



NAK'AZDLI NATURAL RESOURCES OFFICE

P.O. Box 1329

Fort St. James, BC V0J 1P0

Telephone (250) 996-0088 Fax (250) 996 – 7634

nroffice@nakazdli.ca or www.nakazdli.ca

Submission by Nak'azdli Whut'en to Natural Resources Canada's National Energy Board Modernization Expert Panel

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Introduction

This document is Nak'azdli response to Minister of Natural Resources, Jim Carr's, November 8, 2016 announcement that Natural Resources Canada has established a five-person Expert Panel to engage the public in its review of potential changes to the *NEB Act* and National Energy Board (NEB) project review process.

This submission addresses the specific questions posed to Indigenous Peoples by the Expert Panel. We posed these questions to our membership through focus groups, and this submission documents their responses. It is also informed by a review of pertinent literature, and Nak'azdli's experience in the NEB-CEAA Joint Review Panel process for Enbridge's Northern Gateway Pipeline

Nak'azdli Whut'en: Who We Are

We are located, in north central British Columbia, on the shores of Nak'al Bun (Stuart Lake). Our territory is located on the Pacific watershed and we are at the beginning of the spawning grounds for the early Stuart Salmon. Only an hour north of the town of Fort St. James we enter into the Arctic watershed, and in this area to the north is where my family Keyoh is located. In Nak'azdli our governance structure is based on a land system known as Keyoh. Family units are responsible for certain areas within the entire Nak'azdli territory. The Keyoh is where we go to for survival, where we gather medicinal plants, hunt, trap, and pick berries. We return to these areas to keep our connection to our ancestors who walked on the same lands. The Land is so sacred that we were told that we are not supposed to talk about it. We have been raised knowing our identity, histories, songs are on the land and in

the waters. But we are forced to talk about how important the land and waters are to our community because of the massive amount of development that is impacting us (Sam, 2016, 1).

Nak'azdli Whut'en First Nation is one of eight Member Communities of the Carrier Sekani Tribal Council in northeast British Columbia. Nak'azdli is a community of 2000+ members, most of whom live on reserve near Fort St. James, in Fort St. James or Prince George.

The territory of Nak'azdli Whut'en has never been ceded, released or surrendered to the provincial or federal Crown. Nak'azdli's Dak'elh governance system is still in place, expressed through the concepts of *Keyoh* and *Bahlats*. This system is the source of our constitutionally protected section 35 Aboriginal Rights and Title (CSTC AIUS 2006), which establishes our rights of ownership, self-governance and stewardship, including harvesting and ceremonial rights. Nak'azdli decisions related to any proposed projects in our territory are always informed by our responsibility to future generations and our responsibility as stewards of the land.

Nak'azdli culture is tied to the land and waters and tied to the practices that have sustained our people for thousands of years. Nak'azdli Whut'en are Dak'elh people, which means "People Who Travel by Water." Nak'azdli's territory is threaded by ecologically and culturally important waterways like the Nation Lakes, Stuart Lake, the Stuart River, and the Nechako River. Nak'azdli families canoe these waterways every summer. They continue to connect people to village sites, hunting, trapping and fishing areas. These same lakes and rivers also provide important habitat for salmon and many other animals. Salmon are sacred to Nak'azdli people, and most of the waterways flowing through our territory are salmon waters.

Nak'azdli's traditional land holdings, or *Keyoh*, across our territory, have already been affected by resource development including extensive forestry and mining (e.g. Mount Milligan Mine), as well as the taking up of lands related to human settlement and agriculture. Our territory is fragmented by mines, cut lines, clearcuts, and right-of-ways. Our rivers are disrupted by downstream damming and other diversions. Important riparian habitat has been taken up by residential properties and commercial development. This encroachment has made it much more difficult for Nak'azdli to steward their lands, which results in the degradation of the terrestrial and aquatic ecosystems upon which all life depends. These ecosystems no longer support healthy populations of many culturally important species, including salmon, and Nak'azdli members finding it more and more difficult to practice their rights and sustain themselves.

Addressing and restoring ecological integrity and Nak'azdli's Aboriginal Rights is contingent upon good governance, so Nak'azdli Whut'en wishes to thank the Expert Panel for the opportunity to participate in this important policy and process review. Based on our negative experience in the NEB-CEAA Joint Review Panel (JRP) process for Enbridge's Northern Gateway Pipeline, we feel NEB modernization is much needed.

The current process has fallen well short of Nak'azdli standards for meaningful engagement and environmental protection. The remainder of this submission addresses the specific questions posed to Indigenous Peoples by the Expert Panel.

1. The Panel has asked Indigenous Peoples to comment on the positive and negative aspects of the federal government's approach to engagement and consultation on NEB regulated projects.

Overall, the NEB-CEAA process for Enbridge's Northern Gateway pipeline was very frustrating for the Nak'azdli community, and we never felt our perspective was wanted or respected. However, a positive outcome from that experience was the way in which it mobilized and unified Carrier Sekani and other First Nations in common resistance to a project that was not in the best interests of their communities. It highlighted important and common issues, like the need for greater water and aquatic habitat protection, especially in light of a stripped down Navigation Protection Act; it emphasized a need for modernized environmental review processes that respect and recognize Aboriginal Title and Rights as well as our historical knowledge, which would enhance your processes.

Sadly, in Nak'azdli's experience, NEB and other government processes are often doomed from the outset because they tend to impose a generic consultation practice instead of working collaboratively to define culturally appropriate Aboriginal consultation processes that are customized for the particular Project, location, and Indigenous groups affected. This was certainly the case for Nak'azdli in the Northern Gateway review where the Nation was lumped in with the broader public and treated as a stakeholder, rather than recognized as a self-governing Nation with unceded Title and Rights (Sam 2009). Under the *NEB Act*, the JRP had no jurisdiction to explicitly consider impacts on Aboriginal Title and Rights, yet the JRP review became the *de facto* First Nations consultation process—this was a huge problem.

The courts have stated that “the first step in the consultation process is to discuss the process itself.” (WCELA 2009) In the Northern Gateway case, this crucial first step was skipped. The JRP had no mandate to conduct First Nations consultation or to fully assess potential impacts on Aboriginal Title and Rights. Nak'azdli was told to trust the review panel process, to see it through, and then **afterwards** the Crown would figure out how consultation should and would occur. One of Nak'azdli's members stated that this is akin to “knocking somebody's house down and then asking them afterwards: how are you impacted by this?”

When meaningful, early, and substantive consultation does not happen, any opportunity for consent-based decision-making and the fair representation of Aboriginal values is denied. From Nak'azdli's perspective, federal consultation in general and in the NEB EA process specifically often feels like a box-checking exercise with few tangible positive outcomes – the process imposed upon us lacks “meaning”. The NEB's staunch reliance on an outdated and highly subjective “public interest” test employed as a metric

for decision-making does not allow First Nations an opportunity to participate. Such a test does not recognize that Aboriginal rights are priority rights under the Constitution Act, 1982, and that decision-makers – especially a federal government that is committed to both a Nation-to-Nation relationship and reconciliation – must weight these priority rights much more carefully when making decisions that affect those rights.

2. The Panel has asked Indigenous Peoples to comment on what can be changed to enhance indigenous engagement and consultation in the decision-making stage of NEB regulated projects.

The following response to the above question provides useful metrics for meaningful engagement informed by Nak'azdli's experience with the NEB and other impact assessment processes. Our concerns with current engagement and consultation include issues with representation, consent, early engagement, collaboration, the scoping of impact assessments, and social impacts related to industrial development.

Respect for cultural protocols and preferred process

First, the NEB must recognize that individual First Nations self-govern through distinct cultural protocols and governance systems that must be respected and accommodated by Crown processes. One-size-fits-all approaches to consultation fail to create the space needed to collaborate over what respectful and meaningful consultation looks like for distinct nations. For government and industry, working with Indigenous nations to understand their preferred engagement protocols, culture, values, and rights, is critical to establishing more transparent, collaborative and consent-based decision-making (MacDonald and Zezulka 2015). Ultimately, collaboration and flexibility are key.

Recommendation: The following recommendation assumes the modernized is discharged with upholding the Crown's responsibility to consult Indigenous Peoples.

1. That before the NEB impact assessment process begins and any decisions are made, the NEB works collaboratively with affected First Nations to clearly define the process and scope of consultation based on the preferred protocols of the Nation.

We at Nak'azdli, for example, often expect to do our own parallel project reviews, using our own people or people we choose to work with rather than participating in pre-determined processes led by industry or industry hired consultants.

Indigenous representation on the NEB

Nak'azdli is concerned that the current requirements for board appointees establish a National Energy Board that is not representative of Canadians in terms of regional representation or Indigenous perspectives. The NEB currently requires that board members live in the vicinity of Calgary, Alberta, which is, arguably, the epicentre of oil

and gas enterprise in Canada. As such, by virtue of geography, the NEB is closely tied to the industry it is mandated to regulate, and this has led to a reduction in the faith held by Canadians (certainly indigenous Canadians) in the impartiality of the NEB.

We also believe that Indigenous communities must be better represented on the NEB and in NEB environmental assessments (EAs). Board member selection criteria should be expanded to include a priority for experience working in or from an indigenous perspective, and Nak'azdli would like to see the NEB work with Indigenous political entities and groups to recommend appointees to the Board. Indigenous and non-indigenous board members must work towards shared decision-making.

As indigenous engagement is a function of the NEB, board members should have diverse backgrounds and knowledge, and understand key topic and issues that often arise in natural resource governance and management in Canada, including: traditional knowledge, Aboriginal rights and title, cumulative effects, and climate change. Further, board members must undertake training to address knowledge gaps in these and other topics, such as cultural sensitivity, reconciliation, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP), and Free, Prior, and Informed Consent (FPIC). Too often, Nak'azdli feels our perspective is simply not understood or related to by federal and provincial governance bodies, and these measures would help address this issue.

Recommendations:

2. That the NEB expands Board member selection criteria to include a priority for experience working in or from an indigenous perspective.
3. That the NEB consults Indigenous entities and groups to recommend appointees to the NEB Board.
4. That NEB Board members receive education and training in topics that are crucial to understanding the culture, rights, and contemporary struggles facing Indigenous Peoples in Canada, including Indigenous World View/traditional knowledge, Aboriginal Rights and Title, cumulative effects, reconciliation, cultural sensitivity, UNDRIP and FPIC.

Early engagement, information sharing, and process timelines

The process of working towards consent-based decision-making begins with early and active engagement with affected Indigenous groups. Early engagement is critical and aligns with the federal government's commitment to implementing the principles in the UNDRIP, "Real Change" and a "renewed relationship between Canada and Indigenous Peoples."¹

¹ <https://www.liberal.ca/realchange/a-new-nation-to-nation-process/>

Early engagement is critical, as is providing all pertinent information up front. Nak'azdli and other First Nations are often responding to heavy referral loads with limited capacity. The all too common practice of notifying First Nations about projects that are already designed, and then imposing short and strict timelines for review and comment, is simply not acceptable. This issue was recognized by UN Special Rapporteur, James Anaya's (2014), *Report of the Special Rapporteur on the Rights of Indigenous Peoples*, which comments on the "unfair burden" that typically requires overworked Indigenous governance institutions to adhere to short and unrealistic response timelines when participating in federal assessment processes (MacDonald and Zezulka 2015). In some cases, meeting response deadlines is challenged by unresponsive proponents and government agencies who drag their feet with information sharing; the 15 month "clock" of NEB EAs should be stopped in these instances. Nak'azdli and other Indigenous Nations cannot assess impacts to our rights and interests and make decisions without adequate information.

Moving forward in the context of a modernized NEB Act and process, Nak'azdli expects early notification of potential projects in our territory, and information should be provided in a timely fashion. The NEB should require applicants to file a "Pre-Application Project Description" within 3-months before applying to the Board, including maps and preliminary potential environmental and socio-economic interactions and effects of the project.

This will help Nak'azdli identify and communicate potential conflict early, before significant investments in planning have been made. Requests for any additional information must also be accommodated in a timely fashion, and First Nations must be given access to raw data files where requested. Given the referral burden and limited capacities in First Nations lands departments, the NEB, government agencies and proponents must have reasonable expectations and work with us to set realistic timelines for our review of information and comment, but be flexible as well. It is also important to recognize that project-specific information reviews and community assessment processes are a significant financial investment. Funding for technical review of information and data prior to hearings commencing is necessary.

Recommendations:

5. That the NEB requires applicants to file a "Pre-Application Project Description" within 3-months before applying to the Board, including maps and preliminary potential environmental and socio-economic interactions and effects of the project.
6. That the NEB stops the 15 month "clock" of NEB EAs in instances where NEB applicants have not supplied requested information in a timely fashion.
7. That the NEB ensures funding support is provided for First Nations to conduct a technical review of information well before the commencement of NEB project review hearings.

Project siting

Nobody knows Nak'azdli territory better than Dak'elh people, and we expect to be involved in potential development conversations from the very beginning. Nak'azdli involvement in the project design and "siting" phase will help reduce conflict, assuming parties are flexible.

In the NEB process for the Northern Gateway pipeline project, Nak'azdli and other Nations were not asked for input on the project's proposed route. It may not have changed our support for the project, but the opportunity to contribute could have allowed us to communicate our rights and interests, identify culturally important waterways, and other critical information. Instead, the project and process was imposed, not collaborative, and it became adversarial under these conditions.

Engaging Indigenous peoples in project siting is fundamental to our rights and principles related to informed consent, especially when projects threaten our land and culture. Federal and provincial governments in Canada do not mandate collaboration with Indigenous peoples in project siting, but precedents from other jurisdictions could help inform such an approach. For example, in a progressive example of pre-development collaboration from Australia, industry and government worked directly with the Kimberley Land Council (KLC), the Indigenous body representing Aboriginal groups in the Kimberley region, in the siting of an LNG facility. "Indigenous Informed Consent" was included in the Site Selection Criteria for the facility, the objective of which is to "seek to identify site supported by traditional owners through their informed consent" (KLC 2010, Vol. 2, p7). The KLC reviewed many potential site locations and selected the site with the least cultural and social impacts, based on impact assessments provided by six Indigenous groups. This occurred through a "Strategic Assessment" process that allowed site selection criteria to include culture, heritage and rights. The KLC and Indigenous groups were actively involved in the Strategic Assessment, which identified specific project impacts, and precise safeguards and measures to ensure Indigenous Peoples would benefit from the development, and have their rights and interests protected. From the outset, all groups party to the project recognized that robust and comprehensive project approval conditions or requirements related to the project and project impacts were critical to avoiding severely negative outcomes for local Indigenous peoples.

To Nak'azdli, the KLC example contains several attributes and a quality of governance that is missing in current NEB processes. Attributes related to collaboration and flexibility in project siting, more detailed guidance from the NEB to Proponents on heightened expectations for how Indigenous groups should be involved in assessing siting and other "project alternative means" considerations, and the explicit inclusion of "Indigenous informed consent" as criteria for decision-making, are particularly needed.

Recommendations:

8. That the NEB provides detailed guidance to Proponents on heightened requirements for early engagement, including the need to involve First Nations in the earliest stages of the application and review process, including project siting and design, and other planning decisions.
9. That the NEB adopts “Indigenous informed consent” as criteria for decision-making.

Process Scoping

The limited spatial and temporal scope of current NEB EA processes is another key issue for Nak’azdli. The Dak’elh worldview views all land, air and waters as connected. Through this lens, the impact of a pipeline through our territory is connected to the impacts of operations upstream and downstream, as well as past development and potential future projects in our territory. Nak’azdli believes consideration for the upstream implications of projects must be expanded beyond the current scope of GHG emissions, to include biophysical and human environmental effects of induced development in upstream areas. Especially in the context of climate change, more robust analysis using future scenario planning is needed to inform decision-making on new pipelines that are likely to induce additional gas or oil well field development. Nak’azdli believes the NEB should forecast 20 to 30 years into the future or more, instead of simply assessing immediate impacts, when making decisions on all projects.

Another fundamental challenge is current lack of meaningful cumulative effects assessment in NEB EA. The current practice of project-specific and site-specific impact assessment restricts the spatial and temporal scope of consultation and decision-making to a scale that is not representative of the actual cumulative impact on Nak’azdli’s Aboriginal Rights and interests. Further, in the absence of historical baseline data, existing baseline information requirements only focus on “current” base data and ignore the historical context. This assumes an un-impacted baseline and ignores decades of landscape change and the effect it has had on ecological integrity and Aboriginal rights in Nak’azdli.

Generally, project-based reviews have made it difficult to have overarching issues such as cumulative effects recognized in federal processes, but nevertheless, we are observing and experiencing their impacts on our lands and rights now. We would like to see the NEB follow through on the requirements in its Filing Manual that cumulative effects assessment focus on total cumulative effects, not individual project contributions to same. It is absolutely necessary to include a focus on total cumulative impacts because they – not individual Project contributions - define the actual reality we live in. Nak’azdli would also like a modernized NEB to conduct strategic or regional environmental assessments in order to establish broad baseline and trend-over-time information for regions or ecosystems to inform decision-making.

Finally, Nak'azdli would also like to see parallel First Nations-led assessments of impacts from the perspective of Aboriginal Title and Rights included as a mandatory and funded component of all NEB regulated project applications. While current NEB "Lists of Issues" include passing reference to assessment of effects on Aboriginal and Treaty Rights, the NEB makes little or no effort to actually do so, and Title impact assessments need to be added to the mix as well.

Recommendations:

10. That the NEB expands the scope of environmental assessments to include biophysical and human environmental effects of induced development in upstream and downstream areas.
11. That the NEB uses future scenario planning (20 to 30 years) in decision-making for new pipelines and other major projects in order to assess longer-term implications of project approvals instead of simply assessing immediate impacts.
12. That the NEB conducts strategic or regional environmental assessments in order to establish broad baseline and trend-over-time information for regions or ecosystems to inform decision-making.
13. That the NEB, using accurate historical baseline information, follows through on the requirements in its Filing Manual that cumulative effects assessment focuses on total cumulative effects, not individual project contributions to same.
14. That the NEB requires parallel First Nations-led assessments of impacts from the perspective of Aboriginal Title and Rights included as a mandatory and funded component of all NEB regulated project applications.

Social Impacts

The loss, or dispossession, of land and associated environmental impacts are not the only impacts related to industrial development that are borne by Indigenous Peoples. There are social and cultural impacts associated with all resource development projects, but these are often overlooked and not effectively considered during impact assessment and project planning. Nak'azdli believes a modernized NEB must include greater acknowledgement and assessment of social and cultural impacts related to NEB regulated projects, especially those that threaten women and children in remote Indigenous communities.²

² Nak'azdli has participated in two recent studies (Gibson et al. 2017; Shandro et al. 2014) that identify social and cultural impacts and provide recommendations on how they can be better addressed through regulatory processes and all stages of project planning and development. Nak'azdli encourages the expert panel to review both documents.

Indigenous women and children, for example, are most vulnerable to the suite of impacts that can accompany rapid influxes of non-resident workers and construction camps, characterized as a mobile workforce that is disconnected from the region and can recreate historical patterns of gendered violence against Indigenous women (Gibson et al. 2017). That women and children are subjected to the worst of the negative impacts at every phase of resource extraction is well documented (Cane 2015; Gibson et al. 2017; Lahiri-Dutt 2012; Macdonald and Rowland 2002; Shandro et al. 2014). These impacts range from increased domestic violence, sexual assault, substance abuse, and an increased incidence of sexually transmitted infections and HIV/AIDS due to rape, prostitution, and sex trafficking. Other social impacts include increased demand for often limited health services, housing pressures and rent increases, increased motor vehicle traffic and accidents, among others (Shandro et al. 2014).

Gibson et al. (2017) also show how indigenous rights and interests related to cultural continuity are also impacted by project construction, including industrial camps. Hunting and food harvesting areas may be impacted by high levels of traffic, potential contamination, and competition for resources as shift workers become harvesters themselves in the territories they are in. Such barriers to rights and interests impact community health and wellbeing (spiritual, social, physical, and overall health), food security, and cultural practices, and the transmission of knowledge, language and culture tied to them.

Shandro et al. (2014) and Gibson et al. (2017) document Nak'azdli's experience with these issues. All parties need to consider social, cultural, and environmental issues in industrial camp review and siting. As stated in Gibson et al. (2017, p6), this requires "collaboration between Indigenous leaders, industry, and agencies to protect communities, promote responsible stewardship, and maintain the safety of women, children, and vulnerable populations." Failure to address social and cultural impacts will only exacerbate and worsen the living conditions of Indigenous Peoples in Canada that UN Special Rapporteur, James Anaya, already described as "distressing" and the "most jarring manifestation" of human rights problems (Anaya 2014).

A modernized NEB must proactively work with First Nations to prevent these types of impacts. The current NEB Filing Manual is relatively barren of meaningful, disaggregated assessment of social and economic impacts (as opposed to benefits) on individual First Nations. Cultural impact assessment must go beyond the current approach that primarily and sometimes exclusively limits the expression of our Indigenous culture to our archaeological history and remains.

Recommendations:

15. That the NEB adopts more robust assessment of a project's potential socio-economic and cultural impacts, and require mitigations for risks to women and children associated with labour influxes and construction camps, and other negative project interactions.

Working towards consent

The storied history of contentious resource conflict surrounding extractive projects and processes in Canada should be enough to indicate by now that co-creating meaningful and just processes to engage and protect the rights of Indigenous peoples is fundamental to progressing towards more positive Nation-to-Nation relationships. Working with Nak'azdli and other Nations to address the preceding issues will help move consultation and engagement towards processes that embody principles of Free, Prior, and Informed Consent (FPIC).

Article 32 of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) states that governments must engage in good faith with Indigenous peoples in order to “obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.”³ Federal and provincial governments tend to scare at the mention of FPIC, as they may frame FPIC to a First Nations “veto” power, rather than understand it as a guiding principle for engagement and decision-making. Aboriginal lawyer and author Paul Joffe (2015, 1) remarks that “such extreme positions are the antithesis of reconciliation.” In the context of the types of projects regulated by the NEB (pipelines, large transmission lines), which cross many Indigenous territories, Joffe (2015) points out that no single nation has the power to veto the whole project, but they may, however, choose to assert their right to give or withhold consent relative to their own territory.

Nak'azdli believes the NEB should view the principle of FPIC constructively as a tool to build meaningful engagement practice. Addressing many of the preceding issues is a good place to start. Early, informed engagement, processes and timelines that respect cultural protocols and operational capacities, process scoping and assessments that are attentive to social impacts and cumulative effects; these are critical attributes to good consultation and decision-making that help push the needle towards consent. Consent emerges as people become informed and respected through good process.

In the Kimberley Land Council case discussed earlier, Indigenous “rights” were viewed broadly and included the right to participate in determinations of project developments that will occur on Indigenous lands. As such, the recognition of Indigenous traditional land owners’ rights mandated a collaborative process for the strategic assessment of project impacts and project planning, including project siting. The standard of FPIC was used in the design, including the benchmarks for assessment of granting of consent⁴; sufficient resources were also applied to the consent process, including the negotiation

³ http://www.un.org/esa/socdev/unpfii/documents/DRIPS_en.pdf

⁴ While the standard of FPIC established a positive and collaborative engagement process, in the actual unfolding of events, FPIC was undermined by process restraints including a compulsory acquisition threat (in the absence of agreement), time constraints, the threat of loss of state funding (in the event of no agreement), weak baseline information, as well as a state decision to unilaterally select the James Price Point location for the LNG project.

of Indigenous Land Use Agreements with financial terms. Nak'azdli encourages the NEB Expert Panel to review the Kimberley Land Council engagement design and adopt FPIC as the standard for the modernized NEB process. Our request that the NEB incorporate FPIC in its legislation and regulations follows similar requests from other Indigenous organizations (see, for example, First Nations Summit 2017).

Recommendations:

16. That the NEB Expert Panel review the Kimberley Land Council (Australia) case study to inform the modernization of NEB protocols for engagement with Indigenous nations and organizations.
17. That the modernized NEB legislation and regulations fully incorporate the standard of FPIC as the minimum required standard for assessing indigenous engagement.

3. The Panel has asked Indigenous Peoples what can be done to improve their involvement in other phases of NEB-regulated projects.

In our experience, systemic barriers to our ability as Indigenous Peoples to work and get business or other beneficial opportunities from projects, are not meaningfully considered by the NEB, which leads to the continuation of the imbalance of benefits versus risks we encounter. Impact equity and inter-generational equity are essential principles of good impact assessment and must be adopted as key metrics in a revamped NEB EA process.

Currently, the NEB Filing Manual and the Board's EA practice does not adequately consider issues related to the relative distribution of – and ability to take advantage of – Project-related benefits between indigenous and non-indigenous populations. Like the federal and provincial government, Nak'azdli expects to receive a fair share of benefits from development in our territory. This includes direct economic benefits, funding for community development and stewardship initiatives, as well as opportunities for education and training, and capacity-building. For example, at Nak'azdli, we are training our own land monitors through a Guardian program, which we see as a critical aspect of our inherent stewardship responsibilities as Dak'elh people. The modernized NEB should ensure that consistent funding for Indigenous communities to develop programming to strengthen lands stewardship is provided, either through government support, or as a condition of NEB authorizations (MacDonald and Zezulka 2015).

To Nak'azdli, a fair share of benefits to compensate for hosting development in our territory includes revenue-sharing, opportunities for community-owned businesses and local employment, and assurances that effective mitigations will be implemented to protect key ecosystems and related Indigenous land uses and rights, among others. The federal Crown may be called upon to initiate consultation alongside the NEB EA process, to capture required accommodation such as revenue sharing, when a project

is likely to have serious to significant impacts on Aboriginal rights, title or territory-based resources that support those rights and title. However, negotiating impact benefit agreements (IBAs) or other contractual agreements is Nak'azdli's jurisdiction, and these are a condition of doing business in our territory. Ultimately, ensuring a fair share of benefits for impacted communities is derived from building positive connections, protecting from impacts, and providing the resources and opportunities to increase long-term community capacity.

Recommendations:

18. That the modernized NEB adopt impact equity and inter-generational equity as key metrics in a revamped NEB EA process.
19. That the NEB ensures that sufficient funding for Indigenous communities to assess projects to satisfy their Indigenous lands stewardship standards is provided, either through government support, or as a condition of NEB authorizations.

4. The Panel has asked Indigenous Peoples to comment on how Indigenous Knowledge and Traditional Ecological Knowledge (IK/TEK) should be further integrated into NEB processes and what potential constraints exist.

There is a need for, and a lot of work to be done to develop a respectful methodology and best practices for the integration of Indigenous knowledge. While the actual work of collecting and interpreting IK must be led by Indigenous nations and organizations, proponents and government have roles and responsibilities in terms of the ongoing and evolving practice of IK/TEK incorporation in resource governance contexts.

Generally, proponents and governments demonstrate a lack of understanding of community-specific IK/TEK, particularly its cultural importance and sensitivity. Issues often arise in relation to permissions and the distinct cultural protocols that each nation applies for engaging knowledge holders and sharing information with outsiders. In Nak'azdli's past experience with the NEB, we had issues and concerns with the lack of guidelines to assure the protection of our knowledge holders' intellectual property, as well as the use of our Indigenous knowledge in western science dominated decision-making processes. In addition, the NEB's current Oral Traditional Evidence hearings, which don't allow for First Nations to weigh in on Project effects in a culturally meaningful way, effectively muzzle our voices as experienced impact assessors, and must be updated in consultation with Indigenous Peoples in Canada.

To better protect intellectual property, the NEB should work with communities to establish information-sharing agreements or protocols that outline how IK/TEK will be used, and ensure it will not be mistreated, or taken out of context. The second issue is that Nak'azdli knowledge holders and staff are tired of having our knowledge devalued as "unscientific" or "anecdotal" and pushed to margins of decision-making. That this still

occurs despite the volumes of literature that recognize and celebrate the value of IK/TEK as a vital source of information for land and resource decision-making, suggests current NEB EA practices are behind the curve, and demonstrates the lack of equal weighting of Traditional and Western scientific knowledge. IK/TEK must be recognized as its own knowledge system, given authority on par with western science, and used to direct scientific inquiry. Nak'azdli would like to see reference to equal weighting built into both the *Canadian Environmental Assessment Act* and the *NEB Act*, and this principle put into actual practice by the NEB.

Ultimately, as Indigenous Peoples, we must be allowed to share our knowledge on our terms. Nak'azdli prefers to conduct Community-led project related Knowledge and Use studies using our own members or people we choose to work with. There is tremendous value in supporting community-controlled research and project reviews, particularly relating to the incorporation of sensitive IK/TEK (Macdonald and Zezulka 2015). To bolster the integration of this critical information, regional indigenous advisory panels should be created to inform the NEB on its procedural adequacy on issues related to Traditional Knowledge, Traditional Land Use, cultural impact assessment, and Aboriginal rights impact assessment. Any panel reviewing a project in Nak'azdli territory should have a seat for one of our experts (traditional knowledge keepers) to sit as an advisor to the panel on these concepts. That person must have intimate knowledge of Dak'elh world view and be able to speak to all of our concerns. For such an advisory position, being First Nations/Aboriginal does not suffice; impacted communities must have specific representation. At Nak'azdli, we are not experts on other Indigenous cultures and would not presume to comment on their history, culture, or lands.

Recommendations:

20. That the NEB works with Indigenous communities to establish information-sharing agreements or protocols that outline how IK/TEK will be used, and ensure it will not be mistreated, or taken out of context.
21. That reference to equal weighting be built into both the *Canadian Environmental Assessment Act* and the *NEB Act*, and put into actual practice by the NEB.
22. That the NEB work with Indigenous organizations to create regional indigenous advisory panels through which impacted First Nations will inform the NEB on its procedural adequacy on issues related to Traditional Knowledge, Traditional Land Use, cultural impact assessment, and Aboriginal rights impact assessment.

5. The Panel has asked Indigenous Peoples to comment on how the Government can best consider and address the principles outlined in the UN Declaration on the Rights of Indigenous Peoples in the modernization of the NEB.

Currently, the NEB Act and all federal legislation involving decision-making on natural resources does not officially endorse UNDRIP or FPIC requirements. This has to

change. The legislation must be updated to adopt UNDRIP in the modernized NEB. For the NEB and proponents of NEB regulated projects, it requires acknowledging that Indigenous nations are self-determining and self-governing, and then working with Indigenous Peoples and organizations to co-create a process that puts UNDRIP into practice. A key step is to address policy limitations that currently force Aboriginal Title and Rights, and other First Nations interests, to the margins of decision-making where they are generally usurped (improperly) by the NEB's strict adherence to date to a "public interest" test. The NEB must formally recognize its obligation to act in a manner consistent with the Constitution with respect to the role of Indigenous communities. This obligation supersedes considerations of public interest, and is not to be weighed against other factors, in the same way that the NEB must balance social and economic considerations in project reviews.

The modernized NEB process must have tangible steps that address core UNDRIP principles like FPIC, and applicants must be held to account in relation to these. The NEB should, in consultation with Indigenous Peoples, develop guidance and metrics for how adherence to UNDRIP and FPIC will be met as a part of decision-making. For example, Nak'azdli believes the NEB should only approve projects that affect and impact Indigenous communities where they were given Free, Prior, and Informed Consent. To obtain consent, the NEB and applicants must follow procedures that respect Nation-specific protocols, and work with First Nations to design consent-based processes, which includes the right to just say no sometimes when proposed projects are clearly not in the host Nation's best interest, and/or when adequate mitigations for impacts to Indigenous rights and interests have not been agreed upon.

Sometimes, but not always, consent can be obtained through flexible, substantive, meaningful, and collaborative consultation and engagement. The NEB and all other federal/provincial regulatory bodies must work with Aboriginal governments to create a legal and policy landscape that strengthens collaborative decision-making processes.

Recommendations:

23. That the NEB, in consultation with Indigenous Peoples, develop guidance and metrics for how adherence to UNDRIP and FPIC will be met as a part of decision-making.

Conclusion

Nak'azdli has made the following recommendations for the NEB Expert Panel to take forward in its review and modernization of the Board's the current policy and practice:

1. That before the NEB impact assessment process begins and any decisions are made, the NEB works collaboratively with affected First Nations to clearly

- define the process and scope of consultation based on the preferred protocols of the Nation.
2. That the NEB expands Board member selection criteria to include a priority for experience working in or from an indigenous perspective.
 3. That the NEB consults Indigenous entities and groups to recommend appointees to the NEB Board.
 4. That NEB Board members receive education and training in topics that are crucial to understanding the culture, rights, and contemporary struggles facing Indigenous Peoples in Canada, including Indigenous World View/traditional knowledge, Aboriginal Rights and Title, cumulative effects, reconciliation, cultural sensitivity, UNDRIP and FPIC.
 5. That the NEB requires applicants to file a “Pre-Application Project Description” within 3-months before applying to the Board, including maps and preliminary potential environmental and socio-economic interactions and effects of the project.
 6. That the NEB stops the 15 month “clock” of NEB EAs in instances where NEB applicants have not supplied requested information in a timely fashion.
 7. That the NEB ensures funding support is provided for First Nations to conduct a technical review of information well prior to the commencement of NEB project review hearings.
 8. That the NEB provides detailed guidance to Proponents on heightened requirements for early engagement, including the need to involve First Nations in the earliest stages of the application and review process, including project siting and design, and other planning decisions.
 9. That the NEB adopts “Indigenous informed consent” as criteria for decision-making.
 10. That the NEB expands the scope of environmental assessments to include biophysical and human environmental effects of induced development in upstream and downstream areas.
 11. That the NEB uses future scenario planning (20 to 30 years) in decision-making for new pipelines and all projects in order to assess longer-term implications of project approvals instead of simply assessing immediate impacts.

12. That the NEB conducts strategic or regional environmental assessments in order to establish broad baseline and trend-over-time information for regions or ecosystems to inform decision-making.
13. That the NEB, using accurate historical baseline information, follows through on the requirements in its Filing Manual that cumulative effects assessment focuses on total cumulative effects, not individual project contributions to same.
14. That the NEB requires parallel First Nations-led assessments of impacts from the perspective of Aboriginal Title and Rights included as a mandatory and funded component of all NEB regulated project applications.
15. That the NEB adopts more robust assessment of a project's potential socio-economic and cultural impacts, and require mitigations for risks to women and children associated with labour influxes and construction camps, and other negative project interactions.
16. That the NEB Expert Panel review the Kimberley Land Council (Australia) case study to inform the modernization of NEB protocols for engagement with Indigenous nations and organizations.
17. That the modernized NEB legislation and regulations fully incorporate the standard of FPIC as the minimum required standard for assessing indigenous engagement.
18. That the modernized NEB adopt impact equity and inter-generational equity as key metrics in a revamped NEB EA process.
19. That the NEB ensures that sufficient funding for Indigenous communities to assess projects to satisfy their Indigenous lands stewardship standards is provided, either through government support, or as a condition of NEB authorizations.
20. That the NEB works with Indigenous communities to establish information-sharing agreements or protocols that outline how IK/TEK will be used, and ensure it will not be mistreated, or taken out of context.
21. That reference to equal weighting be built into both the *Canadian Environmental Assessment Act* and the *NEB Act*, and put into actual practice by the NEB.
22. That the NEB work with Indigenous organizations to create regional indigenous advisory panels through which impacted First Nations will inform the NEB on its procedural adequacy on issues related to Traditional

Knowledge, Traditional Land Use, cultural impact assessment, and Aboriginal rights impact assessment.

23. That the NEB, in consultation with Indigenous Peoples, develop guidance and metrics for how adherence to UNDRIP and FPIC will be met as a part of decision-making.

Nak'azdli wishes to thank the Expert Panel for undertaking this critical public review process, and hopes the Panel's final recommendations for NEB modernization represent our concerns and the concerns of other Indigenous Peoples in Canada.

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