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March 31, 2017

Natural Resource Canada's NEB Modernization Secretariat
580 Booth Street, 17th floor
Ottawa, Ontario
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Helene Lauzon and Gary Merasty
Co-Chairs
NEB Modernization Expert Panel

Dear Ms. Lauzon and Mr. Merasty,

RE: Fort Nelson First Nation Comments and Recommendations to the National Energy Board Modernization Expert Panel

Fort Nelson First Nation (FNFN) thanks you for the opportunity to make this written submission to the National Energy Board (NEB) Modernization Expert Panel (Panel).

Our members are Dene and Cree people of the northeastern portion of British Columbia. We have past experience – unfortunately, most of it negative – in National Energy Board processes, especially as it pertains to the environmental assessment (EA) process, and lessons to share with the Expert Panel. We hope you will consider our experience carefully in making recommendations to the federal Crown on how to revise both legislation and process. Given the amount of energy development that has already scarred our traditional territory in recent years, and the high likelihood of future expansion in the natural gas sector, our survival as a culture depends on better decision-making regarding lands and resources in our territory.

Our written submission to the Expert Panel builds on the themes we identified in the presentation I gave at the March 2, 2017 hearings in Fort St. John, BC, previously filed with the NEB Modernization Secretariat and also available for your review.

Given the complexity of the NEB process and the need to re-craft the NEB process as one with a Nation-to-Nation focus between the federal Crown and indigenous groups,

our comments herein cannot be considered comprehensive. We trust that the Panel will include in its report recommendations on next steps for the federal Crown in setting up a meaningful consultation process to consider your recommendations, and chart a path forward together.

Mussi cho,

Lana Lowe
Director,
Lands and Resources Department
Fort Nelson First Nation

Fort Nelson First Nation's Submission to the NEB Modernization Expert Panel

March 31, 2017

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1. Introduction: About Fort Nelson First Nation

We are the Dene and Cree people of southern Denendeh, now known as the Fort Nelson First Nation (FNFN). We are the People of the Land and the Rivers and we have lived in our homelands in northeast British Columbia since time immemorial. We are protectors and stewards of this land and we honour our obligation to care for the land and water for future generations.

We are also Treaty people. Treaty No. 8, a Nation-to-Nation treaty with Canada signed in the spirit of peace and sharing in 1910, affirms our established Aboriginal Rights and Title to our lands and our Nation-to-Nation relationship to the Crown and confirms our mutual responsibility to protect our treaty lands and "mode of life" "for as long as the sun shines, the grass grows and the rivers flow."

Our traditional territory includes almost the entire Liard River watershed in northeast British Columbia. Many of our members have strong desire to engage in practice of our Treaty rights and practice of our traditional mode of life on the land, which requires access to large areas of forest within which to conduct our seasonal rounds.

In recent years, however, our members' ability to meaningfully practice their harvesting and incidental rights have been increasingly constrained by increased industrial development, especially in the natural gas sector. Our territory is contains several major gas basins that have been promoted by the federal and territorial governments as the economic breadbasket for the future of this country, especially with the potential development of a Liquefied Natural Gas (or LNG) export system.

Natural gas exploration and extraction-related activities, including hydraulic fracturing pose a very serious threat to the land and water in FNFN territory. The environmental impacts of natural gas activities are deep and far-reaching, including massive landscape disturbance, threats to wildlife, risks to water quality and quantity, and high levels of greenhouse gas emissions and potential air pollution and increased particulate matter. Over the last decade, these activities and impacts have rolled out across our territory at a rapid pace and scale and without a regulatory framework capable of understanding, assessing or monitoring the extent of the potential impacts to the health and resilience of the land, water, and animals, and in turn, the health and resilience of our community.

These changes are rarely properly assessed in the current environmental assessment (EA) system, either because most projects don't require an EA (they are considered "sub-threshold"), or because upstream effects of major projects are not meaningfully assessed. This leaves FNFN and the resources we rely upon in a highly vulnerable state. It is within this context of high risk and minimal existing protection in law or process that we seek fundamental changes to the way the federal government and the NEB conducts EA and regulates oil and gas development.

1.1 Organization of Submission

The information provided herein is informed by our Nation's direct engagement in the NEB EA process itself, including the Horn River Mainline (2010), Kitimat LNG Export Licence (2011), Komie North pipeline (2012), Ekwan pipeline (2012), and North Montney mainline (2015). Wherever possible, we use specific examples from those experiences to show the Expert Panel that our concerns not academic – they are urgent and fired by our real world experience of a flawed process that is currently functioning well beneath the requirements of the federal government's fiduciary responsibility to Canadian indigenous peoples.

Given that the NEB EA process is linked to both the *NEB Act* and the *Canadian Environmental Assessment Act (CEAA 2012),* our December 2016 comments on revisions required to the federal EA system defined and administered under *CEAA* are also relevant and can be reviewed at http://eareview-examenee.ca/view-submission/?id=1482517484.8976. In addition, our presentation slides from the March 2, 2017, Expert Panel hearings in Fort St. John, BC, which lay out some of FNFN's concerns and proposed solutions for the NEB modernization process, are available via prior filing with the NEB Modernization Secretariat.

FNFNs experience in NEB EAs to date has been extremely disappointing. These processes failed to protect the environment or our treaty rights despite substantial effort made by us to engage in the process. Our experience with the NEB to date includes:

- **Intimidation** at NEB's highly formal, legalistic, and adversarial process that leads to low community member willingness to participate;
- **Disrespect** throughout the process, beginning with the tactic of sending non-Indigenous, corporate scientists into our communities to collect "TEK", our Elders and Land Users feel that they are continuously having to prove their very existence and what our Treaty already recognizes—that we are the Indigenous People of this Land.
- **Disappointment** in spending immense amounts of time and effort in meaningfully working in the process to find no specific changes were made to required mitigation measures (NEB Conditions) or NEB findings; and,
- **Abandonment** that starts with promises and leaves us without adequate funding or consultation process steps.

As currently structured, the NEB is extremely ill-suited to the conduct of EA, given it has many other responsibilities, some of them which potentially conflict with their current role as a federal EA body. For this reason, Section 2 of this submission focuses on recommendations for core structural changes to the NEB that would see it relinquish its currently awkward role as a runner of EAs.

If indeed the NEB continues to conduct EAs in the future, it must do so in a substantially altered and improved way and with much greater involvement of other agents of the federal Crown. Sections 3 and 4 of FNFN's submission identify a series of current problems and recommended solutions for such a future. In Section 3, we focus on answering the request by the Expert Panel at our presentation to the Expert Panel on March 2, 2017, for us to provide written feedback on the question of how our recommended Crown Reconciliation Unit process would work to improve Crown consultation and accommodation before, during and after an NEB EA process.[1] This is a critical solution to the problem of defining and implementing a Nation-to-Nation relationship.

Section 4 identifies a series of more incremental improvements to existing problems in the way the NEB runs EAs, and includes a response to the Expert Panel's request from the March 2, 2017 hearing that the participants address the following question:

> *How can Indigenous knowledge and western science come together in the hearing, application and assessment processes?*

While FNFN identifies a series of ways in which the NEB EA process can be improved in Section 4, we must emphasize that these are not enough by themselves to meet the federal Crown's 2016 commitments to Canadian indigenous peoples. The fundamental revisions outlined in Section 2 and 3 are absolutely essential, foundation elements of a new Nation-to-Nation relationship.

For each section, the issues with the current system are described and recommended solutions are presented. Specific recommendations are presented in bold text and are numbered throughout.

2. Revising NEB Responsibilities re: Federal Environmental Assessments

NEB's Awkward Fit as an EA Body, Given Multiple Mandates

The NEB currently has multiple responsibilities and potentially conflicting mandates, including requirements to (a) promote Canadian energy development and positive economic outcomes; and (b) impartially assess the same energy projects that provide that economic growth, to identify whether they will result in significant (human and biophysical) environmental effects.

The NEB currently has responsibilities for overseeing exploration where unregulated by other jurisdictions (e.g. certain offshore and northern areas), while also regulating import and exports of oil, gas, and electricity, and construction and operation of power and energy infrastructure and facilities. The NEB Strategic Plan defines the NEB purpose as regulating pipelines, energy development, and trade in the Canadian public interest.

[1] The Expert Panel specifically asked us: "What is the structure / governance of Fort Nelson's proposed reconciliation unit in regards to Crown and FN communities/organizations?"

Public interest refers to a "balance of economic, environmental and social considerations"[2].

Fort Nelson has found that this "balance" tends to favour the present-day policy priority of securing economic benefits through energy development, benefits that preferentially accrue to non-indigenous Canadians, while adverse environmental effects (and associated infringements of priority Aboriginal and treaty rights due to loss of habitat, wildlife and harvesting opportunities) preferentially are felt by indigenous[3] minorities. These priority rights are largely ignored and the NEB has been very clear that its interpretation of "public interest" is focused on benefiting the majority.

The NEB EA approach not only promotes the infringement of priority Constitutional protected rights and is contrary to the purpose of EA outlined in the *Canadian Environmental Assessment Act 2012,* which is to assess certain activities and **prevent significant adverse effects**. In our experience, NEB tends to overlook crucial information on adverse impacts. As a result, NEB recommendations to the Minister are arrived at without an in-depth understanding of adverse impacts on environment, or adverse impacts on economy or society, and are completely barren of consideration of the distribution of those benefits and adverse effects.

These fundamental flaws in the NEB EA process and mandate have been evident in all the NEB EAs Fort Nelson has been involved in, and are a reflection of the inconsistency between NEB EAs and those run by the Canadian Environmental Assessment Agency (CEAA), even though the same parent legislation is supposed to guide both EA processes.

This begs the question of why the NEB is conducting a small sub-set of federal EAs by itself, when we have a federal agency explicitly designed to do so in CEAA. CEAA does not have any other mandates, such as energy data collection and dissemination, provision of expert advice to the federal government on energy, determination of appropriate tolling structures for energy infrastructure, issuance of export licenses, or day-to-day pipeline regulation, to dilute its focus on EA. While by no means perfect, CEAA is dedicated to the singular practice of EA and has much higher credibility in this regard than the NEB in relation to the quality and independence of its EA process (one need look no further than the disastrous ongoing NEB Energy East process to see this). In EAs run by CEAA, evidence is considered in greater depth to identify and assess impacts, and CEAA staff has proven more knowledgeable about EA and Aboriginal rights.

[2] National Energy Board. (2016). *National Energy Board Strategic Plan.* Retrieved March 21, 2017, from: https://www.neb-one.gc.ca/bts/whwr/gvrnnc/strtgcpln-eng.html

[3] In this submission, FNFN uses the terms indigenous, aboriginal and First Nations indiscriminately and synonymously, and with no disrespect intended to any of the different indigenous groups of Canada.

In our experience, the NEB has proven extremely weak at assessments of impacts on the environment and Aboriginal rights and interests. The NEB is, however, very good at regulating the detailed engineering components of energy and power facilities and infrastructure, at determining the reasonableness and fairness of tolling structures, and other key aspects of pipeline development. Continued strong oversight of Canada's energy infrastructure is important and the NEB is well suited to continue this role. However, the NEB's role as an "independent" EA body has not proven credible or of adequate quality to merit its continuance.

Recommendation 2.1: The responsibility for managing federal pipeline and powerline environmental assessments should be removed from the NEB and given to the Canadian Environmental Assessment Agency. The NEB, like other federal agencies (e.g., DFO, Transport Canada, ECCC), can continue to provide expert input to CEAA-run EAs in the future.

Improving the Export Licensing Process

One of the responsibilities that the NEB currently has in its busy mandate is the issuance of export licenses. FNFN does not disagree with the NEB running this export licensing process, however, the timing and focus of export licensing needs to change, and the NEB must engage upstream Indigenous nations on the effects of these decisions.

Presently, the NEB issues export licenses without any consideration of potential adverse impact on environment or rights. Under current legislation, the NEB only contemplates whether the exported product will put Canada's ability to meet domestic energy requirements at risk when determining whether to issue an export license. Ignored in the export license process is that these licenses are used by companies upstream of the proposed export facility to secure investment that, in turn, induces upstream resource development. The relationship between issuing export licenses and induced increases in gas exploration and extraction, gas plants and distribution pipelines are currently ignored by the federal government. Yet, this relationship has real adverse impacts on the rights and interests of "upstream" First Nations like FNFN.

Recommendation 2.2: Export licensing processes under s.118 of the NEB Act must be altered so that either:

- **NEB may only issue export licenses *after* a project has received approval once impacts are assessed through a federal EA (FNFN's preferred option); or**
- **NEB may only issue export licenses after the conduct of a much more detailed export licensing approval process, which includes consideration of environmental impacts at the facility and upstream to the energy source region.**

3. Towards Nation-to-Nation Relationships Between the Federal Crown and First Nations

Regardless of who is overseeing the EAs currently run by the NEB, the federal EA process must be fundamentally restructured in order to ensure the federal government may begin on a meaningful path towards reconciliation with Canadian indigenous groups via the committed-to Nation-to-Nation relationship. For example, a Nation-to-Nation relationship requires that the afore-mentioned "public interest" definition that guides decision-making be revised to allow for appropriate weighting of Constitutionally-protected indigenous rights.

As stated above, the NEB purpose defined in the Strategic Plan is to regulate in the "public interest". This aim, however, is often pitted against section 35 Aboriginal rights. Similarly, the objectives of protecting Aboriginal rights and environmental values, while promoting economic development and jobs, are also often in conflict. The road to reconciliation must begin with a clear recognition that protecting rights and the environment is not always possible when also trying to promote economic development. As a result, a relationship built on trust must begin with this reasoned understanding and a commitment to a fair and rigorous process that meaningfully considers impacts to rights, environment, and other interests and recognizes that Section 35 Constitutional rights are priority rights, weighted as such.

Recommendation 3.1: If the NEB continues to run EAs, its guiding legislation and process guidance should be revised to recognize that Section 35 Constitutional rights will be weighted higher than other rights in EA decision-making. If the NEB does not continue running EAs, similar language needs to be built into the legislation and guidance of the appropriate federal EA bod[ies].

Recommendation 3.2: Legislation and policy related to federal EA (NEB and non-NEB) should be revised to recognize reconciliation, adherence to UNDRIP, and Free, Prior and Informed Consent of indigenous peoples are priorities to be achieved though both EA process and EA outcomes, and appropriate guidance document developed with metrics against which to measure success in meeting these priorities.

The Need for Meaningful Parallel Nation-to-Nation Consultation Processes

Please note that the term "meaningful" is underlined above. The federal Crown has suggested that it already has a Crown Consultation process set up for NEB EAs, or is in the process of generating one. However, our experience is that in the past, such Crown consultation has been primarily paper in nature, or absent of any actual substance in terms of accommodation for infringements of our rights.

As part of the structuring of a Nation-to-Nation relationship, Fort Nelson strongly recommends the collaborative design and implementation of Crown Reconciliation Units (RUs).

Recommendation 3.3: Design and develop a federal Reconciliation Unit (RU) with expertise in Indigenous law, culture, EA, and has extensive experience working with Indigenous communities. The RU would be responsible for ensuring the consultation and accommodation process is done in a way that meets the full spirit and intent of reconciliation.

The RUs would be activated by a major project or regional development initiative/critical federal Crown decision process, and run parallel to the EA process and play the lead role in the federal government-to-indigenous government relationships before, during, and after the EA, with a crucial role in informing the Ministerial decision and working to make sure adequate information is provided through the EA process to support the Nations in developing their own, parallel Chief and Council decision.

RUs would be agents funded and staffed by the federal government, which would generally work in equal partnership with representatives of each affected First Nation (adequate and secure federal funding would be required for First Nations to administer their half of the relationship as well).

While final decisions may be made separately by individual First Nations and the federal Ministers, the EA process that provides information to inform those decisions is streamlined so baseline studies, scope of assessments, analyses, and other parts of the EA are defined in a way that meets information requirements for each independent government sufficient to make their own separate, final decisions.

The RU would also collaborate with the Nations on their assessment and conclusions, including developing conditions and recommendations to Minister(s). Those recommendations would critically include the capacity to identify additional accommodation measures over and above the Conditions recommended by the EA body (e.g., CEAA), which to date have generally focused on measures that can be easily implemented into regulatory instruments, rather than innovative accommodation measures that are outside the regulatory instrument track – which may in fact be as much or more important to reconciliation of rights and interests.

The RU would generally undertake the following tasks in partnership with each Nation in the context of an EA (examples only; RU responsibilities and roles would need to be developed in a consultative forum):

- **Pre-EA phase:** set up custom consultation requirements for Project X, determination of which First Nations should be parties to the EA, identify likelihood of infringement and required depth of Crown consultation and have this inform information requirements for the EA in relation to First Nation X, determine Proponent engagement requirements with First Nation X, involvement in issues, temporal, and geographic scoping for development of the EA terms of reference (replacing the highly generic NEB Filing Manual);

- **EA phase:** supplement EA body information, assist in determination of completeness of Application (especially in relation to Aboriginal and treaty rights, traditional use, cultural impacts), have direct line to EA body to raise procedural issues and concerns - including extensions to timelines for EAs when there are major information or analytical deficiencies replace EA body as arbiter of adequacy of Proponent "First Nation consultation" reports;

- **EA decision recommendations:** consult on and provide joint or separate draft conditions to EA body prior to the drafting of EA conditions (e.g., the NEB's "Possible Conditions" document) and after recommendations are drafted, RU joint drafting of aboriginal/treaty rights impact assessment and consultation/UNDRIP adequacy report, and option of filing final submission alongside EA body recommendations to Ministers (where findings differ); and

- **Post-EA recommendations:** Crown and First Nation X to work to develop any required additional conditions to recommend to Ministers prior to Ministerial approval.

The RU could also play a life-of-project role re: compliance and enforcement, on terms that would need to be developed on a Project-by-Project basis.

The RU would thus have a key role in setting up a much more meaningful Crown consultation process in federal EA, without the current "double delegation" situation where the federal Crown first delegates some aspects of consultation to the NEB (which experience shows us, has no interest or acumen in conducting it), which then delegates it further down to Proponents of a project.

In addition, the parallel oversight role of the RU would see a greater number of First Nation recommendation actually captured – either through adoption by the NEB of jointly recommended additional conditions to its recommendation to the Ministers, or adoption during post-EA consultation of additional accommodation measures. Currently, the NEB's record of adopting First Nations recommendations is extremely poor. See for example, Appendix 1 to this submission, which details the NEB's effective ignoring of FNFN's recommended conditions, without any supporting rationale and despite the NEB's recognition that several of those recommendations "could enhance environmental outcomes for the Project relating to traditional land and resource use", in the Northwest Mainline Expansion EA.

FNFN is very open to providing further input to the Expert Panel re: the structure and function of the RU upon request.

Increase the Accommodation Latitude of Federal Ministers in Relation to NEB Recommendations and Conditions

A major implementation problem with the clearly nobly intended Interim Approach imposed by the federal government in relation to federal EA in January, 2016,[4] is that at this time, the Major Project Management Office/Natural Resources Canada Crown Consultation team and the Minister both have extremely limited powers to develop additional accommodation measures over and above the typically narrow conditions set by the NEB.

To our understanding, the post-EA consultation and accommodation system set up under these Interim Measures has little or no latitude beyond recommending to the Ministers that they exercise one of the three options already available under law in their decision:

1. Accept the NEB recommendation;
2. Send the recommendation back to the NEB for further consideration; or
3. Reject the NEB recommendation.

The imposition of additional accommodation measures, though committed to in the Interim Approach measures, does not appear to have any mechanism to make it happen under the current system.

Developing a RU composed of experts in Indigenous culture, rights, EA, and working with Indigenous communities would provide more relevant conditions for the Minister to work with, provided that the Minister be given power to add additional conditions particular to the highest order of Canada's laws: Constitutionally derived accommodation measures for addressing potential impacts on section 35 rights.

Recommendation 3.4: Change legislation to give more power to the Minister(s) so they may require additional accommodation measures as part of the conditions of a decision, and provide the RU the mandate to develop recommendations to the Minister in this regard.

4. Incremental Improvements Needed in NEB EA Structures and Processes

FNFN recommendations in Sections 2 and 3 above require a dramatic shift in the way federal EAs are done for energy and power projects in Canada. If NEB continues to manage and recommend decisions on EAs, and if a proper Nation-to-Nation consultation forum is not set in place (an RU being just such a forum), FNFN would find it very difficult see the process as credible. The above revisions are fundamental to federal EA modernization; critically necessary revisions. That said, we provide additional recommendations for minimum incremental improvements needed to move NEB run EA towards a process that is more meaningful to affected First Nations.

[4] Accessed at http://news.gc.ca/web/article-en.do?nid=1029999; Interim Approach measure #4 states that "Indigenous peoples will be meaningfully consulted, and where appropriate, impacts on their rights and interests will be accommodated".

4.1 Improving Assessment of Impacts on Aboriginal and Treaty Rights

Despite consistently listing "potential impacts of the Project on Aboriginal interests, including Aboriginal and treaty rights" in its List of Issues for Hearing Orders, The NEB EA process currently overlooks the majority of effects on Fort Nelson rights and interests, presents little advice to Proponents or parties on how this assessment should be undertaken, and NEB decisions do not provide in depth assessment or appropriate and defensible rationales for findings that Aboriginal and treaty rights will not be unduly infringed.

For example, Appendix 1 to this submission provides a detailed set of concerns from the NEB EA of the Northwest Mainline Expansion, conducted in 2011-12. In that process, FNFN raised concerns with the NEB prior to it making its final decision, that the draft Environmental Screening Report of the NEB "fails to adequately consider or represent cumulative infringement of FNFN rights", and details treaty rights assessment gaps (p 2).

Our concerns fell on deaf ears and no revisions were made to the NEB's subsequent report to the Ministers. This begs the question of why FNFN or any indigenous group should bother to engage in a process where all our inputs, on those issues most critical to our well being, way of life and even cultural survival, are treated as refuseable advice.

Improvements both structural and process in nature are required to remedy the NEB's current indigenous rights and interests assessment 'blind spot'. They include the following necessary (but not necessarily sufficient) revisions:

Recommendation 4.1: The need to provide recommendations to the Ministers on effects of proposed Projects on Aboriginal and treaty rights and title must be explicitly built into legislation guiding the NEB (*NEB Act* and *Canadian Environmental Assessment Act*).

Recommendation 4.2: The federal Crown, in consultation with Canadian indigenous groups, needs to develop guidance on how all federal EA bodies will assess effects on aboriginal and treaty rights and title.

Recommendation 4.3: The afore-mentioned Crown Reconciliation Unit will provide enforceable, specific instructions to the federal EA body responsible for a specific EA, on the scope of assessment required for Aboriginal and treaty rights and title.

Recommendation 4.4: The NEB currently spartan "List of Issues" in its Hearing Orders, to be replaced by Project-specific Terms of Reference/Information Requirements.

Recommendation 4.5: The NEB to be required to provide more detailed reasons for decision in its draft and final ESRs, especially in relation to findings related to Aboriginal and treaty rights and title infringements/impacts, and cumulative effects (see further discussion on this topic below).

NEB EA Must be More Inclusive of Traditional Knowledge (TK) and Indigenous Perspectives

One of the main causes of the inability to protect First Nations rights and interests is that the NEB EA process does not embrace or even largely understand indigenous knowledge or worldviews.

We know that the Expert Panel is keenly interested in this reality, given your question: "How can Indigenous knowledge and western science come together in the hearing, application and assessment processes?"

We attempt here to identify solutions for two key elements to this ultimate current failing:

1. The current NEB process alienates indigenous people and does not properly gather traditional knowledge; and
2. The people making decisions are rarely well versed in the culture and worldview of the indigenous groups being affected.

As to the first issue, FNFN's experience is that the NEB process is highly adversarial and legalistic in nature that effectively excludes Elders and harvesters from participating. In the case of the Northwest Mainline Expansion, FNFN stated clearly to the NEB in the hearing itself and again in written submissions (e.g., at p. 3 of Appendix 1 herein), that "at least four FNFN members who had direct evidence related to the Project area were not comfortable with the formality and structure of the NEB's hearing process and thus were precluded from being heard". Despite one member being overcome with emotion at the formal structure of the hearing and unable to continue, the Board refused to adjourn the oral hearing or set up any other forum where our members could be heard.[5]

The NEB process must create space in hearings for presentations that are open-ended and may allow for limited questions from the Board. Communicating with Elders and harvesters in a way that is comfortable and familiar will allow for improved information, both within and beyond hearing settings.

Recommendation 4.6: Eliminate cross-examinations and legalistic approaches to testing knowledge from traditional knowledge holders and indigenous community members in general. Focus more on parties providing presentation to the NEB Panel, rather than creating a court-like setting that alienates indigenous parties. Create spaces that are more appropriate through consultation with the affected aboriginal groups and enshrine appropriate hearing structures into the Project-specific Terms of Reference (the RU may play a key role in this process).

[5] We had a nearly identical experience in the Komie North hearings, as we stated in our opening statement at that hearing: "he National Energy Board process is a challenge for us. Because of our culture and experience, many FNFN members are uncomfortable in the formal, public, and adversarial setting of this hearing. Today we will not hear directly from two FNFN members who have important knowledge to share about their traditional practices in the project area. They are not comfortable coming here to talk. It is too formal, and they don't want to answer questions. This is not our way".

In addition, we advise that an independent organization be set up at arms length from government and made to represent regional groupings of Indigenous nations. Such groups could provide advise to NEB on process and issues for incorporating indigenous knowledge, traditional use, culture, and rights in EAs.

Recommendation 4.7: Set up standing regional aboriginal advisory panels to inform the NEB process on issues related to adequacy of Traditional Knowledge, Traditional Land Use, cultural impact assessment, and Aboriginal rights impact assessment.

It is important to remember as well that the NEB is meant to govern projects throughout their life cycle, so there should be no artificial "stop" sign for TK integration after the EA is complete. NEB Panels have generally treated First Nations recommendations as refusable advice, and these often include pre-, during and post-construction indigenous monitoring. Such programs are necessary for TK to be built into the life cycle of NEB-regulated projects.

Recommendation 4.8: If the Board is serious about implementing TK into Project throughout the life cycle, life of project monitoring and TK reporting is critical alongside western science. Conditions for indigenous pre-, during and post-construction monitoring and adaptive management roles need to become the norm, not a negotiable add on.

In addition to making the NEB process more welcoming of traditional knowledge and its holders, the membership of the NEB is also a concern. NEB members tend to be predominantly based on energy industry experience. This experience is irrelevant to their ability to assess impacts on environment and FNFN's priority rights. At least some of these members must have backgrounds in Indigenous law, culture, EA, and extensive experience working with Indigenous communities.

Recommendation 4.9: NEB members must demonstrate independence from the energy and power industries and a strong understanding of Indigenous peoples, perspectives, and rights.

Alternatively or (preferably) in combination, more NEB Panels should include non-Board members with appropriate expertise tailored to the Project in question.

Recommendation 4.10: NEB EAs to be run by panels that include non-NEB members (following the "review panel" model used in some CEAA EAs), including experts in areas relevant to the EA that Board members may lack, and prioritize regional aboriginal members nominated by indigenous nations to a roster of potential panel members.

4.2 NEB EA Scoping Processes and Effect Assessments Must by Vastly Improved

Include all Aspects of the Proposed Project in the Scope of Assessment

It is not good EA practice to conduct an EA where all physical works and activities are not included in the scope of development and scope of assessment. Nonetheless, the NEB can exempt certain facilities and activities from its EAs via Section 58 *NEB Act* exemptions.

In the Komie North final decision, Fort Nelson was concerned that the NEB suggested it considered all Section 58 facilities in its EA decision, when in fact no location, size, or nature of these exempted physical works and activities were defined for the EA. It is unacceptable for the Board to decide in advance and without knowledge of locational context, whether a development component will likely be the cause of a significant adverse impact.

The purpose of EA is to link activity type to areal sensitivities in order to estimate likely impacts; when one aspect of that equation is missing, it is impossible to estimate the outcomes. The NEB making conclusions about impacts in advance of understanding where the impacts will be experienced is not good impact assessment. Rather, this approach allows for potentially significant adverse effects to be entirely overlooked in the process. EAs aim to identify and characterize potential impacts of a project on sensitive receptors. In nearly all cases, sensitive receptors are tied to a specific location. This is a fundamental flaw that must be addressed in future NEB EAs by removing the section 58 exemption rule.

Recommendation 4.11: Abolish 58 exemptions from the NEB EA process. Scope of project must include all the location, nature, and potential impacts of all physical works and activities required to undertake the Project, not exempting so-called "minor" or "temporary" ancillary infrastructure.

Provide Specific Guidance to Proponents on "Difficult" Aspects of Assessment

The NEB EA process focus tends to be on tolling and pipeline technical engineering components (and to a lesser degree biophysical impacts), resulting in very little time or effort spent on understanding impacts on traditional use, culture or any aspect of the human environment. The narrow foci of assessments are usually justified by Proponents through reference to "adherence to the NEB Filing Manual". As a result, the NEB's generic Filing Manual is currently the crutch that Proponents respond to First Nations with when we find their Applications inadequate.

While FNFN has already indicated in **Recommendation 4.4** that the NEB Filing Manual should be discarded as the primary information requirements document for individual EAs, there is a strong need for the NEB (or preferably the federal Crown in general) to issue better guidance to all parties on the following issues that Proponents and EA bodies have struggled with consistently in past federal EAs:

Recommendation 4.12: Crown guidance improvements are required in regards to:

a. **TLU requirements, especially pre-Application and "beyond site specific" requirements and proper assessment methods (reject biophysical and access proxies);**
b. **TK requirements;**
c. **Assessment of effects on Aboriginal and treaty rights – for example, the NEB Filing Manual does not require framing of environmental impacts as they translate to Treaty rights infringement;**
d. **Cultural impact assessment, beyond current focus on physical heritage resources;**
e. **Significance thresholds and how they will be applied on a VC-by-VC basis in Crown decision-making;**
f. **Updated cumulative effects assessment requirements (see further discussion below);**
g. **Proof of likelihood of success of mitigation;**
h. **Disaggregated socio-economic impact assessment for each affected First Nation (as per CEAA interpretation of Section 5(1)© of CEAA).**

Inadequate Cumulative Effects Assessment and Consideration of Upstream Impacts

The NEB has proven unwilling to consider the implications of existing cumulative effects loading on the gas fields of northeast BC in its EA process.

In our letter of January 17, 2012, to all parties to the GH-2-2011 (Northwest Mainline Expansion) EA, in response to the NEB's Draft Environmental Screening Report (ESR - our letter is attached here as Appendix 1), FNFN reiterated previously submitted evidence that the possibility of meaningful treaty rights practices had already been largely alienated in large portions of FNFN territory in the pre-Project Case via gas sector development and, as a result the proposed Project:

> *Must be assessed within this larger critical context. As development pressures increase and the number of places where FNFN can practice their Aboriginal and Treaty rights meaningfully diminish, the onus is on the Crown, developers and assessment bodies to conduct meaningful and relevant project-specific and cumulative effects assessments. Every subsequent development inevitably causes and contributes to both specific and cumulative damage of an already critical nature, and must be held to the highest possible standard of assessment… In this case, FNFN finds that the Draft ESR and the NEB process have failed to meet the necessary standards [a variety of failings are listed]… and seeks reconsideration by the NEB on several items. (pg.1).*

The NEB subsequently made no revisions to its findings, and focused in its decision not on managing and reducing total cumulative effects loading - which virtually all credible

EA practitioners agree needs to be the focus (see for example work by Bram Noble) - but rather on the proposed Project's smaller incremental contribution to cumulative effects.

Clearly, the Board has yet to actually implement its stated focus on total cumulative effects loading in its EAs and this is allowing additional cumulative effects loading in the gas fields of northeastern BC.

Similarly, in the Komie North EA, cumulative effects analysis was missing almost completely from the NEB's decision and rationale.[6] Fort Nelson First Nation's "concerns about the impacts and the lasting harm to their culture, identity, and way of life caused by this changing landscape" were mentioned by the Board in their recommendations report, but the Board did not conduct any substantive assessment of same and required no conditions to address the impacts that raised the concerns. The NEB did not appear to even consider requiring the proponent to use well-established cumulative effects analytical methods to assess effects on traditional use in a way that would allow the NEB to even begin to understand this concern within the process.[7]

Environmental disturbance in FNFN territory has accelerated rapidly from a near pristine state in the past 30 years. Yet the NEB process does not consider thresholds of acceptable change or this dramatic historical change over time.

Many areas within our territory are now experiencing critical effects loads. Yet each developer within each NEB EA claims they are not responsible for the present disturbed state and, in turn, finds cumulative effects from an incremental project view are found by Proponents and the NEB to be not significant. Such an approach leads to the Crown turning a blind eye to irreversible and high magnitude impacts on our members' rights and interests, which are often already demonstrably significant in the pre-Project Case.

Cumulative effects assessment in future NEB EAs must start with consideration of historic and ongoing impacts on rights-based activities, including traditional use, and the resources these practices rely upon.

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[6] The NEB decision for Komie North provided no real discussion of cumulative effects, and no identification of quantitative information related to existing total cumulative effects loading whatsoever. Instead, it states but does not follow up on the following: "the Board notes FNFN's concerns about the impacts and the lasting harm to their culture, identity, and way of life caused by this changing landscape." No recommendations are made on the need for additional cumulative effects assessment or monitoring.

[7] This is only one example of a series of failings in the Komie North NEB EA. FNFN was disappointed to see no reference to culture, cultural landscape, psycho-social issues, or ability to meaningfully practice Treaty Rights or pass them on to the next generation in the Board's deliberations or decision. NEB ignored FNFN's re-routing requests and evidence, and accepted false re-interpretation of FNFN traditional land use evidence as accurate, despite hearing testimony by FNFN clearly refuting Proponent reinterpretation. Again, no meaningful mitigation was adopted. FNFN took this combined neglect as proof that the current NEB process holds nothing of value for First Nations, especially given that even the simplest of mitigation and monitoring requirements that would support the engagement of First Nations in pre- and post-construction monitoring are ignored within the NEB's current system.

Recommendation 4.13: The NEB must enforce its stated Filing Manual focus on total cumulative effects loading and not allow Proponents to focus on "project contribution" in cumulative effects assessment.

Recommendation 4.14: The NEB must require appropriate temporal back-casting to establish the degree of impact on Valued Components (VCs) in the pre-Project condition, instead of accepting "current conditions" as a de facto baseline. This may mask substantial cumulative effects loading to date that must be considered in examining the future resilience/vulnerability of each VC.

Similarly, adverse cumulative effects of induced cumulative effects on gas fields from the development of additional pipeline capacity is a critical element of the natural gas development process often overlooked in the NEB process. FNFN must give credit to the NEB on including induced effects and upstream implications in the NEB North Montney EA. However, the NEB process needs additional guidance, predictable/consistent application, and stronger punitive actions for non-compliance on information provision, in relation to consideration upstream, induced impacts. In the North Montney EA, the Proponent largely rebutted the NEBs requests or gave weak responses on the question of upstream, induced effects and the NEB did not sanction them for these deficits.

Recommendation 4.15: Scope of assessment for cumulative effects for NEB pipeline EAs must include induced effects upstream associated with increased gas or oil distribution capacity in the Project Case, focused on the gas or oil fields where supply would be coming from.

5. Conclusions

Our experience has found that the NEB system must be vastly improved to protect Aboriginal and treaty rights and to ensure the 2016 federal government commitments are met. These commitments include:

1. To engage in Nation-to-Nation relationships with First Nations;
2. To adopt United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) and associated Free, Prior and Informed Consent (FPIC) requirements;
3. To include more meaningful post-EA consultation and accommodation with First Nations, and;
4. To incorporate traditional knowledge in a more meaningful way into EA process and decision-making.

It is against these metrics that FNFN has gauged the effectiveness of the current NEB EA process in this submission. Currently, we find that the NEB EA legislation and process are not designed to meet any of the four federal government commitments listed

above, or to meaningfully assess or avoid and mitigate impacts on rights, culture or traditional use.

There is a Dene term for balance – *eh'thee oh t'deh*. We call for the Expert Panel to recommend the federal government work with us to seek this balance between non-renewable resource development and protection of our priority rights and the resources they rely upon by NEB modernization and improvement in the ways we have described in our submission.

In order to do this, the NEB system needs to move to one of co-management between the federal government and indigenous groups in their respective territories. Only through joint assessment and decision-making, and subsequent joint enforcement of the conditions of projects that are allowed to proceed, with the transparency, accountability, and stewardship responsibilities required by indigenous groups be adhered to.

Fort Nelson First Nation calls for the federal government to live up to the spirit and intent of its promises to include traditional knowledge in decision-making, to consult with the intent of accommodating infringements of our Treaty rights of projects that do proceed, and to develop a Nation-to-Nation decision-making framework that does not "restore" our faith in the NEB process, but in fact establishes it for the very first time.