by-project basis

Enhanced, deep and meaningful consultation processes regarding changes to NEB legislation and policy; more specifically conducting consultation including having Indigenous representation in the groups of people tasked with developing policy and drafting legislative changes.

### 3.3 Legislative Tools for Lifecycle Regulation

1. Currently, as has been identified in the Fall 2015 Commissioner of the Environment and Sustainable Development Report 2 on Oversight of Federally Regulated Pipelines, the NEB's tracking of company compliance with pipeline approval conditions is inadequate (Office of the Auditor General of Canada, 2015).

Although the Board has been taking steps to improve its track record and regulatory changes have occurred such as the *Pipeline Safety Act* coming into force in June 19, 2016 which enacts the polluter pays principle, clarifies the audit and inspection authority of the NEB, and may ensure companies maintain responsibility for their abandoned pipelines; there is more to be done to fully modernize the practices of the National Energy Board in regards to lifecycle regulation of energy infrastructure and Indigenous rights and interests.

#### 3.3.1 Compliance, Enforcement, and Ongoing Monitoring

1. Aroland recommends that the NEB strengthen mechanisms for ensuring the Conditions of Approval on projects are met and compliance on these conditions is maintained.
2. Enhance public reporting and access to public information regarding conditions of approval and overall operational compliance through mechanisms such as the release of compliance reports on a regular basis (annual, quarterly etc.). Further, direct notification of compliance status to the intervenors from regulatory process, as well as compliance breaches with special attention to Indigenous intervenors, their notification needs and their capacity requirements to attend to regulatory compliance for facilities in their territories should be implemented.
3. Enhance participation and engagement with impacted Indigenous communities through involvement in monitoring programs including but not limited to environmental monitoring, archaeological monitoring, spill and emergency response monitoring, compliance monitoring, and post-closure monitoring, with reasonable capacity funding.
4. Enhance notification of Indigenous communities about compliance breaches and enforcement orders via the following mechanisms:
  - Release compliance reports on a regular basis (annual, quarterly etc.)



- Direct notification of enforcement orders and follow-up action taken by the proponent to the intervenors to the related project NEB approvals processes

During instances of enforcement orders being issued and follow-up actions being undertaken by a given proponent, provide direct notification to Indigenous groups whose Traditional Territories or harvesting areas are intersected by the project

5. Require project proponents, and existing project operators, to enter into lifecycle agreements with potentially impacted Indigenous communities covering all stages of the project lifecycle. These stages should include planning/approval, construction, operation (including integrity digs) and decommissioning. This will help ensure NEB accommodation of Indigenous right and interests, with minimal burden on NEB staff and resources. These agreements should include, but not be limited to, the following items:

- Participation in cultural heritage and archaeological assessments
- Participation in environmental monitoring
- Participation in facility monitoring (e.g. pipeline or transmission line monitoring)
- Identification and protection of species considered to be at risk by Indigenous communities
- Environmental, cultural heritage and socio-economic mitigation and follow-on programs
- Economic benefits – procurement, supply chain, other
- Linear corridor restoration and maintenance with native species, and with attention to pollinator habitat that benefits Indigenous foods (e.g. wild blueberries)
- Reviews project infrastructure enhancements and improvements that may be available to improve and provide capacity for regional infrastructure and services (e.g. oil pipeline pump stations require transmission reinforcement and/or additional regional power generation that can benefit rural/remote communities and regions; emergency management resources that can be deployed for emergencies beyond the regulated infrastructure)
- Spill response capacity and resources, including training, equipment and service contracts
- Emergency response capacity and resources, including training, equipment and service contracts
- Regulatory compliance monitoring

6. Presently the following components are required as part of a management system for a project:

- Emergency Management Program
- Integrity Management Program
- Safety Management Program
- Security Management Program
- Environmental Protection Program



In their current form these management programs have limited requirements to notify affected Indigenous nations of any incidents or activities that will be undertaken. The NEB should ensure that the requirements of these programs be amended to require notification of Indigenous nations about:

- Opportunities to participate as monitors in these programs, including conditions pertaining to adequate training, contracting, and procurement opportunities
- Adequate whistleblower protections and accountability mechanisms for reporting instances of non-compliance
- Adequate integration of Indigenous knowledge, land use, and occupancy based on guidance provided by the Indigenous groups that have the project located within their Traditional Territory
- Adequate follow-up conducted by the NEB to ensure the conditions mandated pertaining a company's management system are upheld

### *3.3.2 Operations and Maintenance Programs*

1. There should be direct involvement of Aroland First Nation community members where the project intersects or when activities pertaining to the company's operations and maintenance activities impact their traditional lands and waters. This includes providing notice in advance so that Aroland have the capacity and opportunity to raise any issues or considerations of importance and appropriate accommodation measures can be put in place.

2. Ensure measures are taken regarding the protection of the natural environment as well as cultural heritage resources during any operations and maintenance activities – including but not limited integrity management program, facilities maintenance procedures, and any operations that fall outside of the usual day-to-day operations of the facility.

3. Directly consulting AFN in the development and/ or oversight of operations and maintenance programs – including but not limited integrity management program, facilities maintenance procedures, and environmental protection plans.

4. Provide AFN with capacity funding to attend to NEB regulated oversight and maintenance programs in their territory, including funding for legal and technical services to review proponent and NEB reports and compliance information, enforcement orders, and cultural heritage resource protection programs.

5. Require operators to have lifecycle agreements with impacted Indigenous communities whose Traditional Territories or harvesting areas the project intersects to ensure their direct involvement and advance notification when activities are planned pertaining to the company's operations and maintenance activities. Such direct involvement and notification should include but not be limited to Indigenous community involvement and participation in integrity management programs, facilities maintenance procedures, and any operations that fall outside of the usual day-to-day operations of the



facility. This includes providing notice far enough in advance such that the Indigenous groups impacted have the capacity and opportunity to raise any issues or considerations of importance so appropriate accommodation measures can be put in place to address these concerns (e.g. cultural heritage/archaeology, access to harvesting, hunting and fishing areas, environmental issues). Agreements should include provisions and reasonable funding for environmental and archaeological technical expertise on par with the technical expertise available to the proponent and the Board.

6. Presently there is limited guidance provided on vegetation management in transmission line and pipeline right-of-ways (ROWs). There is still frequent use of pesticides to manage vegetation despite its environmental and biodiversity impacts. There are also limited allowances for and encouragement of alternative prescriptions and maintenance practices that maintain wildlife habitat, biodiversity, and water quality protection values. Therefore, we recommend:

- The NEB retain experts to develop Operations and Maintenance guidance and best practices that address these issues.
- Operations and Maintenance guidance policies and/ or manuals be updated to mandate the elimination of pesticide use where possible and application of an Integrated Pest Management (IPM) approach in other circumstances, with an emphasis on protecting water quality and maintaining biodiversity.
- Operations and Maintenance guidance policies and/ or manuals be updated to mandate that project ROWs provide habitat value for wildlife in the project area
- Operations and Maintenance guidance policies and/ or manuals be updated to mandate that project ROWs implement the planting of pollinator friendly species and native plant species as a method vegetation management that supports a thriving ecosystem within a project's footprint.

The NEB can play an important role in supporting and enhancing pollinator habitat along linear corridors. Many of the plants important to Indigenous people across Canada require healthy pollinator populations – like blueberries for example – but those pollinator populations are threatened and in decline. The NEB should develop pollinator planting requirements for linear corridors in consultation with Indigenous people.

### *3.3.3 Emergency Management and Response Programs*

1. There should be mandatory notification to AFN in the instance of any accidental spill, release, or malfunction including the response protocol planned and follow-up compliance monitoring regarding spill/ release abatement.
2. Directly consulting and involving Aroland in the development and/ or oversight of emergency management and response programs
3. The NEB should enhance participation and engagement with Aroland First Nation through involvement, with capacity funding, in monitoring programs including environmental monitoring,



archaeological monitoring, spill and emergency response monitoring, compliance monitoring, and post-closure monitoring.

### 3.3.4 Decommissioning and Post-Closure Monitoring

1. Ensure strong enforcement of measures outlined in the *Pipeline Safety Act* regarding companies maintaining responsibility for their abandoned pipelines.
2. Enhanced notification and participation with AFN in oversight of decommissioning and post-closure monitoring plans via commenting opportunities, implementation of advanced notification systems when

a project is nearing the end of its production lifecycle, and engagement in post-closure monitoring opportunities, with Indigenous capacity funding.

3. Enhance public and Indigenous notification and participation in oversight of decommissioning and post-closure monitoring plans via commenting opportunities, implementation of advanced notification systems when a project is nearing the end of its production lifecycle, and engagement in post-closure monitoring opportunities
4. Ensure strong enforcement of measures outlined in the *Pipeline Safety Act* regarding companies maintaining responsibility for their abandoned pipelines and other abandoned facilities
5. Directly consult and accommodate impacted Indigenous groups in the development and/ or oversight of abandoned pipelines - including but not limited to environmental monitoring and regular facility inspections

## 3.4 Screening, Scoping, and Baseline Evaluation

With respect to screening, scoping, and baseline evaluation criteria the NEB should:

- Develop project screening and scoping criteria that consider the full extent of the project – including but not limited to the electricity requirements of the project, the land requirements of the project, where the project connects to or becomes part of existing or other planned energy infrastructure (i.e. connecting pipeline segments), and any operations and maintenance (e.g. integrity digs) required for existing infrastructure to be redeployed for a new project use (e.g. the integrity digs required to repurpose the TransCanada Mainline natural gas pipeline to bring the pipeline to maximum operating pressure to transport oil – these types of activities are called “operations and maintenance” and conducted under previous project approvals, but are used by proponents to keep key and relevant construction impacts out of future project approvals and environmental assessments. This is not an appropriate or accepted environmental assessment



practice. In particular, this approach must be denied by the NEB when it is clear that a coordinated set of Operations and Maintenance activities are occurring in a manner that enables an unapproved major pipeline project proposal.

- Eliminate the 40 km pipeline length for triggering environmental assessments and replace with a consultative project screening and scoping approach that examines the real impacts of a proposed project and assumes that an environmental assessment will be triggered, unless it can be proven that impacts will be negligible and that Indigenous communities consent to any project going forward without an environmental assessment. This will eliminate project proponents “gaming” the regulatory system by piecemealing project pipeline lengths into segments under 40 km to avoid environmental assessment requirements
- Provide a consultation and accommodation process during the project scoping stage so that Indigenous communities can review and comment on a draft of the project scope to ensure that all aspects of the project important to Indigenous communities can be reasonably included in the scope of the project to be assessed by the NEB

### 3.5 Effects Assessment and Mitigation Measures

1. NEB should assess how the project could contribute to climate change through assessing the projected greenhouse gas emissions associated with the project throughout its lifecycle.
2. Effects assessments conducted by the NEB as part of an Environmental and Socioeconomic Assessment (ESA) must adequately consider the effects a project will have on the Traditional Territories of Indigenous groups. Such an assessment should include but not be limited to effects on traditional land use and occupancy, effects on commercial harvesting/ land use, effects to cultural and historically significant sites, direct and indirect effects on socioeconomic and health conditions, and effects on future land uses planned by communities.

### 3.6 Indigenous Consultation and Engagement

1. As identified throughout this submission, having Indigenous consultation, input, and participation throughout the entirety of the review process and subsequent project lifecycle is crucial to achieving Nation-to-Nation relations with Indigenous Peoples that the Government of Canada has consistently expressed it would like to improve and strengthen.
2. Following best practices regarding the Duty to Consult and Accommodate Indigenous Peoples by enacting the principles articulated in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) including mechanisms that demonstrate a commitment to Free, Prior, and Informed Consent (FPIC).
3. Enhanced integration of Traditional Knowledge, Land Use, and Occupancy information including land use plans, environmental management plans, consultation and accommodation protocols, community social and economic development plans, asset management plans etc.



4. Having the NEB and the Crown directly engage with Aroland First Nation regarding the development of Consultation Plans for projects before the project description has been filed; in pre-project planning stages.

5. The NEB must require the integration of indigenous traditional knowledge, and traditional land use and occupancy information into ESA filing requirements for proponents and its decision-making- where Indigenous groups are willing to share this information. It must also ensure integration of other key indigenous planning documents for their traditional lands or communities, including but not limited to Land Use Plans, Environmental Management Plans, Consultation and Accommodation Protocols, Community Social and Economic Development Plans, and Asset Management Plans amongst others.

6. Currently, the NEB's Participant Funding Program provides a limited amount of funds to Indigenous groups. According to the Participant Funding discussion paper, a maximum of \$80,000 is awarded to groups per hearing however it has been our experience that in projects where funding is in high demand, participants received half that amount (i.e. \$40,000 was the maximum funded per group for the Energy East hearing process). The funding program in its current form does not necessarily reflect nor meet the needs of Indigenous Peoples to be adequately resourced to participate in decision-making processes that can have major implications on Indigenous land and resource use and overall way-of-life.

The current approach to awarding Indigenous organizations with greater funding than entities that have the authority to represent rights-bearing Indigenous communities is inappropriate. The duty to consult and accommodate is to be applied to rights-bearing Indigenous communities, and these communities should have special status, over and above non-rights bearing entities unless those entities have specific agreements in place to represent the rights-bearing entities.

7. In the proposed changes being set forth in the NEB filing guide, the following is said regarding the inclusion of Indigenous Knowledge:

***“Local and Traditional Knowledge***

Consider augmenting the application with local and traditional knowledge and integrating the information and knowledge, where appropriate, into the design of the project. Where local and traditional knowledge is obtained, provide an opportunity for the individual who provided the information to confirm the interpretation of the information and how it was used in the project design.”

Merely “considering” the integration of Traditional Indigenous Knowledge is not an adequate means to appropriately evaluating the effect a project will have on Indigenous rights and interests and ensure the Duty to Consult is upheld.

The NEB should replace the word “consider” with the phrase “The application MUST include or demonstrate reasonable effort to include local and traditional knowledge.” Furthermore, traditional knowledge is collective knowledge and the verification of appropriate interpretation should be conducted at the community level while including the individual in such verification.



## 4.0 Conclusion

The issues and recommendations articulated in this submission should be thoughtfully considered by the National Energy Board Modernization Panel to ensure the perspectives of Aroland First Nation are adequately accounted for in this review process. It is crucial that Indigenous perspectives be thoughtfully considered and integrated into this process if the Government of Canada intends to fulfil on its commitment to collaboration and reconciliation with Indigenous Peoples of Canada.



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