EAGLE LAKE FIRST NATION

"Where the Eagle will continue to soar and develop with the Ojibways of Eagle Lake"

P.O. Box 1001 • Migisi Sahgaigan • Ontario • P0V 3H0 • Tel. 807-755-5526 • Fax 807-755-5696

EAGLE LAKE FIRST NATION'S WRITTEN SUBMISSIONS REGARDING THE FEDERAL ENVIRONMENTAL ASSESSMENT REGULATORY PROCESS

Submitted to the Expert Panel Reviewing Federal Environmental Assessment Processes

December 23, 2016

Introduction

Eagle Lake First Nation (also known as Migisi Sahgaigan) is an Anishinabe community located in northwestern Ontario on the shores of Eagle Lake. We are a signatory to Treaty No. 3 and have occupied the lands and waters in this region since time immemorial. Approximately 370 of our community members live on reserve, while another 243 live off reserve.

Eagle Lake First Nation possesses a unique kinship with the lands and waters within the areas traditionally used by our families. Our lands hold places of historical, cultural, and spiritual significance that continue to exist today. The land is the source of all life and teachings. Therefore, ensuring the continued health of the lands is our ongoing responsibility and is a central component of our Anishinabe culture and life.

A central component of our ongoing caretaking role is to follow good management practices and use of the resources on the land to maintain a harmonious natural cycle. To do so, we follow the Migisi Sahgaigan Maanachi Totaa-aki Declaration and work closely with our Elders and community members to make sound decision-making about resource use on our lands.

The opportunity to participate in the review of the federal Environmental Assessment regime is an important step in the spirit of reconciliation with First Nations. If our concerns are heard, this review has the potential to result in better environmental protections and to increase First Nations' participation in future Environmental Assessments. Because of the nature of our constitutionally protected Aboriginal and Treaty rights, which are often inseparably tied to the environment, the federal Environmental Assessment regime has significant importance to our community.

It remains the Crown's constitutional obligation to adequately consult with, and accommodate Aboriginal and Treaty rights and interests, when it comes to any proposed project that has the potential to negatively impact the land, water, or animals that are the subject of our rights. This is a constitutional duty arising from the Honour of the Crown. We ask the Expert Panel to reflect on the Honour of the Crown and our people's continued Nation-to-Nation Treaty relationship

with Canada when considering our comments and when making recommendations to the Minister of the Environment and Climate Change.

It is important we are involved in and consulted throughout the entire Environmental Assessment process. We want to participate. We want to have a decision-making role in how our lands are used. The environment is paramount to us. Accordingly, our submissions focus primarily on improving Canada's constitutional consultation obligation with our First Nation in relation to Environmental Assessments.

The duty to consult remains a distinct constitutional requirement that encompasses more than simply consultation in relation to environmental impacts. The duty to consult cannot merely be fulfilled by working through the Environmental Assessment legislative regime. However, Canada should strive to integrate and incorporate our recommendations below to improve the consultation process and to ensure we are provided improved opportunities to participate and have a role in determining if, and under what terms proposed projects in Canada will proceed.

One preliminary way to promote Aboriginal consultation in any future review process is to explicitly reference Aboriginal and Treaty rights, as guaranteed under section 35 of the *Constitution Act, 1982* in future Environmental Assessment legislation. The legislation should specifically reference effects on Aboriginal and Treaty rights, rather than diminishing the importance of our rights by making them a subset of environmental effects, as is currently the case under section 5(1) of the *Canadian Environmental Assessment Act, 2012*.

The following submissions touch on a number of important points related to Aboriginal consultation, and are separated into a number of headings for convenience. These include: (1) Aboriginal Laws & Consultation Protocols; (2) Internal Capacity & Support; (3) Participation & Engagement Funding; (4) Identifying Impacted First Nations; (5) Notification of a Proposed Project; (6) Use of Traditional Knowledge; (7) Timelines; and (8) Participation and Decision-Making.

Recommendations:

- **Require consideration of Aboriginal and Treaty rights, guaranteed under section 35 of the *Constitution Act, 1982*, explicitly within any future Environmental Assessment regime.**

Issue 1: Inaakonig'ewin (Aboriginal Laws) & Consultation Protocols

Eagle Lake First Nation has codified and affirmed the Migisi Sahgaigan Maanachi Totaa-aki Declaration [the "Declaration"]. This Declaration guides how our community will continue to take responsibility for and to care for O'Aki (the Earth). It also sets out how we will work with our Elders and community members to make land and resource use decisions to ensure the lands, air, and animals are cared for and natural cycles are maintained.

In our Declaration we also accepted and affirmed the principles set out in the *United Nations Declaration on the Rights of Indigenous Peoples* ["UNDRIP"]. The Environmental Assessment process needs to incorporate our Aboriginal laws, protocols, and decision-making processes. Articles 18 and 32 of UNDRIP protect the rights of Indigenous peoples to participate in decision-making related to the use of their lands, territories, rights, and resources through the development of their own procedures and decision-making institutions. In addition to UNDRIP the Supreme Court of Canada has defined requirements for consultation with us when there is potential for

impact to our Aboriginal and Treaty rights. It is important that consultation is undertaken in a manner that is culturally appropriate and effective.

The Crown and/or project proponent should not dictate the form and content of consultation. Instead, consultation should be completed in accordance with a procedure developed by the First Nation being consulted with. We know best how to engage our membership on proposed projects that may impact our Aboriginal and Treaty rights.

For example, as outlined above, we have a Declaration that guides our consultation with our Elders and community members. However, in Treaty 3, we also have Manito Aki Inakonigaawain – the Great Earth Law – to guide our consultation process amongst Treaty 3 Nations and with the Crown and proponents. This Anishinabe law recognizes that developments on our Treaty lands has potential to impact all Treaty 3 Nations, which consequently requires the Crown and proponents to consult with and get consent of Treaty 3 Nations.

For projects requiring an Environmental Assessment, one of the first steps in the consultation process should be to negotiate a consultation protocol outlining what that consultation process will look like.

For example, issues that may be outlined in a consultation protocol include funding and support, roles and responsibilities, information-sharing and collection procedures, decision-making processes, and dispute resolution procedures. Agreeing how consultation will unfold before it begins improves our ability to meaningfully participate on matters that may affect our rights.

Recommendations:

- **The future Environmental Assessment regime should require developing fulsome consultation protocols in accordance with and that incorporate First Nations' existing legal traditions and procedures.**

Issue 2: Internal Capacity & Support

The current Environmental Assessment process does not provide enough support for our First Nation to meaningfully participate in Environmental Assessments. When the Crown or proponents share information with us about a proposed project, the information is not presented and communicated in a way that makes it accessible and useful for our community members to understand and assess.

The information is typically exceedingly complex and requires the support of technical experts to assist us with understanding and assessing the proposed project. We would like to grow our internal capacity to engage in the Environmental Assessment process, but need additional resources and support to do so and to participate in consultation processes in the meantime.

To further complicate things, we are often inundated with notifications about proposed activities occurring on our lands. The sheer volume of notices makes it even more difficult to quickly assess how a project may impact our rights. This is further complicated by short timelines imposed under the *Canadian Environmental Assessment Act, 2012* and or other legislation. When combined with the lack of support and resources, the volume of notices and short timelines can result in an inability to respond to important steps in the Environmental Assessment process despite potential impacts to our constitutionally protected rights, and a desire to fully participate.

The lack of capacity support is a significant barrier to effective engagement in the federal Environmental Assessment regime. The lack of support in preliminary stages of the duty to consult (notice/information sharing) effectively excludes us from meaningful participation and this leads to a failure of the Crown's duty to consult. We note this lack of capacity support exists throughout the entire consultation process.

Article 13 of UNDRIP requires governments to provide effective interpretation and support services for Indigenous peoples in order to aid their participation in political, legal, and administrative matters. In addition, we have a constitutional right to be involved in decisions that can impact our Aboriginal and Treaty rights. However, we require additional support to build our internal capacity to understand and interpret Environmental Assessment processes and related documents. This is a major prerequisite to any meaningful consultation on Environmental Assessments, whether it is with the Crown or with industry proponents.

Accordingly, we recommend that any future environmental assessment regulatory process provide additional capacity support for affected communities.

Recommendations:

- **Provide additional resources and capacity support options to build the internal capacity of First Nations to allow for effective participation in the review process.**

<u>Issue 3: Participation & Engagement Funding</u>

Meaningful participation and consultation in an Environmental Assessment requires adequate funding support.

Currently, we have the opportunity to participate throughout several stages of an Environmental Assessment, including: (1) the initial determination as to whether an Environmental Assessment is required; (2) the creation of Environmental Impact Statement guidelines; (3) commenting on a proponent's Environmental Impact Statement; and (4) commenting on the Final Report from the Assessment.

Unfortunately, the amount of funding available through the Participant Funding Program is insufficient to allow us to adequately prepare for and participate in each of these important Environmental Assessment stages. The lack of funding bars us from meaningful consultation on a proposed project.

At a minimum, funding for First Nation participation should significantly increase to allow us to effectively participate at all stages of the Environmental Assessment process.

Funding offered through the Canadian Environmental Assessment Agency also typically caps funding for certain line items: E.g. professional fees, legal fees, and honoraria. As long as the expected deliverable is achieved, we should be able to determine how to allocate our funding based on our individual community's needs. For example, a unique allocation of funding may be require where our community's internal consultation process has unique circumstances, or where a project may have an impact that is of particular concern to our community.

As another example, the Canadian Environmental Assessment Agency typically does not provide enough funding to review the project and to cover the costs of hiring a community member to facilitate and coordinate our First Nation's internal community engagement. The responsibilities of community engagement are time-intensive and important; as such it should be a position that

is compensated. Ensuring there is funding for our internal staff will increase our internal capacity and participation in a project's review.

Currently, our First Nation spends a significant amount of time and resources attempting to negotiate funding agreements with the proponents of each proposed project; time and money that is sometimes not reimbursed – and this wastes time and effort that could be committed to actually review and assessing a projects impacts. This situation is unacceptable and can create division amongst impacted First Nations. We should have the ability to seek full funding directly from the Crown, instead of the proponent, where requested. For projects that have the potential to impact Aboriginal and Treaty Rights, the Crown must ensure First Nations receive funding to allow for meaningful consultation.

The Crown must step in when notified by First Nations that project proponents are proposing funding on unfair and unreasonable terms. A proponent's insistence on unfair funding terms can either delay or completely bar our participation in the Environmental Assessment process.

The duty to consult remains the Crown's obligation to fulfill. Accordingly, in the event we do not wish to directly engage with a project proponent, we should have the opportunity to engage directly with the Crown on any aspect of consultation – including securing adequate engagement funding.

Recommendations:

- **Significantly increase funding for First Nation participation in the Environmental Assessment process;**
- **Remove barriers to First Nation participation in the Environmental Assessment process, such as caps on funding certain line items: E.g. professional fees, legal fees, and honoraria;**
- **Guarantee funding support for a paid internal position to coordinate First Nation participation throughout the Environmental Assessment process; and**
- **Increase Crown oversight, where requested by the First Nation, during negotiations for capacity funding agreements between First Nations and project proponents.**

Issue 4: Identifying Impacted First Nations

Our First Nation is concerned with the current process for determining which First Nations communities are sufficiently impacted to receive notice of a proposed project and subsequently, the Environmental Assessment process.

The Crown, which has ultimate authority to approve proposed projects, does not have the requisite knowledge to make a decision about which First Nation community is sufficiently impacted to receive notice about a proposed project. Further, we understand the Crown sometimes uses a ranking system to determine the level of impact upon identified First Nations based on perceived proximity to a project for the purpose of consultation.

The Crown's unilateral selection and perception of potential impacts to our Aboriginal and Treaty rights does not accurately reflect the nature in which our community members exercise our rights over lands and waters. When development occurs within Treaty 3 territory, *all* Treaty 3 First Nations are potentially impacted.

Consequently, the ultimate determination as to whether to proceed with consultation should not lie solely in the hands of the Crown, but should be determined in partnership with First Nations. Because the Crown does not have a complete understanding of our land use, the Crown should implement a system where First Nations have the opportunity to participate in determining whether a project may impact their rights. As outlined above, consulting us in accordance with our own laws and protocols, such as Manito Aki Inakonigaawin – the Great Earth Law in Treaty 3, will improve our ability to participate from an early stage.

This will reduce situations where we do not receive notice of a project because of the Crown's incorrect presumption that it does not impact our rights. This consultation approach also ensures affected First Nations are notified at the earliest stage possible of the consultation process, which in turn provides a full opportunity to participate from an primary stage.

Recommendations:

- **Implement a system where First Nations have the opportunity to determine and identify whether a project may impact their rights, for the purpose of participation in the Environmental Assessment process.**

Issue 5: Notification of a Proposed Project

The constitutional obligation of the Crown to consult with First Nation communities is flawed. Jurisprudence may currently support the proposition that simple information sharing and notice of a proposed project can, in some cases, be sufficient to meet the requirements of the duty to consult—but this determination can only be made following the participation of the impacted First Nation and agreement on the degree of impact to a specific right. If this analysis has not be completed the accommodation measure cannot be identified.

Mere notification of a proposed project and its Environmental Assessment is not enough to satisfy the Crown's duty to consult with First Nations in any scenario. Although it remains a crucial step in the consultation process, the Crown's notification procedures can result in impacted First Nations getting left out of the consultation process.

The Crown's approach of providing written email and mail notice of a project subject to an Environmental Assessment does not fulfill the duty to consult where the First Nation does not respond. Because of chronic underfunding and support, there may not be capacity to respond to these written notices. In some cases, we may first hear about a project when a community member notices activities occurring while out on the land.

It is our position that when a First Nation fails to respond to written notice of a proposed project that can potentially affect our Aboriginal and Treaty Rights, the duty to consult has *not* been fulfilled. To rectify this situation, in addition to written notification, and in light of the government's recent commitment to reconciliation, we expect the Crown to make a face-to-face appearance with our leadership or a designated consultation coordinator in the community for any project requiring an Environmental Assessment—*prior* to any public announcement of a proposed project. This, combined with the implementation of the recommendations will assist in implementing a fair and reasonable process of consultation.

Recommendations:

- **In addition to written notifications, mandatory face-to-face meetings with First Nations leadership or identified community consultation coordinator—*prior* to any public announcement of a proposed project—should be required to notify the First Nation of a proposed project.**

Issue 6: Use of Aboriginal Knowledge

Aboriginal knowledge should *always* be incorporated throughout the Environmental Assessment process. We have a special connection to the land going back centuries, which gives us an intimate knowledge of the lands and waters that may be impacted by a proposed project. Environmental Assessments should draw on this available knowledge held by community Elders and current land users.

Aboriginal knowledge should not be limited to information based on a First Nation's historic customs and uses of its land. Like modern scientific knowledge, Aboriginal knowledge is not static, but always growing and expanding. We continue to use the land today and as such, have an intimate knowledge of both historic and present circumstances affecting the environment.

Accordingly, the requirement to use our knowledge, where provided, should be incorporated throughout the various stages of the Environmental Assessment process, including: the determination of the scope of the Environmental Assessment; the determination of the project's design; and the identification of mitigation measures. Any use of knowledge must further be subject to confidentiality and disclosure measures, at the request of the First Nation providing the information.

To accurately assess the potential impact that a proposed project may have on Aboriginal and Treaty Rights and on the environment, it is essential to draw on this extensive pool of knowledge. To do this, the new legislative regime should require an Aboriginal knowledge review and the subsequent use of that knowledge for every project subject to an Environmental Assessment.

As discussed above, funding is a critical component to participating in an Environmental Assessment and is necessary for gathering Aboriginal knowledge. We first need to understand the project and how it interacts with the lands and waters we use. We then require adequate funding and support to identify and collect this relevant knowledge.

Recommendations:

- **Increase support and funding for the collection of Aboriginal knowledge throughout the Environmental Assessment process;**
- **Require an Aboriginal knowledge review for every proposed project, and use that knowledge in decision-making throughout the Environmental Assessment process; and**
- **Protect the confidentiality of Aboriginal knowledge as per the direction of the First Nation providing the information.**

Issue 7: Timelines

The current Environmental Assessment legislation imposes unrealistic timelines for the various stages of the Environmental Assessment process. This undermines the duty to consult and to

accommodate by restricting effective First Nation participation throughout the various stages of a project's review.

For instance, after receiving a project description for a proposed project falling under the jurisdiction of the Canadian Environmental Assessment Agency, the legislation provides only a 45-day window for the Agency to determine whether an Environmental Assessment is even required. This window also incorporates a rushed 20-day window for First Nations to provide comments.

These, and other timelines throughout the Environmental Assessment process, are wholly inadequate to allow for effective First Nation participation. The timelines provided are simply not long enough to provide our First Nation with a chance to understand, translate, and communicate project-related materials to Elders and other community members. The timelines are also insufficient to consult with off-reserve members and to engage with experts as needed.

For example, where an Environmental Assessment is conducted by the Canadian Environmental Assessment Agency, the legislation mandates a one-year timeline to complete the Environmental Assessment and for the Minister to determine if the project will cause significant adverse environmental effects. In practice, due to the current approach to notification, lack of funding resources, and unreasonable response deadlines this time limit does not provide us with enough time to undertake and complete the necessary work to properly identify the impacts to our Aboriginal and Treaty rights.

Environmental Assessments are complex, in both process and substance. Generally, future legislation should significantly increase timelines for the Environmental Assessment process and more importantly, ensure timelines are flexible to allow proper consultation and accommodation when our rights are impacted.

Recommendation:

- **Significantly increase timelines for the entire Environmental Assessment process and ensure flexibility for First Nation engagement.**

Issue 8: Participation and Decision-Making

Our First Nation calls upon the Government of Canada to fulfill Minister Bennett's promise to fully implement the UNDRIP which enshrines the right to self-determination for Indigenous peoples (Articles 3-4), and protects the right to determine and develop priorities and strategies for any development or use of their lands, territories or resources (Article 32(1)).

UNDRIP includes the concept of Free, Prior and Informed Consent ("FPIC"), which calls for the full consent of Indigenous peoples for any development affecting their lands, territories or other resources (Article 32(2)). While there may be a variety of ways to implement the principle of FPIC in Canadian law, any future Environmental Assessment regime should—at a minimum—require the full consent of any First Nation whose rights will be impacted by a proposed project.

One way of implementing the principle of FPIC within a future Environmental Assessment regime could be to support and encourage the creation of internal consultation and approval protocols for proposed projects at the level of individual First Nations. Where a First Nation has created its own unique consultation protocol, there should be a legislative guarantee that it will

be respected and adhered to by both the Crown and project proponents. In this way, projects will be internally approved through internal community processes.

For an Environmental Assessment to be truly effective, it requires the fostering of meaningful partnerships with affected First Nations. Despite our intimate relationship with the land, water, and animals—particularly within our own lands—our First Nation generally feels that we do not have a real say in major project decisions, and that project approval will ultimately be granted regardless of any input that we provide.

To reconcile this concern, we need to be effectively engaged throughout the entire Environmental Assessment process. This includes decision-making in relation to, for example, the scope and screening of a proposed project. Under the present legislation, decisions relating to the scope of an Environmental Assessment are largely in the hands of the Responsible Authority who has jurisdiction to perform an Assessment.

Determining the scope of a review is a crucial component to any Environmental Assessment. The ultimate decision as to scope can have serious consequences in relation to: (1) which aspects of a project are reviewed; (2) which elements of the surrounding environment are assessed for potential impacts; and (3) which aspects of a First Nation's Aboriginal and Treaty rights are considered.

Consequently, any decision to artificially limit the scope of an Environmental Assessment can seriously impact our community's interests by overlooking crucial issues in the scoping phase of a review. For example, in the ongoing Energy East Project review, the proponent does not assess its project in relation to the pipeline's impacts to wild rice or to fur-bearing mammals in its Environmental and Socio-Economic Assessment. Had our First Nation been effectively consulted during the scoping phase of this project, these important issues—which bear directly upon our Aboriginal and Treaty rights—would surely have been raised and assessed.

Because of the deficiencies in the current Environmental Assessment process, the scope of a project's review tends to coincide with the project as proposed by the proponent, which results in a limited scope for Environmental Assessments. While the Responsible Authority has the power to expand the scope of a project review to include additional information, the scope of many Environmental Assessments remains disappointingly limited. One recurring complaint amongst First Nations is that the cumulative effects of development projects are not being fully considered during the Environmental Assessment process.

For future Environmental Assessments, First Nations should be granted the right to participate during the process for determining the scope of an Assessment. To guarantee the effective participation of First Nations during this stage of a review, a series of community meetings should be held where affected First Nations can be consulted for the express purpose of determining the scope of an Environmental Assessment.

More than any other factor, the accuracy and effectiveness of an Environmental Assessment depends upon the available information that must be reviewed according to the scope of the Assessment. Any future Environmental Assessment regime should consequently include legislative guarantees that mandate a broader scope for project reviews. Project splitting (i.e. where future aspects of the project are not considered in the initial project description) should be restricted, but where it is unavoidable, more stringent standards of review (and accompanying informational requirements) should be imposed for later stages of the process.

Similar participation requirements for decisions relating to the content and adequacy of a proponent's Environmental Impact Statement, along with any ultimate decisions relating to the approval and accompanying conditions/mitigation measures, should also be guaranteed in any future Environmental Assessment regime. As Treaty partners, we are entitled to play a role in making decisions about our shared lands.

Our First Nation asserts our right to be adequately consulted throughout the various stages of a review. As discussed above, this requires the implementation of the principle of FPIC throughout the Environmental Assessment process—particularly in relation to any ultimate approval of a project to ensure that the Crown meets its constitutional obligations to consult with First Nations.

Recommendations:

- **Implement the principle of Free, Prior and Informed Consent within any future Environmental Assessment regime, by supporting the creation of, and adherence to, internal First Nation consultation and approval protocols for proposed projects;**
- **Guarantee that First Nations have a say in determining the scope of any Environmental Assessment, by requiring a series of community consultation meetings;**
- **Include legislative guarantees mandating a broader scope for project reviews, including the cumulative effects of a project on the broader environment;**
- **Project splitting should be avoided, but where it is unavoidable, more stringent standards of review and informational requirements should be imposed for later stages of the review process;**
- **First Nation participation in decisions relating to the content and adequacy of a proponent's Environmental Impact Statement should be guaranteed; and**
- **First Nations should have a legislatively enshrined consent-based decision-making role regarding the approval of a proposed project, along with any accompanying conditions or mitigation measures.**

Thank you for considering our submissions – we look forward to further consultation with Environment and Climate Change Canada regarding this important matter and regarding any proposed future environmental assessment legislation.