COLD LAKE FIRST NATIONS
CONSULTATION DEPARTMENT

P.O. BOX 389
COLD LAKE, ALBERTA
T9M 1P1

PHONE: (780) 594-7183 EXT. 229
CONSULTATION@CLFNS.COM

March 31, 2017

Expert Panel for the National Energy Board (NEB) Modernization
Natural Resources Canada's NEB Modernization Secretariat
580 Booth Street, 17th floor
Ottawa, Ontario
K1A 0E4

Comments submitted to the Panel via the NEB Modernization: Expert Panel Website
http://www.neb-modernization.ca/participate/survey_tools/share-a-document

Re: Cold Lake First Nations' Written Submission
for the National Energy Board Modernization Expert Panel

Dear Expert Panel,

Cold Lake First Nations is submitting comments in relation to the Government of Canada's review of the National Energy Board's (NEB) structure, role and mandate under the *National Energy Board Act*. This submission is based on information provided through community engagement with Cold Lake First Nations Chief and Council and membership, and was developed with the assistance of consultants and staff within various Nation departments. The Expert Panel's recognition of the need to be guided by the United Nations Declaration on the Rights of Indigenous People (UNDRIP), Nation to Nation relationships, a Rights-based Lens and Indigenous Collaboration represents a significant and positive step forward in the Federal approach to Indigenous engagement.

Meaningful engagement in the regulatory process and the management of the natural and cultural resources within our traditional territory, *Denne Ni Nennè*, is of critical importance to our Nation. Cold Lake First Nations' experience has been that despite our input and participation in many regulatory and consultation processes, encroachments on our lands and water and impacts to the

exercise of our Section 35 and Indigenous rights continue without being properly addressed. It was evident in engagement sessions with Cold Lake First Nations community members in December 2016, January 2017 and March 2017, our members are disillusioned with environmental assessment and consultation processes, and often do not want to participate because they have seen no positive outcome over the years of any participation or knowledge sharing.

Despite these concerns, Cold Lake First Nations is participating in this review process because the preservation of our culture and our livelihood for future generations depends on protecting the lands and waters within our traditional territory, *Denne Ni Nennè*, and the continued exercise of our Section 35 and Indigenous rights. After many years of government and industry making decisions about the lands and resources of our traditional territory, we know that Cold Lake First Nations requires more than assessment and consultation to ensure lands and resources and our associated rights are protected and preserved for future generations. To achieve greater sovereignty, independence and dignity for our people as envisioned by our Elders 25 years ago (see the 'Future Circle of Livelihood' diagram in Figure 2 of our submission) we need decision-making authority regarding our traditional lands.

As the Federal Government has committed to a renewed Nation-to-Nation relationship with First Nations people, we hold new optimism that the treatment of our input in this process will be different. The Panel's willingness to explain how, specifically, it has considered and incorporated our individual comments would be a significant indication of Canada's serious intent towards ensuring that concerns of Indigenous groups are heard and taken into account in the modernization of the NEB. Should there be instances where the Panel does not incorporate our input, we expect an explanation of why our comments were not incorporated. Showing how input is or is not incorporated is key in building the Nation's capacity to understand the process and gives the Government the opportunity to fulfill the requirements of the Indigenous Engagement Plan and demonstrate consequential efforts towards meeting the goal of "renewing its relationship with Indigenous people in Canada and moving towards reconciliation".

Overall, Cold Lake First Nations emphasizes two key recommendations on outcomes of the Panel's review:

(1) The Crown must fully execute consultation, accommodation and consent obligations in accordance with its constitutional duties and the Crown's commitment to the principles outlined in UNDRIP and the importance of considering the relationship between Crown legislation regarding the environment and the Treaty and Indigenous rights of our Nation.

(2) The Crown must jointly develop an implementation process with First Nations guiding Indigenous involvement in policy and legislative development moving forward. To support First Nations involvement in developing the implementation plan, there is a need for the Provincial and Federal Governments to collaborate in delivering a harmonized education program and easy to follow guidance materials to our Nation on their various regulatory functions, how those regulatory processes interrelate, and to clearly explain how impacts to our Nation are assessed and addressed through the regulatory process and associated consultations by various levels of government and as represented by their various departments and agencies.

We also note that the funding offered by the Government of Canada under the Contribution Agreement is inadequate for meaningful review and the timelines proved to be a challenge for our First Nation. Please be advised that due to capacity and timeline constraints, Cold Lake First Nations was unable to provide as much detail in our review and submissions as we would have liked. We reserve the right to raise additional comments as new information arises and the environmental and regulatory review processes continue.

Regards,

Darren Frederick
Consultation Director, Cold Lake First Nation Consultation Department
Darren.frederick@clfns.com**Please copy all correspondence to consultation@clfns.com*

cc: Cold Lake First Nations Access Committee

Cold Lake First Nations' Written Submission for the National Energy Board Modernization Expert Panel

Submitted March 31, 2017

Via the NEB Modernization: Expert Panel Website

http://www.neb-modernization.ca/participate/survey_tools/share-a-document

Background

Cold Lake First Nations (or 'the Nation') is a *Denesuline* Nation whose reserve lands and home communities are located in what is now identified as Alberta, about 300 kilometers northeast of Edmonton and close to the Alberta-Saskatchewan boundary. The Nation's traditional territory, *Denne Ni Nennè*, is largely centered around *Ah 'Touwe* (Primrose Lake) and encompasses lands and waters within both Alberta and Saskatchewan, including *Łouwe Chok 'Touwe* (Cold Lake). According to the Nation's Elders and oral tradition, *Denesuline* people have lived on the lands surrounding *Ah 'Touwe* and *Łouwe Chok 'Touwe* for thousands of years and local archaeological digs confirm an unbroken pattern of use and occupancy in the area for over thousands of years.

Cold Lake First Nations has 2,858 registered members, over 1,300 of whom live on our own reserves. These include Cold Lake 149 (Le Goff), 149A Indian Reserve Fish Camp square mile water boundary (Cold Lake Town), 149B (English Bay) and 149C (Martineau River). CLFN's administrative offices are located on reserve No. 149, east of Bonnyville and south of Cold Lake. The entirety of Cold Lake First Nations traditional territory is called *Denne Ni Nennè*, meaning 'Our Land' or 'The People's Land.' These traditional lands extend northeast to La Loche and Southeast to Paradise Hill in Saskatchewan; westward along the Sand River south to Beaver Dam (Angling Lake) and as far north as Winefred Lake (see Figure 1).

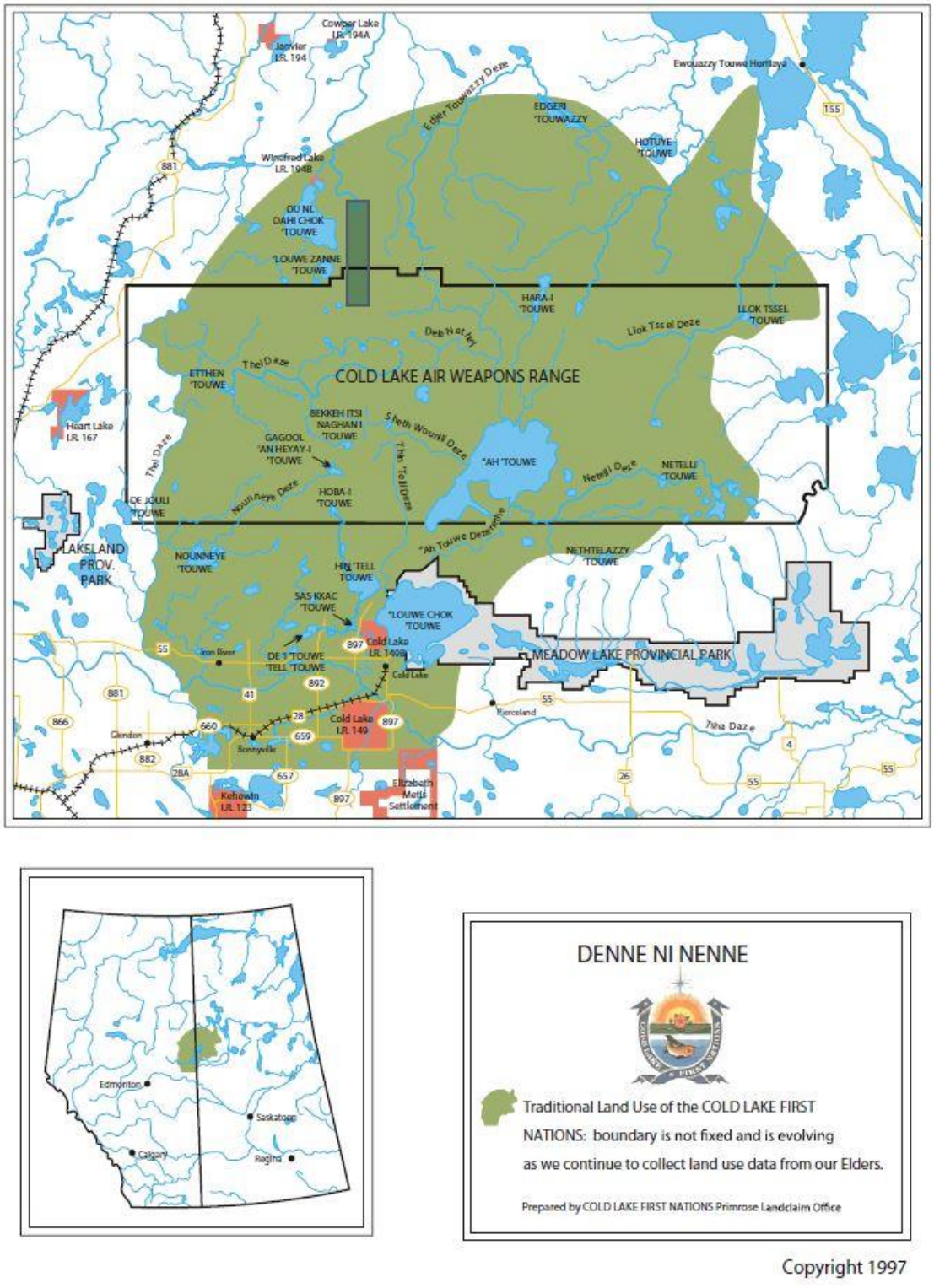

Figure 1: *Denne Ni Nennè* as Recognized in the Cold Lake Air Weapons Range (CLAWR) Claim Settlement Agreement

Cold Lake First Nations is an Indian Band pursuant to the *Indian Act*, an Aboriginal people under s. 35 of the *Constitution Act, 1982*, and an Indigenous people as defined by the United Nations Declaration on the Rights of Indigenous People (UNDRIP). Our members are the beneficiaries of Treaty 6, which affords land use rights pursuant to the Treaty, the *Natural Resources Transfer Agreement* and the *Constitution Act, 1982*. Included in these rights that we prefer to call 'Treaty rights' are the right to carry on our traditional activities of hunting, fishing, trapping, gathering food and medicinal plants, carrying out ceremonial activities, engaging in wildlife management practices, and teaching future generations the *Denesuline* language and way of life in a manner consistent with the way these activities were conducted prior to Treaty.

In 1952, the Federal Government created the Primrose Lake Air Weapons Range, now known as the Cold Lake Air Weapons Range (CLAWR), within *Denne Ni Nennè* in the provinces of Alberta and Saskatchewan. As a result of this action, Cold Lake First Nations families were removed from and prohibited from using a 11,630 kilometres^2 area that extends across the centre of *Denne Ni Nennè* and takes up the majority of the Nation's traditional lands; prior to 1952 this area provided the basis of the Nation's economy. In 1975, the Nation filed a specific claim regarding inadequate compensation for the creation of the range, and in 1992, the Indian Claims Commission agreed to hold inquiries into the grievance. The Commission's conclusions included the following:

> … There can be no dispute that the exclusion of the people of Cold Lake from the air weapons range substantially impaired their livelihoods and their access to food and other resources. The results of that event continue as a sense of loss and a source of grievance in the community and the results are still painfully evident. The damage to the community was not only financial, it was psychological and spiritual … The cumulative impact was to destroy the community as a functioning social and economic unit. (ICC 1994)[1].

During the process of the Primrose Land Claim, Cold Lake First Nations Elders shared their experience, knowledge and understanding to establish the three 'Circles of Livelihood' (Figure 2). The first circle represents pre-colonialism and how the Nation derived a harmonious lifestyle from their traditional land following purposeful monthly activities within seasons and the Nation's traditional laws given by the Creator. The second circle of livelihood represents the chaos and

[1] Indian Claims Commission (ICC) 1994 "Cold Lake and Canoe Lake (Primrose Lake Air Weapons Range) Inquiries," Indian Claims Commission Proceedings 1. Ministry of Supply and Services Canada. Ottawa, On. Available online at https://www.landuse.alberta.ca/Forms%20and%20Applications/CLFN%20-%20Application%20Appendix%20Indian%20Claims%20Commission_2014-03-05_PUBLIC.PDF

disruption that occurred after the creation of the CLAWR, where the Nation lost most of its' independence. The third circle represents the Elders vision of the future, where members can once again regain interdependence and have a sustainable livelihood whereby the community can function in accordance of a blended modern lifestyle along with their traditional ways.

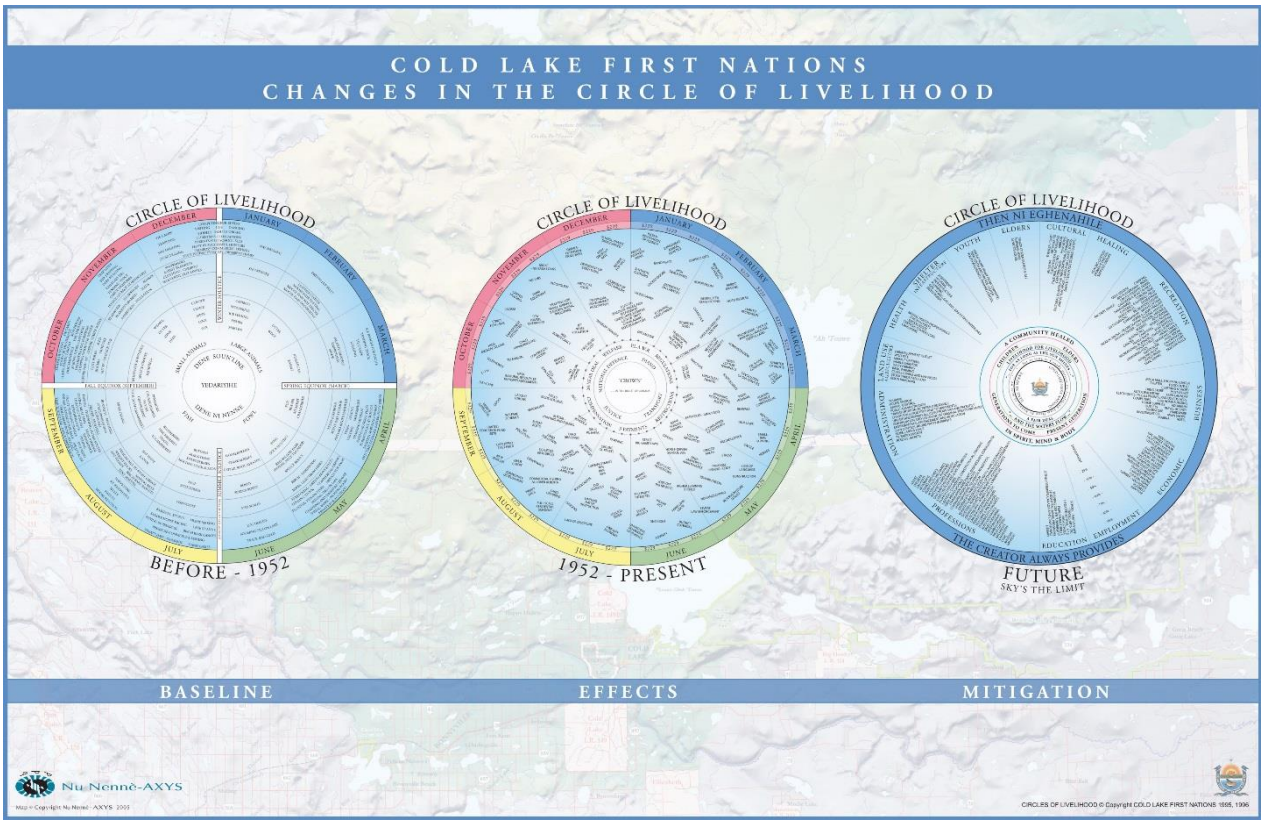

Figure 2: Cold Lake First Nations Circles of Livelihood

It took fifty years of effort on the part of Cold Lake First Nations to obtain a final settlement with the Department of National Defense for compensation related to the social and economic impacts from the creation of the CLAWR. The agreement finally reached on July 12, 2002 included access rights to the range for Cold Lake First Nations. The Nation's Traditional Territory map (see Figure 1) was formally recognized and acknowledged by Canada and the Provinces of Saskatchewan and Alberta through its inclusion in the Access Agreement. The Access Agreement provides exclusive access to parts of the CLAWR for Nation members to practice Treaty rights, traditional uses, and other uses (with numerous limitations). The Access Agreement is to be renewed every five years and there is a 1986 Memorandum of Agreement between Alberta, Saskatchewan and Canada—called the "Principal Agreement" which is to be renewed every twenty years.

The Government of Canada and the Provincial governments of Alberta and Saskatchewan have a responsibility to Cold Lake First Nations from the Settlement and Access Agreements. The Agreements provide for exclusive rights to access and utilize the CLAWR for traditional purposes and recognize Cold Lake First Nations territorial lands. The spirit of the federal and provincial commitments in the Access Agreements has fallen short, but Cold Lake First Nations has taken steps towards more active management of our lands guided by the Circles of Livelihood which provide teachings from our ancestors, as told by our Elders.

Cold Lake First Nations' livelihood has endured substantive alteration as a result of the development of the energy industry. Federal authorities need to uphold the highest level of standard to ensure the decisions of the past, as well as those that occur in the future, provide for an effective balance of environmental, economic, and social considerations in the implementation of those decisions, particularly in the context of the infringement of Section 35 and Indigenous rights. The National Energy Board plays a key role within the federal framework and creating a broader role for First Nations to become part of the decision-making and evaluation process is critical to achieve this balance.

Overarching Concerns

Three key themes emerged from the engagement with Cold Lake First Nations members regarding the Nation's review of federal environmental and regulatory processes including the National Energy Board Act. These are:

- CLFN members see that the regulatory system has failed to protect the waters, the land and their Section 35 and Indigenous Rights;
- CLFN members are disillusioned with consultation processes; and
- CLFN members have many questions and concerns about federal versus provincial regulatory responsibilities and jurisdictions.

These themes have also arisen through numerous other consultation and research processes with the Nation.

The first is a general distrust of the current regulatory regimes in Canada which have failed to protect the land, water and other resources that Cold Lake First Nations' livelihood depends on

and have thereby also failed to fulfill the Crown's obligation to protect our Nation's Treaty and Indigenous rights. Members shared knowledge about how the lands, waters, wildlife, plants and fish within *Denne Ni Nenne* have been damaged, contaminated, reduced and destroyed to the extent that the current and future exercise of Cold Lake First Nations Treaty rights is extremely tenuous, as it is for many Indigenous people in this country. One member described some of the deterioration of the environment she has seen in her lifetime, particularly to water and fish, and concluded: "Obviously, they didn't do a very good job in protecting our waters." Another Elder commented that "The Government itself has destroyed all our lands, waters and our air, everything. They have allowed industry to destroy everything." Essentially, if past or current regulatory systems were effective in protecting the environment and Treaty and Indigenous rights, the community believes the environment would not be in the damaged and deteriorated state it is in now.

The second theme was a deep disillusionment with consultation processes undertaken by government and by industry. In the words of two participants:

> *"We never really were involved in any decision making over the years I have been here anyway. Our people, the older people that I know didn't like what was going on but no one listened to them. The first thing that ever happened tragically was our land bring taken away from us in Primrose. That was the biggest hurt in this community. They weren't consulted. All of a sudden, they had to move out. So I don't trust this Federal Government … The Government itself has destroyed all our waters, our lands and our air, everything. They have allowed industry to destroy everything. So when I'm sitting on a committee like this, I would like to talk to the government people that are leading this. I don't know if they will ever listen. We are the last people on this land that are being listened to. We are right on the bottom. We are land owners of this country but no one listens to us."*

> *"They came back and say, 'Yup, we consulted with Cold Lake First Nations elders' and we sat at the table with them and they fulfilled that without really doing anything. We are like token, and I'm tired of being that you know like, for me, it's got to be more than just consulting. There's got to be some action and more you know, follow through by the people that are coming to us, rather than say oh yeah they consulted with us….That's my only concern with this whole thing. I am very leary. We haven't been heard today."*

Based on the members experience, consultation amounts to token efforts that do not represent true involvement in decision-making and do not result in tangible or beneficial outcomes.

The third theme came across the most strongly in the latest session on March 20. Members have many questions and concerns about federal versus provincial regulatory jurisdictions and how that can create gaps in the protection of the environment and Section 35 and Indigenous Rights. For example, one member questioned how the National Energy Board "relates" to "provincial mandates" on federally regulated projects. Another member expressed concern that because Cold Lake First Nations reserves and the Cold Lake Air Weapons Range (CLAWR) are federal lands federal level environmental assessments should be triggered.

The Nation also faces conflicts in having to choose between full participation in project-specific assessment processes and the desire to obtain economic benefits from a project such as business and community investment. The Nations' experience has been mostly negative in regards to how impacts and concerns have been addressed in past regulatory and consultation processes. First Nations are faced with the decision to forgo full participation in the regulatory process to ensure the opportunity to benefit economically from a specific project is not jeopardized. While agreements with Proponents can provide economic benefits, they do not address cumulative impacts to Section 35 and Indigenous Rights. There should be a process to ensure First Nations impacts and rights are addressed regardless of participating in the regulatory process or reaching benefit agreements.

Cold Lake First Nations understands that the intent of Canadian environmental law is to ensure that the government takes environmental and social impacts into consideration in decision-making, and to provide accountability in decision-making processes so that short-term economic or political gains are not prioritized over long-term environmental protection. Nation members are concerned that the existing damage may already be irreversible:

> *"…is it recoverable, like is the damage already gone too far where it's not recoverable? Like you take a look at Primrose (Lake), like I have seen all these fish … the meat's gone soft, like you can just take your finger and stuff it right through, that's how soft the fish are. They're gross, there's worms … is that recoverable? I think it's too far gone to even be recoverable so where do we get in there before it's too late?"*

Concerns such as this lead members to question whether their concerns are ever heard. The modernization of the NEB needs to ensure consultation processes are meaningful and address these concerns.

Members made recommendations to address some of these concerns. For example, members talked about the need to develop a "cumulative threshold" that would be protective of their Section 35 and Indigenous Rights that could be applied in regulatory and consultation processes. Another suggestion was for greater First Nations involvement in holding regulators and proponents accountable. First Nations should be involved in continuous life-cycle monitoring of pipelines in their traditional territories including decommissioning and remediation that provide for the practice of Section 35 and Indigenous rights.

These concerns and recommendations form the basis of Cold Lake First Nations following specific comments on the NEB modernization.

Comments and Recommendations Specific to the NEB

Most of our comments are most applicable to the "Indigenous Engagement" aspect of the review panel's mandate, although since many of our criticisms of the current NEB process arise from the limited role First Nations play in the decision-making process and overall regulatory framework, recommendations also apply to "governance" and "mandate". Given that the NEB Environmental Assessment (EA) process is also guided by the Canadian Environmental Assessment Act (CEAA) 2012, we request the Expert Panel to consider our prior submission to the Expert Panel on Federal Environmental Assessment Processes filed on December 23, 2016[2]. . Our EA recommendations in many cases are relevant to improving the NEB EA process as well. Further recommendations with respect to integrating Indigenous traditional knowledge are outlined in our June 2016 comments on the *Canadian Environmental Assessment Agency's Technical Guidance for assessing the Current Use of Lands and Resources for Traditional Purposes under the Canadian Environmental Assessment Act, 2012.* We request these comments also be taken into consideration in the present review of the National Energy Board.

1. The Need for Expertise Specific to First Nations in NEB Governance, Structure and Overall Regulatory Framework

Currently, First Nations involvement is limited to consultation and intervening at hearings on specific projects. Problematically, there is little capacity within the NEB to fully understand and

[2] CLFN's submission to the Expert Panel on Federal Environmental Assessment Processes filed on December 23, 2016 can be found at: http://eareview-examenee.ca/wp-content/uploads/uploaded_files/clfn-federal-ea-process-submission-dec-23-2016-final.pdf

apply the concerns and information that First Nations raise in the project-specific context. The current NEB Board members have expertise in areas such as energy, business, and economic development that is not balanced by expertise in areas of social science and Indigenous law. The organizational structure of the NEB also appears to lack a specific role or function related to the assessment of social impacts and understanding the unique rights, cultures and circumstances of First Nations (and other Indigenous) communities.

Rather than limiting First Nations involvement to project-specific consultation, and intervention, a greater role must be given in the governance and structure of the NEB for those with expertise relevant to understanding First Nations concerns, impacts and rights.

Every aspect of the NEB's regulatory function requires First Nations involvement and input. For example, existing regulatory thresholds and guidelines were not developed in conjunction with First Nations. First Nations should be at the table when regulatory standards are being created so we can be confident the standards adequately protect Section 35 and Indigenous rights. Incorporating First Nations unique perspectives and clear methods for assessing and accommodating Section 35 and Indigenous Rights throughout the NEB institution is one way to encourage increased confidence in the NEB and assist in meeting the UNDRIP goal of Free, Prior and Informed Consent.

Recommendations:

1.1. Involve First Nations in the development of regulatory parameters, environmental and technical standards, monitoring and enforcement processes, as recommended in Section 9.

1.2. Create a position on the NEB's Board of Directors for a person with expertise relevant to understanding the unique concerns and impacts related to First Nations communities. Engage Indigenous communities in developing the process for recruiting and appointing a person for this position.

1.3. Create a business unit that is tasked with developing processes that would be implemented in all other NEB business units for ensuring that NEB processes accommodate First Nations

engagement in culturally appropriate ways and effectively incorporate Section 35 and Indigenous Rights into project assessments, decision-making, monitoring and operations.

1.4. Appoint temporary Board members from potentially affected First Nations communities to be involved in decision-making on projects with high potential for impact to Section 35 and Indigenous Rights.

2. Timelines

First Nations and Indigenous groups must be engaged in the NEB's process from the early stages during initial project notification, prior to the submission of project applications and prior to any key decisions being made. This level of engagement needs to continue through all phases of the project life-cycle (project planning, regulatory hearings, construction and operation and abandonment). Currently, there is a 15-month period, after the project application is deemed complete, for the NEB to complete its assessment of the Project, hold a hearing and make a public interest decision. The NEB does not ask if First Nations are ready to begin reviewing the Project or whether a technical review can be completed within the 15-month time period.

Project Applications are enormous documents containing multiple volumes of complex information. It takes time and capacity to review the project information, understand the potential impacts and risks to our Nation, and to provide meaningful input. The Nation contracts experts to explain and evaluate the project and its potential impacts while concurrently engaging leadership and community members including Elders and harvesters. This involves having one or more community meetings where we can present technical findings in a meaningful format to community members and obtain their input. Individual interviews with members whose rights stand to be directly affected by the project are also conducted. Obtaining the specific knowledge and input of our members is critical to determining the risks to our community and impacts to Section 35 and Indigenous rights.

These are the minimum steps required to ensure we *understand* the project and the impacts to start a meaningful consultation process about impacts and mitigation. Often there is not enough time to complete a thorough review of Project information, identify potential impacts to our Nation and to address those impacts with the Proponent and the Crown. This is exacerbated by the fact that the proponent's application often does not identify and assess impacts specific to our Section 35 and Indigenous Rights properly, if at all. This puts us in a position where we have to apply to intervene

in a hearing to preserve our right to ongoing consultation without having all the information required to adequately participate in the hearing. If our technical review is incomplete, we cannot prepare information requests or submit our written evidence. This reactive approach as demonstrated on past projects, places an unfair burden on the limited resources within our Nation, while creating unnecessary disruption in the regulatory process affecting project proponents and the NEB.

***Recommendations**:*

2.1. *Require that proponents, in their project application, specifically assess impacts to Section 35 and Indigenous Rights specific to, and taking into account the views of, each affected Indigenous community.*

2.2. *Improve notification of new projects and access to funding early and throughout all stages of review. This recommendation is elaborated upon in Section 3 below.*

2.3. *Implement reasonable, flexible timelines. The modernized NEB Act should either completely eliminate the 15-month review timeline or require input by First Nations into the status of commencing an independent technical review of the project prior to triggering the 15-month review period.*

2.4. *Require proponents and the Crown to consult with First Nations at the earliest stage possible: the project design phase. This would facilitate participation in the assessment of environmental and socio-economic effects, as well as the review of the proposed project before the final application is filed.*

2.5. *Hold the oral traditional evidence portion of hearings in the affected communities. This alleviates the capacity constraint of Chief and Council and community witnesses travelling back and forth between their community and the hearing location and promotes improved attendance and comfort in participation in the hearings. This would reduce the travel disbursements, much of which are not recoverable under the Participant Funding Program (discussed further in Section 3 of this submission). Hosting hearings on reserve would allow members to listen to the evidence presented, express their own views, and engage directly with the Board and would contribute towards building confidence in the regulatory process.*

3. Participant Funding Program

The Participant Funding Program ("PFP") is inadequate. For example, it only covers costs incurred after the PFP application is approved and an agreement is executed. This exacerbates the timing problem identified above in Section 2. If the proponent will not fund activities that the First Nation sees as necessary to understanding the project and its potential impacts, then First Nations have to apply for intervenor status in the hearing to get participant funding to conduct these activities. The 15-month period for reviewing the project does not account for this potential delay and First Nations do not have the capacity to acquire technical assistance without funding. Furthermore, without activities such as traditional use studies or technical reviews being completed, we may not have the evidence necessary to support an intervenor application for the hearing.

Funding does not cover the actual cost of involvement and historically covers a small portion of the capacity required for First Nations to participate in the process. For example, travel disbursements are limited to three people, even when hearings are held outside of the community. That is not sufficient to cover the attendance cost of witnesses, legal and technical support, and leadership. The PFP also does not begin to cover the costs of participating in the review of a complex application, consultation activities, preparing evidence, or preparation or participation in oral or written hearings.

Finally, there is no funding for post-hearing involvement. As a result, we do not have the capacity to follow up with a project proponent on commitments they made during the hearing, conditions drafted by the NEB, and the consultation process to ensure they are being implemented. We discuss the need for First Nation involvement in monitoring and enforcement in section 9 of this submission.

***Recommendations**:*

3.1. Open the Participant Funding Program at the Project design stage.

3.2. Fund consultation on a lifecycle basis, inclusive of project design, hearings, consultation, enforcement, monitoring and abandonment.

3.3. Recognize that each individual First Nations community will have its own unique concerns and circumstances that must be addressed and require Industry to fund technical and community costs associated with a First Nations' review of and input into every project for which consultation is required.

3.4. Fund 100% of First Nations' costs for involvement in the NEB's process, including all costs that will provide capacity for First Nations to meaningfully participate in the regulatory process, including allowances for overhead of administering a consultation office, technical and legal support, and consultation activities.

4. "Public Interest" Must Expressly Include First Nations' Interests

As we understand it, the NEB considers impacts to First Nations in the context of "(e) public interest" which it describes in the following terms: "The public interest is inclusive of all Canadians and refers to a balance of economic, environmental and social interests that change as society's values and preferences evolve over time"[3]. While the NEB interprets its discretion to consider other factors broadly and can include environmental and socio-economic effects directly related to a project, it does not currently expressly consider Section 35 and Indigenous Rights as a factor in the public interest test. This is insufficient - not only does it leave consideration of First Nations' interests to the discretion of the Board - but it gives the impression that First Nations' interests are subordinate to other specifically enumerated economic factors.

The current NEB assessment process does not adequately balance the impacts of a project on First Nations and the general public. Projects are approved because they are viewed as being in the interest of the public as a whole, despite impacts being heavily concentrated on First Nations who live and hold rights in the project vicinity. An appropriate balance of environmental and socio-economic impacts, the resulting infringement of Section 35 and Indigenous rights, and the measurable, positive economic benefits is necessary to provide a more appropriate level of accommodation to First Nation communities. If a project offers no benefits to First Nations that adequately balance against impacts in a way that is acceptable to affected communities, then this should weigh heavily against project approval. Otherwise, First Nations bear the burden of unmitigated impacts to their Section 35 and Indigenous Rights without tangible benefit or compensation. Conversely, society as a whole receives the benefit of a project without bearing the direct impacts. This does not further the goals of reconciliation and continues a pattern of ignoring

[3] NEB Modernization Discussion Paper: Determining the Canadian Public Interest. http://www.neb-modernization.ca/system/documents/attachments/a8852da2d2acd9a66b0b54224ee016b86c5070f7/000/005/198/original/Discussion_Paper-Public_Interest_EN.pdf?1484584581

or downplaying the Crown's role in preserving and enhancing Indigenous, Treaty and Aboriginal Rights.

***Recommendations**:*

4.1. The modernized NEB Act must specifically and explicitly include a requirement that the Board consider impacts to Section 35 and Indigenous Rights and potential benefits to First Nations interests in a transparent assessment that carries equal weight to the assessment of the economic benefits of a project to society as a whole. This assessment should consider the views of the potentially affected First Nation(s).

4.2. Where the public interest decision results in impacts to Section 35 and Indigenous Rights the Board must include recommendations on how these impacts can be accommodated or compensated.

5. Assess Impacts to Section 35 and Indigenous Rights and Traditional Knowledge Integration

Currently, assessment of Section 35 and Indigenous Rights are not a required component in project applications and the current approach does not lead to proper assessment of impacts to First Nations.

The NEB Filing Manual (the "Manual") states that proponents should, as part of their Aboriginal consultation activities, "Consider augmenting the application with local and traditional knowledge and integrating the information and knowledge, where appropriate, into the design of the project" (emphasis added).[4] The Manual also states the following regarding the analysis of project effects: "Where there is applicable local and traditional knowledge, it must be included in the ESA." While this guidance document indicates that Traditional Knowledge ("TK") "may" be considered and integrated in environmental assessment and provides some limited direction regarding how to use TK, the integration and use of TK in environmental assessments is usually superficial if attempted at all. The differences between western science and TK render 'integration' between these two worldviews very challenging. Unfortunately, these challenges can serve to perpetuate the reduction

[4] 2004. National Energy Board. Filing Manual (release 2016-02). Available online: https://www.neb-one.gc.ca/bts/ctrg/gnnb/flngmnl/flngmnl-eng.pdf.

of TK's scope and depth, and limit the application of TK in land and resource management unless there is real commitment to doing so.

The Manual also includes the following filing requirement for a project-specific environmental and socio-economic assessment ("ESA"): "An assessment of impacts on current use of lands and resources for traditional purposes by Aboriginal people is required for the ESA." This assessment should include: a description of what current use is occurring; by which Aboriginal groups or persons; the spatial and temporal extent of the use; alternatives considered to avoid impact; measures proposed to mitigate impact; and, in the case of identified residual effects, whether and how those effects are likely to interact with other planned physical activities (i.e. cumulative effects).

In recent environmental assessments, effects on 'traditional land and resource use' are usually assessed in isolation from other aspects of effects on First Nations Section 35 and Indigenous Rights (such as socio-economics, health and historical resources). More intangible aspects of First Nations' culture and rights (such as language or intergenerational knowledge transfer) are frequently not assessed at all. Separating these aspects disregards the deep linkages between ecology and land use, society and culture, and fragments the assessment relevant to First Nations across different disciplines, components, and sections of project applications. The narrow scope of the assessment of 'current use of lands for traditional purposes' and the lack of assessment of effects related to the loss of current land use and intangible effects means that project effects on First Nations people and their Section 35 and Indigenous rights are not properly understood or considered. Additionally, limited consideration is given to project effects on First Nations' rights in the future, and the environmental conditions required for the meaningful exercise of those rights. Proper consideration is also rarely given to cumulative effects on First Nations' land use and rights.

***Recommendations**:*

5.1. *Require proponents to assess in their project application impacts to Section 35 and Indigenous Rights specific to each potentially affected Indigenous community taking the views of those communities into account.*

5.2. *Assessments to predict impacts to First Nations should be undertaken in collaboration with each community, the proponent and the Crown. In each assessment, all aspects of First Nations' communities should be addressed using methods that acknowledge and address*

the linkages between ecological and social systems – between the land, community, culture, livelihood and well-being.[5]

5.3. The assessment should include an evaluation of:

- *the adequacy of consultation and mitigation measures on Section 35 and Indigenous rights and residual impacts that cannot adequately be addressed by mitigation measures;*
- *socio-economic impacts on and benefits to First Nations, inclusive of impacts to health, economy, land use and culture;*
- *cumulative effects of projects on First Nations; and*
- *protection of the environment and Section 35 and Indigenous rights as an equal priority to economic benefits.*

5.4. Inclusion of TK in the project design and environmental and socio-economic assessment should be mandatory.

5.5. Require incorporation of TK into early phases of project design and assessment scoping and throughout the project's life-cycle.

5.6. Standard methods and best practices guidelines need to be established for the assessment of impacts to First Nations' Section 35 and Indigenous Rights and the use of TK in environmental assessments. These guidelines should be developed by a working group with First Nations and Crown representation.

5.7. Assessment of impacts to Indigenous groups needs to recognize the uncertainty inherent in mitigation measures that are often unproven with regards to land use and rights, and compensation needs to be applied in a comprehensive and consistent manner where effective mitigation of impacts cannot be proven.

6. Transparency in Assessing and Addressing Impacts to First Nations

Transparency about how First Nations impacts and concerns are being addressed is required. Often, First Nations raise a concern with Industry about a particular impact who "addresses" our concern by referring to an existing regulatory standard. This approach does not accomplish an enhanced

[5] See for e.g., Ts'elxwéyeqw Tribe Management Limited et al. 2014; and Parlee, Geertsema and Willier 2012.

level of mitigation and simply defaults to a standard that has often led to an accumulation of adverse effects resulting in the ongoing erosion of our ability to hunt and fish within *Denne Ni Nennè*. We feel that simply implementing preexisting regulatory standards that have been developed without consideration of our Section 35 and Indigenous Rights is inadequate because it maintains the status quo rather than promoting best practices and mitigating or avoiding the impact. This does not address the adverse impacts to our rights and our livelihood, nor does it align with the purpose of conducting an environmental and socio-economic assessment.

The same is true of the TK we share with proponents. If First Nations share TK with industry an explanation of how that information was used by the proponent should be required coupled with appropriate opportunities for First Nations to validate the proponent's attempt at considering our TK. Industry does not report back to the Nation, either to leadership or to the community, exactly how it considered First Nation concerns and incorporated TK into a project. Too often, the community feels like it isn't being heard or concerns are not being considered by Industry.

Transparency is perhaps most important at the decision-making stage. Nothing is more discouraging for our community than receiving a decision that does not appear to have taken First Nation concerns into account. This leaves our members feeling that their concerns have been discounted and that their participation and input was not heard or considered. NEB decisions need to clearly set out how First Nations interests were considered, how First Nations interests were evaluated compared with other factors leading to the rejection/approval of a project, and how the impacts to First Nations interests will be appropriately accommodated.

Guidance documents for assessment of Section 35 and Indigenous Rights and regulatory standards that are developed taking into account thresholds and measures for the consideration and protection of these rights in assessment, decision-making and monitoring would help to address this issue.

***Recommendations**:*

6.1. Require proponents to provide an explanation of how First Nation concerns were considered and how TK was used and incorporated TK into a project, including appropriate opportunities for First Nations to validate the proponent's attempt at considering TK.

6.2. Require Panels to address First Nations interests (separately for each community), setting out the concerns expressed by each First Nation, how those concerns were addressed, and why those concerns were more or less important than other factors leading to the

approval/rejection of the project. Consider requiring Panels report their findings and recommendations to affected communities/intervenors and providing an opportunity for the First Nation to evaluate the adequacy and make further recommendations.

6.3. Work with Indigenous communities to develop a guidance document for assessment of Section 35 and Indigenous Rights.

6.4. Work with Indigenous communities to review and amend regulatory standards in key areas, such as wildlife, fisheries, remediation, reclamation etc. so that they protect the ongoing practice of Section 35 and Indigenous Rights.

7. Consultation Process

Consultation is meant to be meaningful and to achieve reconciliation of interests, which for Cold Lake First Nations means that impacts to our rights (including our livelihood, culture and community well-being) are adequately assessed and addressed through mitigation, accommodation or compensation. Currently consultation associated with NEB applications does not meet this standard and the outcomes are not meaningful. This occurs for a number of reasons including:

- Late engagement, rushed timelines and lack of funding affect the information and evidence our Nation can bring to bear in regards to identifying and assessing impacts.
- There is no explicit requirement to assess and address impacts to Section 35 and Indigenous Rights. Without this requirement, consultation focuses on procedural, rather than substantive aspects.
- Delegation of procedural consultation to the proponent results in a presentation of our concerns based on the proponent's interpretation of them and their views on whether or not their proposed mitigation measures will be effective.
- Consultation often focusses on documenting communication events without seriously and substantively addressing concerns. This has led to the current situation serious cumulative impact to our Section 35 and Indigenous Rights.
- Based on its understanding of Treaty 6 Cold Lake First Nations is in a relationship with the Crown. Proponent-led consultation does not fulfill the principles of a Nation-to-Nation relationship.

- Consultation in the post-approval (compliance, monitoring and remediation) phases is usually insufficient, if it occurs at all.

***Recommendations**:*

7.1. Ensure consultation directly between the Crown and the affected First Nation occurs prior to a decision being made. This step should inform the NEB decision / recommendation stage.

7.2. Require proponents to provide an explanation of how specific First Nation concerns were considered and incorporated into a project, including appropriate opportunities for First Nations to validate the proponent's attempt at considering and addressing their views and input.

7.3. Require on-going consultation with First Nations throughout the lifecycle of the project, including through involvement in monitoring, enforcement, remediation and reclamation.

8. Avoidance and Mitigation of Impacts

The greatest opportunity for improvement lies in the avoidance and mitigation of project impacts to achieve responsible and sustainable development. The Crown must attempt to deal with us "in good faith, and with the intention of substantially addressing" our concerns.[6] Without effective mitigation of impacts, even the most in-depth consultation process only amounts to information exchange with the overarching result that First Nations still suffer the same negative impacts. Our community members speak to the fact that no matter what information and concerns they share in processes such as these, impacts to the land and to their rights are continuing and getting worse. It is this, more than anything else, which reduces our confidence and trust in the NEB and the Crown.

In our experience, mitigation that "substantially addresses our concerns" does not often occur. To illustrate, if we raise concerns about impacts to the last remaining moose hunting area close to our reserve, industry might say that our concerns are addressed by mitigation measures they have put in place to limit their impacts to moose. However, these mitigation measures do not necessarily address impacts to our *ability* to hunt moose. For example, our *access* to the moose hunting area may be negatively affected and not easily mitigated, or the quality of moose in the area may be

[6] *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388 at para 55.

affected by contaminants, or it may not be safe for us to hunt moose due to the presence of industrial facilities or workers. Monitoring and follow up does not occur to prove that proponent mitigation measures address impacts to moose and moose hunting. If First Nations are unable to hunt moose even after mitigation is applied, the impacts remain negative and unmitigated. The NEB and the Crown need to assess whether industry's mitigation measures *actually* mitigate impacts to Treaty and Indigenous rights in a meaningful way, otherwise, the need for accommodation becomes mandatory.

Often, there are residual impacts despite industry's efforts at "mitigation". This can include climate change; loss of land for traditional activities; decreased hunting, fishing and trapping opportunities due to declines in wildlife populations etc. Usually, addressing residual impacts would require responses outside the control of the proponent and therefore can only be done by the Crown. The NEB regulates in the public interest, but there is no legislated definition of what that entails or to what extent the NEB is obligated to address the concerns raised by First Nations. With every project there are residual impacts that cannot be addressed by the proponent or are addressed by "monitoring and adaptive management" which falls short of addressing impacts to First Nations. For example, there is no requirement for monitoring First Nation specific impacts. The Crown has the duty to substantially address *all* adverse impacts. When the Crown relies on the NEB's process to discharge its duty to consult, it excludes mitigation of these larger residual impacts from the outset. This is a fundamental flaw that can only be resolved by disentangling Crown consultation from the NEB process.

***Recommendations**:*

8.1. The Crown must directly consult with and mitigate, compensate and/or accommodate First Nations on all residual impacts and cumulative impacts that are outside the scope of the NEB process prior to the issuance of project approvals.

8.2. The Crown must ensure residual impacts are addressed prior to any approvals being granted.

9. Involve First Nations in Monitoring and Enforcement

Our interest in a project does not cease to exist once a project has been approved. Currently, once a hearing is over and a proponent has a project approval in hand or consultation is deemed

complete, First Nations no longer have a forum in which to voice their concerns. Experience shows this results in First Nations concerns falling by the way side. While ongoing consultation with First Nations is a standard commitment in most project applications, there are gaps with respect to monitoring that need to be addressed by the modernized NEB Act. (1) First Nations involvement in compliance monitoring; and (2) monitoring of First Nations-specific effects.

First Nations involvement in project compliance monitoring and enforcement would help address transparency, compliance and community concerns. Our members have observed first hand through their time on the land and through their work in various industries that environmental standards and project conditions are regularly not met and standards are disregarded. Additionally, our Nation has found it difficult to take an active role in the responsible operation throughout the life-cycle of a project. For example, it is difficult to obtain monitoring data from proponents for our independent evaluation. Our people need the assurance that our future generations can continue to rely on a healthy landscape long after a project is decommissioned.

It is critical to First Nations to have confidence in monitoring data and to have the opportunity to compare monitoring data with our own knowledge and data. As infrastructure ages, we require proponents and the Crown to uphold the conditions of approval and the safe operation of energy infrastructure to guarantee that they do not pose detrimental or harmful effects through all phases of their operations. Ongoing monitoring, compliance reporting, communication, active participation and co-management by both parties will serve to accomplish responsible, sustainable development and reclamation.

Furthermore, limited monitoring of effects on First Nations and their rights and culture is undertaken after project approval and commencement of construction or operations. Given existing knowledge gaps regarding the effects of industrial development and other Crown decisions on Section 35 and Indigenous rights and culture, and the success of mitigation measures frequently proposed to reduce or eliminate these effects, such monitoring is critical. Please note that this would be different than and in addition to the kinds of environmental and compliance monitoring requirements typically required by project approvals.

***Recommendations**:*

9.1. First Nations should be involved in continuous life-cycle monitoring of pipelines in their respective territories. Collaborative arrangements should be developed with First Nations

to ensure Indigenous environmental monitoring and compliance throughout the NEB process and throughout the lifecycle of the project, including the following phases: (1) planning and application assessment; (2) construction; (3) operation; and (4) deactivation, decommissioning or abandonment.

9.2. First Nations and their members should be given the right of first refusal for contracts for work to undertake follow up and compliance monitoring, maintenance and reclamation of projects within their traditional territories.

9.3. Government should introduce enforcement measures including accountability reporting to First Nations to ensure that proponents fulfill their obligations.

9.4. The application of TK needs to extend beyond the project application, environmental assessments and hearing phases, and should be required throughout the life-cycle of projects, including in monitoring and enforcement. All projects should require community-based monitoring of effects to First Nations peoples and their rights and culture at regular intervals during project construction and operations (separate from construction and environmental monitoring). Such monitoring should be led by impacted First Nations with indicators and thresholds determined by those groups.

9.5. Regular reporting regarding monitoring and compliance should be provided to both the Crown and the project proponent, to determine adaptive management strategies, and whether further mitigation and compensation are required. Monitoring data and reported outcomes as well as technical capacity for review and understanding, should also be made available to the members of the First Nation.

Conclusion

Cold Lake First Nations' livelihood has endured substantive alteration as a result of the development of the energy industry and as a result of cumulative impacts our Nation and its members have lmited ability to exercise our Section 35 and Indigenous Rights. Federal authorities need to uphold the highest level of standard to ensure the decisions of the past, as well as those that occur in the future, provide for an effective balance of environmental, economic, and social

considerations in the implementation of those decisions, particularly in the context of the infringement of Section 35 and Indigenous rights. The NEB plays a key role within the federal framework and creating a broader role for First Nations to become part of the decision-making and evaluation process is critical to achieve this balance.

Environmental assessment and regulatory processes need to address cumulative effects and the impacts to First Nations at a much broader level. It is clear that both the Federal and Provincial governments have not effectively planned for cumulative effects. There are failed land management plans that attempt to deal with Treaty and Indigenous rights in a narrow and superficial way.

Cold Lake First Nations knows that we are the rightful stewards of the land and given the capacity and opportunity will be able to develop a management approach to properly address cumulative effects. This approach will not be the conventional model focused on resource optimization, economic prioritization and trade-offs, but will be grounded in a model that recognizes that the land and our culture are a unique and interdependent social ecological system. Thus, the approach must take into account not only our land and resource use, but our long-term needs, capacity, livelihood, health, infrastructure, education, governance and other aspects of our total wellbeing. Creating a long tem plan and managing all aspects of impacts is crucial. Capacity given from the standpoint of legacy would provide a long-term approach to building the right resources for Nation building and coping with the ever-changing modern world.

Cold Lake First Nations and other First Nations have modified their traditional economies to meet the realities of the modern world. Cold Lake First Nations has risen to meet this challenge by continually seeking a "livelihood for a livelihood" and ensuring that if others seek to benefit from the resources within *Denne Ni Nennè*, then so shall Cold Lake First Nations. We do this while prioritizing sustainability and the needs of future generations, and also ensuring our members retain important connections to the lands and waters within *Denne Ni Nennè*. These fundamental rights and values must be considered and protected within meaningful consultation processes and must form the foundation of any consultation process if Canada hopes to achieve reconciliation with First Nations.