Submission to the Expert Panel on the Review of Environmental Assessment Processes

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Submission Prepared by
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1 Introduction

Musqueam Indian Band is an Indigenous nation with traditional, ancestral, and unceded territory located in what is now the city of Vancouver and surrounding areas in the province of British Columbia.[1] Musqueam retains Aboriginal rights and title across all lands and waters within Musqueam's core territory, as described in the 1976 Musqueam Declaration to include:

The lands, lakes and streams defined and included by a line commencing at Harvey Creek in Howe Sound and proceeding Eastward to the height of land and continuing on the height of land around the entire watershed draining into English Bar, Burrard Inlet and Indian Arm; South along the height of land between Coquitlam River and Brunette River to the Fraser River, across to the South or left bank of the Fraser River and proceeding downstream taking in the left bank of the main stream and the South Arm to the sea, including all those intervening lands, islands and waters back along the sea shore to Harvey Creek, and the sea, its reefs, flats, tidal lands and islands adjacent to the above described land and out to the center of Georgia Strait[2].

Expert traditional ecological knowledge, refined and maintained over thousands of years through a sophisticated oral tradition, remains foundational to Musqueam's demonstrated resilience as a people. Musqueam continues to seek recognition and reconciliation of its continuing Aboriginal rights and title with the fact of Canadian settlement. A major step in this direction was the 1990 *Sparrow*[3] decision, in which Supreme Court of Canada recognized that Musqueam has a proven Aboriginal Right to fish within our territory. Throughout its territory, Musqueam continues to assert our rights and title.

1.1 Background

The Musqueam Indian Band has prepared this submission for the Expert Panel ("the Panel") on the Federal environmental assessment ("EA") process review ("the Federal EA Review") with the hope and expectation that the Panel will deeply consider our recommendations for a new legal and procedural framework for conducting EA within our territory and across the country. This submission sets out in the subsequent section 13 key areas of concerns, and provides 38 recommendations for improving the federal EA process (See Appendix B).

We are a nation of nearly 1,400, with our main community located on the north arm of the Fraser River, adjacent to southwest Vancouver (See Appendix C: Musqueam Territory Map). Musqueam has managed the lands, water and resources of our territory for at least 8,000 years. When European newcomers first arrived in our territory in the late 1700s and early 1800s, they found our people - originally more than 30,000 in number - managing and benefiting from the abundance of our lands and waters, including but not limited to the immensely rich and diverse Fraser River delta.

[1] Wilson, Jordan P.H. 2015. Sq'eq'ip – Gathered Together. (Masters Thesis) Retrieved from the University of British Columbia.
[2] Musqueam Indian Band. 1976. Musqueam Declaration. Vancouver, British Columbia.
[3] https://scc^csc.lexum.com/scc^csc/scc^csc/en/item/609/index.do

1.1.1 Sparrow Right

Fishing and subsisting from the Fraser River, the Salish Sea, and other freshwater and saltwater bodies are defining aspects of Musqueam's history as evinced by archaeological, historical, and oral records.[4] Fishing provides tangible and intangible benefits for Musqueam members, such as food security and income, and is the lifeblood of members' spiritual, psychological, and cultural wellbeing.

Musqueam's right to fish was established in the *Sparrow* decision of the Supreme Court of Canada, and is thus protected by section 35 of the *Constitution Act 1982.* Under the *Sparrow* decision, the Crown must justify any potential infringement of an established Aboriginal right. The threshold for a potential infringement on an Aboriginal right is low: any proposed Crown decision that contemplates the infringement of Aboriginal rights must provide adequate justification. As initially established in *Sparrow* and subsequently expanded upon in other decisions by the Supreme Court of Canada and especially the *Tsilhqot'in* case[5], the justification test in the context of an Aboriginal right to fish can be summarized as follows:

1. Has the Crown met its duty to consult and accommodate in the circumstances?
2. Is there a valid compelling or substantial legislative objective for the infringing Crown action?
3. If there is a valid compelling or substantial legislative objective, is the Crown acting in a manner that is consistent with its fiduciary relationship to Musqueam?
    a) Did the Crown give appropriate priority to the Aboriginal right? The Crown must give priority to Musqueam over other users subject only to conservation concerns.
    b) Will the infringement deprive future generations of the benefit of the Aboriginal right?
    c) Are the Crown's actions minimally impairing of the Aboriginal right?
    d) Were the Crown's actions necessary to achieve its objective? Is there a rational connection between what the Crown says it is attempting to do and what it is actually doing?
    e) Are the benefits that may arise from the Crown's actions outweighed by the adverse effects they have on the Aboriginal right (proportionality of impacts)?
    f) Has any compensation been offered to Musqueam?

While the *Sparrow* justification test was explicitly designed to be used in situations where the Crown is contemplating a decision that might infringe upon an Aboriginal right – the same issue that should be at the heart of federal Environmental Assessments – Musqueam notes that neither the Provincial nor the Federal Crown has developed any semblance of a justification test to be

[4] Evidence from heritage sites between the Fraser River and Boundary Bay and from oral histories and place names demonstrate the importance of sea life for Musqueam people. The four largest heritage sites in the Fraser River delta reveal a complex system of harvesting and dependency on delta ecological resources by Musqueam people dating back at least 8,500 years (e.g., səẃáq̓ʷeqsən), and oral histories speak of a time when the delta was only water "tə ʔi ńa ɬeq̓əməx wə qaʔəɬ ćɛ ʔal̓," translating to "this flat land was only water" (Musqueam Band Council 1984; Ham 2014; Musqueam Indian Band 1976; Roy 2007).

[5] 2014 SCC 44 at paragraphs 77 to 88; http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/14246/index.do

used in environmental assessment. In the era of the United National Declaration on the Rights of Indigenous Peoples and the requirement for Free, Prior, and Informed Consent by indigenous peoples contained within (Article 32), this oversight needs to be redressed in law and practice.

Cumulative infringements on right to fish remain unaddressed

Musqueam members' ability to exercise our Aboriginal right to fish has been seriously eroded by the increasing industrialization and urbanization within our territory, particularly over the last 100 years. Such infringements have not been properly accounted for nor justified by the Crown.

Many thresholds related to meaningful opportunity to practice recognized and affirmed Aboriginal rights have been, or are close to being, surpassed throughout Musqueam territory. Keystone cultural species, such as eulachon and white sturgeon, have declined in recent decades past the point at which they can be harvested. Current fishing activities are largely focused on salmon, which have witnessed serious declines over the past 30 years.[6]

This leaves Musqueam and Musqueam territory in a high state of vulnerability to any future change (See Appendix A for list of past, present and reasonably foreseeable projects and activities within Musqueam territory). Indeed, we argue that any reasonable person would find that there is a pre-existing significant adverse cumulative effect in the entire Lower Fraser region, for fish and fish habitat, terrestrial game, waterfowl and other migratory birds, marine mammals, and by extension, for what the Federal Crown calls "current use of lands and resources for traditional purposes" – what we call our Aboriginal rights and mode of life. Musqueam rights that can still be exercised in the marine and estuary environment (Fraser River delta) are threatened by continued impacts from existing projects/activities and new proposed activities/projects. We note that this cumulative effects context, is rarely if ever deeply considered in Project-specific environmental assessments. Current practice of EA in Canada systematically ignores this critical contextual baseline for understanding the potential seriousness of effects of future projects. This too must change.

All future infringements on our rights must be adequately assessed and subject to the *Sparrow* test. Past impacts don't justify new impacts; Musqueam is not willing to treat its unceded territory as a never-ending "brownfield" and neither should the Crown. The federal EA process must be changed to ensure that areas that are already heavily impacted are protected from further degradation.

[6]The decline in the sockeye salmon fishery on the Fraser River was the subject of the Cohen Commission. Cohen, Bruce I., commissioner. *Commission of Inquiry into the Decline of Sockeye Salmon in the Fraser River (Canada) The uncertain future of Fraser River sockeye.* Vol.1, The Sockeye Fishery October 2012, pp. 1-2.

Musqueam as a priority rights-holder merits more focus and support in EA

Even for Projects where the Crown has stated it owes Musqueam an obligation to be consulted at the deep end of the *Haida* spectrum (such as RBT2 and WesPac LNG), current federal EA process treats Musqueam as just another party to the EA, as though we are bystanders witnessing a bipartisan back and forth between the Proponent and the Crown.

Within our territory, and given our proven *Sparrow* right, Musqueam must be seen and treated as a priority rights holder where a proposed project potentially impacts our rights. Moreover, given the highly-impacted condition of our territory, we must also be seen and treated as the most sensitive receptor: effects on our human environment and the biophysical environmental features we rely upon need to become more central in EA. Therefore, in the instance of Projects that potentially pose adverse effects on our territory, culture and rights, the Crown must take bold steps to enhance its assessment, consultation and accommodation level of effort with Musqueam, including restructuring its funding for meaningful engagement and assessment, and its inclusion of Musqueam in decision-making.

2 ADDRESSING GAPS AND DEFICIENCIES IN THE CURRENT FEDERAL EA SYSTEM

In the following sections, Musqueam has elaborated on the following key issues and recommendations for improvement in the federal EA process:

1. Project-specific Cumulative Effects Assessments
2. Better use of Regional EA
3. The Port/PER process under s. 67 of CEAA
4. Justification requirements
5. Re-instatement of "screening-level" projects for meaningful review
6. Incorporation of indigenous Traditional Knowledge (ITK)
7. Assessment of indigenous rights, socio-economic conditions, health and culture
8. Process – Timelines
9. Participant Funding
10. Substitution
11. Project-splitting
12. Mitigation issues
13. Monitoring, Compliance, and Enforcement

2.1 Project-Specific Cumulative Effects Assessment

Cumulative effects assessment is a critical part of environmental assessment. Without taking into consideration past, current and future effects of other interacting projects and activities, the assessment of the significance (or seriousness) of effects of a proposed Project on a particular Valued Component (VC) or Aboriginal rights-based practice is not a meaningful or valid exercise.

Our members are well aware of the cumulative effects of past and current projects and activities on our rights-based practices. Our knowledge, experience and expertise related to the changes in context should be recognized as a critical requirement of any cumulative effects assessment that takes place in our territory.

The application of a consistent standard of cumulative effects assessment continues to be a serious challenge in provincial and federal EAs across Canada.[7] Currently, only general, non-prescriptive guidance is provided to proponents who have every interest to downplay and minimize the potential for cumulative interactions. In our experience, deficient and flawed project-specific cumulative effects assessments using methodology and standards that fall far short of professional practitioner best practices have become the "industry norm". In some cases, we have witnessed proponents (with the help of large industry consulting firms) manipulating their effects assessment in a manner that permits them to side-step the requirement of a cumulative effects assessment altogether. These are serious gaps that the new federal EA process must address.

Recommendations:

1) **Cumulative effects assessment should be undertaken collaboratively between the Crown and Musqueam within Musqueam territory.**
2) **If cumulative effects assessment is undertaken by a Proponent, there must be clear and prescriptive guidance (i.e., methodological requirements) from the CEA Agency for conducting cumulative effects assessment in accordance with updated best practices (current guidance dates back to 1999);**
3) **Any guidance for cumulative effects assessment should incorporate consideration of "hypothetical" future projects where a new project is proposed within an area of intensive or rapid environmental change/development. Such a requirement would support the common law duty to consult on strategic decisions (e.g., where the *West Moberly* decision found that mining exploration is linked to increased likelihood of a mine development, there should also be consideration of other potentially linked incremental cumulative effects of proposed development); and,**
4) **Any guidance for cumulative effects assessment must establish pre-industrial conditions as the baseline for the assessment of seriousness of adverse effects to Aboriginal rights, and make the consideration of effects of past projects and activities (including "legacy effects") a mandatory requirement.**

[7] For discussion of challenges faced in Canada for meaningful cumulative effects assessment, see, Noble, B., 2010. "Cumulative Environmental Effects and the Tyranny of Small Decisions: Towards Meaningful Cumulative Effects Assessment and Management." *Natural Resources and Environmental Studies Institute Occasional Papers No. 8,* University of Northern British Columbia, Prince George, BC, Canada.

2.2 Towards Regional EA

Musqueam recognizes that it is not practical or reasonable to place all the responsibility for addressing total cumulative effects loading on the shoulders of individual companies. It is clear from our experience and from the observation of many experts in EA that project-specific EA is incommensurable with effective cumulative effects assessment and management.

In 2009, the Canadian Council of Ministers of the Environment reported that since the 1990s, EA practice has been "narrowly scoped, confined within the spatial and temporal boundaries of individual project assessments" which has disconnected EA from the broader regional planning and environmental management framework.

The federal government's special representative on energy projects, Douglas Eyford, also reported in 2013 on the failure of project-specific cumulative effects assessment and the need for a new approach:

> "The *Canadian Environmental Assessment Act, 2012* ("CEAA 2012") requires the consideration of cumulative environmental effects; however, in practice it is difficult to identify and assess cumulative effects in the environmental assessment of a single project. Cumulative effects are best addressed on a regional basis to account for the combined environmental impacts of proposed and existing developments."[8]

Further, Eyford recommended:

> Where federal jurisdiction is engaged, Canada should collaboratively participate in regional planning with provincial governments, Aboriginal communities, local governments, and other stakeholders to effectively assess cumulative effects and encourage sustainable development.
>
> Canada should establish a joint initiative with Aboriginal groups for environmental stewardship and habitat enhancement to address concerns about cumulative effects of major resource projects.[9]

However, the current track record of the federal government in addressing regional environmental concerns through regional studies has been abysmal over the last few decades. Although *CEAA 2012* includes the requirement that all federal EAs take into account "the results of any relevant study conducted by a committee established under section 73 or 74", i.e., "Regional Studies", the over the past decade or more, the federal government has not commissioned a single regional study under this legislation.[10] The province of BC has initiated a number of initiatives,

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[8] Eyford, Douglas R., *Forging Partnerships, Building Relationships: Aboriginal Canadians and Energy Development.* Report to the Prime Minister. Canada, 2013. p. 14

[9] Ibid., p. 15

[10] Subsection 19(1)(i) requires the assessment of effects to include ""the results of any relevant study conducted by a committee established under section 73 or 74". The only example of a regional study undertaken in Canada over the past decade is the Beaufort Regional Environmental Assessment, initiated in 2011. However, it does not appear to have not undertaken through the provisions of the *CEA Act*.

including its Cumulative Effects Framework and its LNG-related Environmental Stewardship Initiative, however the federal government to date has not indicated any interest in participating. *CEAA 2012* is designed to allow for such an assessment, and many regions of the country, including the Lower Fraser River, require it, but to date it has not been used where it is needed most. Regional EA is required for the following purposes:

- Establish current conditions and trajectories of key indicators
- Define measurable parameters and thresholds of acceptable change
- Address future development options in a proactive approach to inform present-day project-specific assessments
- Assess these scenarios of future induced development against regional values, management benchmarks, targets and thresholds, and local and regional management plans
- Identify objectives to determine the preferred development option from development alternatives under each scenario[11]

Recommendations:

5) **The CEA Act and the CEA Agency itself should be restructured to give a greater role to its regional offices to work with Indigenous nations, provincial ministries and regional governments in the function of regional cumulative effects assessment and management frameworks and regional EA review and monitoring agencies;**
6) **The CEA Act must be amended to create mechanisms for triggering, funding and implementing regional EAs in regions of intensified development that fall within one or more areas of federal jurisdiction; these triggers should be linked to relevant thresholds for the protection of Aboriginal/treaty rights, or environmental benchmarks such as COWESIC recommendations or SARA recovery plans;**
7) **Regional EA must be undertaken collaboratively with indigenous nations; and,**
8) **New federal EA legislation and processes should include a clearly defined cost-recovery mechanism related to present and future federal permitting/project review processes to fund regional EAs.**

[11]Staples, Lindsay and Hannah Askew, *Regional Strategic Environmental Assessment for Northern British Columbia: The Case and the Opportunity*, West Coast Environmental Law and Northwest Institute for Bioregional Research, May, 2016. "In 2009, the Canadian Council of Ministers of the Environment (CCME) issued a report recognizing the role of regional strategic environmental assessment and their application in addressing conditions and issues like the ones described in the Dialogues. These transcend project-specific effects and focus on the combined and cumulative effects resulting from multiple projects and how these in turn inform judgments about individual projects and the developments that they may induce."

2.3 The Port/PER process under s. 67 of CEAA

Prior to 2013, the federal government, together with regional governments, played a significant collaborative role in the environmental management and protection of the Fraser River Estuary and Burrard Inlet. The Fraser River Estuary Management Program (FREMP) and the Burrard Inlet Environmental Action Management Program (BIEAMP) were tasked with continued monitoring and study of the Fraser River Estuary and Burrard Inlet, as well as the review of proposed projects and activities within these two ecological regions through an intergovernmental committee.

In 2013, the responsibilities of FREMP and BIEAMP, including the review of environment effects of proposed projects, were handed over to the Vancouver Fraser Port Authority (VFPA) to be conducted under its Project and Environmental Review ("PER") process. Under *CEAA 2012*, the VFPA, functioning as a "federal authority", was no longer bound by previous federal EA requirements and was subject only to the undefined requirements of Section 67 of *CEAA 2012,* which states that a project or activity carried out on federal lands could only proceed if it is not likely to cause significance adverse environment effects. No federal legislative definition for a federal assessment of environment effects of a project or activity carried out on federal lands is set out under Section 67, thus leaving the VFPA's "PER" process entirely discretionary.

In order to resolve the conflicted and illegitimate situation of the VFPA reviewing, assessing and approving its own proposed projects (and those of its clients), as well as the legislative vacuum for project review on federal lands, a new arm-length regulatory body is required for lands falling within federal port lands. Any new regional agency responsible for environmental management and protection and project review within Musqueam territory (i.e., Fraser River Estuary and Burrard Inlet) must include Musqueam.

Recommendations:

9) **The Port of Vancouver's PER process should be replaced by a new arms-length environmental management and review agency responsible for undertaking regional cumulative effects assessment, monitoring and management;**
10) **The new agency should have shared Crown-Musqueam decision-making structures;**
11) **New federal EA legislation should set out the authority of the Minister to enter into agreements to establish and fund regional EA agencies;**
12) **All proposed projects within the Fraser River Estuary and Burrard Inlet, including projects currently subject to a discretionary "screening-like" environment impact review under Section 67 of the CEA Act, would be reviewed by the new regional agency; and,**
13) **Any project with potential for serious irreversible impact on rights within the Fraser River Estuary and Burrard Inlet that are initially received by the new regional agency may be elevated by recommendation of the agency to a Joint Review Panel that includes at least one Musqueam-appointed expert.**

2.4 Justification of project and project alternatives

Past renditions of the CEA Act (pre-CEAA 2012) included discretionary provisions related to "[the] need for the project and alternatives means of carrying out the project." Thus, Responsible Authorities in past federal EA processes were permitted to include this factor for consideration during the EA. However, *CEAA 2012* removed this provision and instead narrowed the permissible range of consideration to, "the purpose and alternative means of carrying out the designated project". Thus, today federal reviewers can only consider different ways to achieve the same project, rather than looking at whether the project is justified at all, and if so, what different options may exist to the project itself for achieving a similar objective (e.g., wind farms instead of hydro dam to generate electricity).

Without a provision for assessing the project justification, current EA process does not align with the legal duty to justify infringements as set out under *Sparrow* and *Tsilhqot'in*. (see above). It would serve the interests of both Indigenous Nations and the federal Crown to have the federal EA process align with the duty to consult, justify and accommodate, especially where there are established or proven rights where the Crown is required to undertake a justification test related to any potential infringements of rights.

Recommendations:

14) **New federal EA legislation and procedures make mandatory a clear requirement for project justification and evaluation of alternatives means of carrying out the project;**
15) **In all instance where a proposed project poses risk of a potential *prima facie* infringement upon our constitutionally-protected Sparrow fishing rights, the Crown will be legally required to meet the justification test for such infringements. Musqueam recommends that this requirement be incorporated into the federal EA process for all Projects; or alternatively, for all Projects where a potential infringement of a proven/established right has been identified.**

2.5 Re-instatement of "screening-level" projects for meaningful review

Prior to *CEAA 2012*, federal EA involved four basic process options: screenings, comprehensive studies, mediation, and panel reviews. Based on a 'trigger' process, nearly all projects – large and small - formerly underwent obligatory review by federal department officials and then, based on the seriousness of potential effects and public concern, were carried through to either a screening review, comprehensive study review, or panel review. Due to key changes in *CEAA* 2012, screening-level EAs were dropped entirely from the federal EA process, while comprehensive studies were consolidated into a 'one-size-fits-all EA process' where the development stage of a project-specific scope of assessment was eliminated and replaced by template "Environmental Impact Statement (EIS) guidelines". With the elimination of screening-level assessments, federal EA has been reduced to the review of a fixed list of major projects, i.e., the Regulations Designating Physical Activities where most projects fall into a "standard EA" process, with only the exceptional project under Ministerial authority being elevated to panel review.[12]

Consequently, the federal EA process is not assessing the cumulative impacts of many smaller projects that, in concert with larger developments, pose serious risks to the vital ecological and cultural values of the Musqueam people. Especially within regions of our territory, such as the Fraser River Estuary – an area of national and international ecological importance, facing multiple industrial pressures, and falling within many layers of federal jurisdiction – these critical gaps in federal EA must be closed.

Recommendations:

16) **Re-instatement of CEAA 2012 application to projects across a wide range of scales, including smaller projects.**

[12] Doelle, Meinhard. *Journal of Environmental Law and Practice* 24.1 (Nov 2012): 1-17.

2.6 Indigenous traditional knowledge

Section 19(1)(3) of the *CEAA 2012* provides responsible authorities conducting an EA the option of including Aboriginal traditional knowledge into a EA. The CEA Agency has also developed guidance for Proponents in the consideration of Indigenous Traditional Knowledge (ITK) in EA. However, the guidance itself does not address many critical issues and remains an incomplete document. Even more problematic is the lack of requirement that the Proponent to adhere to this guidance; it is entirely optional. As a result, federal EAs often fail to integrate ITK into the assessment of biophysical or human VCs, and where proponents claim to have collected ITK, they have frequently done so in an incorrect and inappropriate manner.

Recommendations:

17) **ITK must be incorporated into the EIS under relevant human and biophysical VCs, as well as effects on rights;**
18) **CEAA's 2015 current guidelines on ATK (i.e., ITK) must be replaced by a new set of mandatory guidelines developed in collaboration with representatives of Indigenous nations and ITK technical experts;**
19) **ITK collection must not be conflated with "consultation" efforts.**

2.7 Rights-based activities, socio-economic conditions, health and culture

Under *CEAA 2012*, the assessment of effects related to Aboriginal peoples are required under subsection 5(1)(c). Currently, Musqueam has found that: **direct** project effects are not included in this assessment; cultural and heritage impact assessment is still heavily biased towards tangible culture; CEAA applies a lower standard for the assessment of baseline and effects studies on social and rights-based VCs as compared to biophysical VCs; and, in-depth studies necessary to properly assess affects (e.g., Traditional Use Studies) are optional, not required. Thus, there is a lack of proper assessment of effects on Aboriginal rights and title in current federal EA.

Recommendations:

20) **Federal legislation should require the assessment of both direct and direct impacts of a project on rights-based practices, socio-economic conditions, and Indigenous culture;**
21) **CEAA's 2015 current guidelines on the assessment of effects on rights-based practices, socio-economic conditions, and Indigenous culture must be replaced by a new set of prescribed guidelines developed in collaboration with representatives of Indigenous nations and technical experts, and,**
22) **These guidelines should require "nation-specific" studies to be undertaken collaboratively with Indigenous nations and completed prior to submission of the EIS.**

2.8 Process (timelines and scoping)

Under the current federal process, timelines are too short for meaningful indigenous input and the much-needed process for working group development of a project-specific "scoping document" has been eliminated. The result is that – under a standard federal EA - Indigenous groups are not being meaningfully engaged in the EA process until the EIS has been submitted. Process timelines prior to the EIS submission are inadequate for any kind of meaningful consultation related to scope of the project and scope of assessment to take place.

Recommendations:

23) **Re-instate a working group consultation process in the development of project-specific EIS guidelines; and**
24) **Replace the federal "clock" with a joint decision-making process on information sufficiency at different steps in EA, with the ability for priority rights-holders to stop the process in the event of critical information gaps.**

2.9 Participation funding

Adequate and timely participation funding is essential to allow Indigenous nations meaningful access to and participation in the EA process. Currently, the CEA Agency acknowledges that it does not provide adequate support to support meaningful participation, and instead directs nations to lobby the proponent for additional funds. This is an unacceptable approach that is a significance drain on the nation's limited time and resources, and inevitably leads to funding not being made available until late in the EA process, if at all. A rough estimate is that a ten-fold increase in federal funding is required for indigenous groups to meaningfully engage in EA, through both impact studies and process engagement.

<u>Recommendations</u>:

25) **Establish a federal EA legislative requirement for an arms-length funding arrangement (a "User Pay System" for Proponents, tied to an independent body that determines the amount of funding required) such that Indigenous groups have adequate capacity to engage in effects characterization studies and the EA process overall;**
26) **This federally-coordinated user pay EA system should see Proponent costs tied to project size, complexity, and the breadth and depth of First Nations issues; and**
27) **This system must apply to pre-EA steps as well, so that project funding is available right from the outset of project planning.**

2.10 Substitution

Substitution of federal EA to the BC Environmental Assessment Office (EAO) is not working. In our territory, one substituted EA has been completed (Woodfibre LNG), while another is currently underway (WesPac Tilbury LNG). Our concerns include:

- Federal departments, including but not limited to CEAA and the DFO, are not meaningfully engaging in province-led EAs. Their expertise and their accountability to indigenous peoples are undermined by the substitution process, as federal departments often leave their assessment and related consultation duties until after the completion of the EA.
- EAO lacks expertise in assessing impacts to Aboriginal rights and effects related to Indigenous peoples (currently identified under subsection 5(1)(c) of *CEAA 2012*); these are not being properly assessed as VCs with measureable parameters;
- Prior to federal substitution commencing in 2013, the EAO previously had largely relied on the federal government to undertake cumulative effects assessment. The EAO has yet to develop proper requirements for proponents pertaining to the meaningful assessment of cumulative effects;
- The EAO appears to be subject to undue influence by proponents and other provincial ministries, (i.e., it has proven unable to act as a neutral and impartial regulator);
- Under substitution, the federal Crown's responsibility to consult and accommodate is "twice removed" due to the EAO's delegation of large aspects of the Crown's duty to consult and accommodate to the proponent under a Section 11 Order. Although a significant portion of consultation has been delegated to the proponent, CEAA has no direct oversight of the proponent's actions; and
- Under a substituted EA, federal capacity funding is not issued until the EIS (Application) review period commences, which may be years into the EA.

<u>Recommendations</u>:

28) **The MOU between CEAA and BC EAO on Substitution of EAs (2013) should be terminated, and full federal EAs should be re-instated for all major projects where substitution is currently underway,[13] with adequate resources provided to regional CEAA offices to ensure a smooth transition to federal re-instatement, and**
29) **Federal EA legislation should be amended to seek efficiencies through co-operation and harmonization with other jurisdictions, rather than substitution.**

[13] The memorandum of understanding may be terminated by either Party, 45 days after written notice is provided to the other Party.

2.11 Project-splitting

Project Splitting often occurs in the federal EA system, when one larger vertically-integrated production system is split into component parts, with some related physical works and activities artificially exempted from the scope of assessment. This leads to underestimation of total Project-related effects loading, to the detriment of the EA process and defensible Crown decision-making. Project splitting is recognized by EA practitioners and assessment bodies as undesirable:

> "Practice has shown that it is both ineffective and inefficient to separately assess the many individual components of a large development, even if developers apply for these components separately [this undesirable practice is known as "project splitting"]. To assess these parts individually risks missing the bigger picture, by failing to recognize impacts related to scale and combined effects of the separate parts. The Review Board avoids this by ensuring that the entire development undergoes environmental assessment."[14]

Musqueam has encountered an increasing amount of "project-splitting" in recent EAs. The assessment of Woodfibre LNG was split apart from the review of the Eagle Mountain Natural Gas Pipeline project, even though the Projects are inextricably linked (i.e., there can be no LNG facility without the purpose-built feeder gas pipeline). Similarly, the assessment of the WesPac Tilbury Jetty was split apart from the review of the integrated BC Fortis LNG expansions project. In addition, the CEA Agency did not consider LNG vessels that have been specifically designed to berth at the WesPac Tilbury facility to be within the scope of the WesPac Tilbury Jetty Project. In both cases, this approach has undermined the effective assessment of project effects on the environment and our Aboriginal rights.

<u>Recommendations</u>:

30) **Federal legislation should be amended to include a requirement that "all physical works and activities required to undertake a Project" be included in the scope of assessment; and**
31) **The federal EA system should include updated guidance on the avoidance of project splitting, focusing on the critical factors of dependence, linkage and proximity.**

[14] From the Mackenzie Valley Review Board's *Environmental Impact Assessment Guidelines* (2004), pg 27 – accessed at http://www.reviewboard.ca/upload/ref_library/MVE%20EIA%20Guidelines_1195078754.pdf

2.12 Mitigation issues

Mitigations are the tools used to try to avoid, reduce or compensate for impacts. One of the current problems in federal EA is that even though EA is supposed to consider effects beyond what existing regulatory instruments can handle, few Proponent commitments and federal EA Conditions regarding mitigation go beyond things that would likely be included in a regulatory instrument. This leaves many "extra-regulatory" issues (including impacts on traditional land use, rights and culture) without any form of meaningful mitigation. This is a failure of process and a failure of imagination. Currently, Musqueam recommendations for further enhanced mitigation are treated by both proponents and the Crown *advice* in EA, which is inconsistent with nation-to-nation collaborative consent decision-making sought by Musqueam.

Recommendations:

32) **The federal EA system needs to provide further guidance and enhanced quality control regarding proponents' "mitigation" commitments, including on:**
33) **The need to show evidence of success of proposed mitigation;**
34) **Minimum information requirements for environmental management plans;**
35) **Invalid so-called "mitigation measures" such as yet-to-be-completed agreements, ongoing discussions, and prior notice commitments; and**
36) **The Nation-to-Nation consultation process needs to include joint mitigation meetings between affected indigenous groups and the federal Crown, both during and after the EA is complete.**

2.13 Monitoring, Compliance & Enforcement

New compliance, penalty & enforcement provisions were one of the few positive developments of *CEAA 2012*, but problems remain related to federal capacity to monitor and enforce EA Conditions on the ground. To address both federal capacity constraints and in recognition of the stewardship responsibilities and jurisdictions of indigenous nations, the new federal EA process should collaboratively develop indigenous monitoring programs to be an integral part of EA follow-up programs.

Recommendations:

37) **Federal EA legislation should empower the Minister to integrate or align monitoring and compliance requirements with Indigenous Nation's rights, lands, and water management processes; and enable the involvement of First Nations in all aspects of monitoring within their territories, and,**
38) **Monitoring and compliance enforcement must cover the full life-cycle of the project.**

PART III – CONCLUSION

Musqueam appreciates the efforts made by the federal EA process Review Panel to hear our concerns and consider our 31 recommendations related to the future of the federal EA process.

While we have provided a comprehensive listing of recommendations (See Appendix B below for Summary of Recommendations) and feel that all of them are important and implementable, some critical enabling factors **simply must** be put in place for these changes to result in better quality decision-making regarding land and resource use and development in our territory. These include:

- The federal Crown must work with indigenous groups to develop appropriate Nation-to-Nation frameworks for joint environmental assessment conduct, regional cumulative effects monitoring and management and regional decision-making. For Musqueam, the critical area for this structure is well defined in the Lower Fraser River and Burrard Inlet.
- Decision-making must be re-tuned to the requirement in law for the justification of infringements to Aboriginal rights, using an agreed upon justification framework to guide environmental assessment and related decision-making.
- Exponentially more focus and funding must be afforded to indigenous groups through the federal EA process than is currently; we are the most sensitive receptors in the human environment **and** the priority rights holders under the Canadian Constitution.
- Cumulative effects assessment needs to go from an awkward, "tacked on" portion of federal EA, to a central focus. The acceptability of proposed further changes to the environment must be assessed against a well-informed cumulative effects context of total effects loading to date on indigenous peoples and the resources we rely upon. Environmental assessment, a process designed explicitly to answer tough questions like "how much is too much", must once again begin to pose and answer these questions.

We trust that the Panel's recommendations to the federal government will reflect these needed changes. Without structural changes to federal EA, real change – the type of change promised by the new federal government – cannot occur.

APPENDIX A: PAST, PRESENT AND REASONABLY FORESEEABLE PROJECTS AND ACTIVITIES IN MUSQUEAM TERRITORY

Past

- Loss of river foreshore habitat due to historic and contemporary diking, wharfs, etc.
- Agricultural effects (run-off, pollution)
- Residential and industrial development (on Musqueam title lands)
  Road, bridge and tunnel construction (transportation infrastructure)
- River Dredging (change in river processes)
- Canneries
- Overfishing
- Sawmills
- River Port facilities, including cement plants, gravel and sand transport
- Barge traffic on the Fraser River
- Log booms on river (past and current)

Current

- Seaplane traffic on River (exclusion zones) *
- Barge traffic on the Fraser River *
- Large vessel traffic on the Fraser River *
- Maintenance dredging of navigation channel along South Arm of Fraser (PMV)
- DeltaPort (causeway) *
- BC Ferries Terminal at Tsawwassen *
- Vancouver International Airport * (causeway - effects on fish)
- Boundary Bay Airport
- Fraser Wharves
- Coast 2000 Terminals
- Lehigh Hanson Cement Plant*
- Varsteel
- Seaspan Ferries Corporation Tilbury Terminal
- FortisBC Tilbury LNG Plant (existing) *
- Fraser Surrey Docks*
- Vancouver Fraser Port Authority

** Note that these Projects and activities have effects extending back into the "past" in addition to current effects, and also have enduring legacy effects*

Reasonably Foreseeable

- Tilbury Liquefied Natural Gas (LNG) Facility Expansion Project
- Vancouver Airport Fuel Delivery Project
- Maintenance Dredging of the Lower Fraser River
- Port of Vancouver Habitat Enhancement Program (*Note: TBA, still under review and likely to be used as habitat offsetting for RBT2*)
- Fraser Surrey Docks Direct Transfer Coal Facility (Texada Coal)
- WesPac Tilbury Marine Jetty Project
- Fortis BC Tilbury LNG Facility Expansion Project – future phase
- Roberts Bank Terminal 2
- Ladner Harbour Revitalization
- Lehigh Hanson South Richmond Terminal Project
- George Massey Tunnel Replacement Project
- Pattullo Bridge Replacement Project
- Kinder Morgan Trans Mountain Pipeline Expansion Project
- Relocation of BC Hydro's transmission line that runs through the George Massey Tunnel
- BHP Potash Terminal at Fraser Surrey Docks
- Centerm Expansion Project
- BURNCO Aggregate Project
- Eagle Mountain Woodfibre Natural Gas
- Woodfibre LNG
- WCMRC (new oil spill base)

***Extensive deepening of navigation channel on South Arm of Fraser River, potentially induced by tunnel removal, has not been included in this list but should be included in discussion with informants.*

APPENDIX B: SUMMARY OF MUSQUEAM RECOMMENDATIONS

Project-specific cumulative effects assessment

1) Cumulative effects assessment should be undertaken collaboratively between the Crown and Musqueam within Musqueam territory.
2) If cumulative effects assessment is undertaken by a Proponent, there must be clear and prescriptive guidance (i.e., methodological requirements) from the CEA Agency for conducting cumulative effects assessment in accordance with updated best practices (current guidance dates back to 1999);
3) Any guidance for cumulative effects assessment should incorporate consideration of "hypothetical" future projects where a new project is proposed within an area of intensive or rapid environmental change/development. Such a requirement would support the common-law duty to consult on strategic decisions (e.g., where the *West Moberly* decision found that mining exploration is linked to increased likelihood of a mine development, there should also be consideration of other potentially linked incremental cumulative effects of proposed development); and,
4) Any guidance for cumulative effects assessment must establish pre-industrial conditions as the baseline for the assessment of seriousness of adverse effects to Aboriginal rights, and make the consideration of effects of past projects and activities (including "legacy effects") a mandatory requirement.

Regional EA

5) The CEA Act and the CEA Agency itself should be restructured to give a greater role to its regional offices to work with Indigenous nations, provincial ministries and regional governments in the function of regional cumulative effects assessment and management frameworks and regional EA review and monitoring agencies;
6) The CEA Act must be amended to create mechanisms for triggering, funding and implementing regional EAs in regions of intensified development that fall within one or more areas of federal jurisdiction; these triggers should be linked to relevant thresholds for the protection of Aboriginal/treaty rights, or environmental benchmarks such as COWESIC recommendations or SARA recovery plans;
7) Regional EA must be undertaken collaboratively with indigenous nations; and,
8) New federal EA legislation and processes should include a clearly defined cost-recovery mechanism related to present and future federal permitting/project review processes to fund regional EAs.

The Port/PER process under s. 67 of CEAA

9) The Port of Vancouver's PER process should be replaced by a new arms-length environmental management and review agency responsible for undertaking regional cumulative effects assessment, monitoring and management;

10) The new agency should have shared Crown-Musqueam decision-making structures;
11) New federal EA legislation should set out the authority of the Minister to enter into agreements to establish and fund regional EA agencies;
12) All proposed projects within the Fraser River Estuary and Burrard Inlet, including projects currently subject to a discretionary "screening-like" environment impact review under Section 67 of the CEA Act, would be reviewed by the new regional agency; and,
13) Any project with potential for serious irreversible impact on rights within the Fraser River Estuary and Burrard Inlet that are initially received by the new regional agency may be elevated by recommendation of the agency to a Joint Review Panel that includes at least one Musqueam-appointed expert.

Justification of project and project alternatives

14) New federal EA legislation and procedures make mandatory a clear requirement for project justification and evaluation of alternatives means of carrying out the project;
15) In all instance where a proposed project poses risk of a potential *prima facie* infringement upon our constitutionally-protected Sparrow fishing rights, the Crown will be legally required to meet the justification test for such infringements. Musqueam recommends that this requirement be incorporated into the federal EA process for all Projects; or alternatively, for all Projects where a potential infringement of a proven/established right has been identified.

Re-instatement of "screening-level" projects for meaningful review

16) Re-instatement of CEAA 2012 application to projects across a wide range of scales, including smaller projects

Indigenous traditional knowledge

17) ITK must be incorporated into the EIS under relevant human and biophysical VCs, as well as effects on rights;
18) CEAA's 2015 current guidelines on ATK (i.e., ITK) must be replaced by a new set of mandatory guidelines developed in collaboration with representatives of Indigenous nations and ITK technical experts;
19) ITK collection must not be conflated with "consultation" efforts.

Rights-based activities, socio-economic conditions, health and culture

20) Federal legislation should require the assessment of both direct and direct impacts of a project on rights-based practices, socio-economic conditions, and Indigenous culture;

21) CEAA's 2015 current guidelines on the assessment of effects on rights-based practices, socio-economic conditions, and Indigenous culture must be replaced by a new set of prescribed guidelines developed in collaboration with representatives of Indigenous nations and technical experts, and,
22) These guidelines should require "nation-specific" studies to be undertaken collaboratively with Indigenous nations and completed prior to submission of the EIS.

Process (timelines and scoping)

23) Re-instate a working group consultation process in the development of project-specific EIS guidelines; and
24) Replace the federal "clock" with a joint decision-making process on information sufficiency at different steps in EA, with the ability for priority rights-holders to stop the process in the event of critical information gaps.

Participation Funding

25) Establish a federal EA legislative requirement for an arms-length funding arrangement (a "User Pay System" for Proponents, tied to an independent body that determines the amount of funding required) such that Indigenous groups have adequate capacity to engage in effects characterization studies and the EA process overall;
26) This federally-coordinated user pay EA system should see Proponent costs tied to project size, complexity, and the breadth and depth of First Nations issues; and
27) This system must apply to pre-EA steps as well, so that project funding is available right from the outset of project planning.

Substitution

28) The MOU between CEAA and BC EAO on Substitution of EAs (2013) should be terminated, and full federal EAs should be re-instated for all major projects where substitution is currently underway,[15] with adequate resources provided to regional CEAA offices to ensure a smooth transition to federal re-instatement, and
29) Federal EA legislation should be amended to seek efficiencies through co-operation and harmonization with other jurisdictions, rather than substitution.

Project-splitting

[15] The memorandum of understanding may be terminated by either Party, 45 days after written notice is provided to the other Party.

30) Federal legislation should be amended to include a requirement that "all physical works and activities required to undertake a Project" be included in the scope of assessment; and
31) The federal EA system should include updated guidance on the avoidance of project splitting, focusing on the critical factors of dependence, linkage and proximity.

Mitigation Issues

32) The federal EA system needs to provide further guidance and enhanced quality control regarding proponents' "mitigation" commitments, including on:
33) The need to show evidence of success of proposed mitigation;
34) Minimum information requirements for environmental management plans;
35) Invalid so-called "mitigation measures" such as yet-to-be-completed agreements, ongoing discussions, and prior notice commitments; and
36) The Nation-to-Nation consultation process needs to include joint mitigation meetings between affected indigenous groups and the federal Crown, both during and after the EA is complete.

Monitoring, compliance and enforcement

37) Federal EA legislation should empower the Minister to integrate or align monitoring and compliance requirements with Indigenous Nation's rights, lands, and water management processes; and enable the involvement of First Nations in all aspects of monitoring within their territories, and,
38) Monitoring and compliance enforcement must cover the full life-cycle of the project.

Appendix C: MUSQUEAM TERRITORY MAP