

**ENVIRONMENTAL ASSESSMENT
IN THE CONTEXT OF RECONCILIATION**

Submission by

**Coastal First Nations - Great Bear Initiative Society
on behalf of
Old Massett Village Council, Skidegate Band Council, the Council of the Haida Nation, Nuxalk
Nation and Wuikinuxv Nation**

To

The Expert Panel Reviewing Canada's Environmental Assessment Process

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INTRODUCTION

Coastal First Nations - Great Bear Initiative Society (“CFN”) is an alliance of eight First Nations and one Council on the Central and North Coast and Haida Gwaii¹. CFN is providing this submission on behalf of the specified First Nations to the Expert Panel Reviewing Canada’s Environmental Assessment Process to ensure that the new federal environmental assessment legislation is consistent with Reconciliation with First Nations. Reconciliation requires a collaborative environmental assessment approach that respects First Nation decision-making authorities, and is aimed at achieving First Nation consent.

For over sixteen years, CFN has been at the forefront of developing a sustainable conservation economy on the coast and shared decision-making over the lands and waters of our traditional territories. CFN coordinates regional work on land use planning, marine use planning, government-to-government relationships and economic opportunities (forestry, non-timber forestry resources, shellfish, carbon credits, renewable energy, and fisheries).

CFN has achieved great success in advancing its objective of self-sufficient and self-governing First Nations through partnerships with environmental groups, the federal and provincial governments, municipal leaders, industry and other interests. These partnerships have allowed us to develop agreements defining resource benefit sharing and decision-making over our traditional lands and waters, including:

CFN- B.C. Agreements

- Government-to-Government relationship: (with individual First Nations) for land use planning, and economic opportunities in forestry and tourism.
 - Strategic Land Use Planning Agreements
 - Land and Resource Protocols for collaborative implementation of land use plans, Ecosystem Based Management and new protected areas.
- Reconciliation Protocol and Engagement Framework: for implementation of land use planning agreements and economic measures and to establish a joint review process of development proposals based upon the recognition that both B.C. and First Nations have rights and responsibilities.
- Economic Agreements: forest tenure opportunities and carbon offsets.
- Grizzly Bear Moratorium: to limit the commercial trophy hunt.
- The Marine Planning Partnership for the Pacific North Coast (MaPP): to collaboratively develop marine plans for coastal sub-regions that provide recommendations for key areas for marine protection and conservation.

CFN- Canada Agreements

- Interim Measures Framework Agreement: with DFO and INAC for marine use planning, economic opportunities and cooperative management.

¹ Wuikinuxv Nation, Nuxalk Nation, Heiltsuk Nation, Kitasoo/Xaixais First Nation, Gitga’at First Nation, Metlakatla First Nation, Old Massett Village Council, Skidegate Band Council, and the Council of the Haida Nation.

- Pacific North Coast Collaborative Oceans Governance Memorandum of Understanding: for the development of an integrated marine plan for the Pacific North Coast (PNCIMA).
- Marine Protected Area Process: a collaborative process with DFO to develop a Network of Marine Protected Areas for the Northern Shelf Bio-region (the same geographic area as MaPP and PNCIMA).
- Fisheries Reconciliation: with DFO/INAC with the goals of: Healthy Ecosystems; Collaborative Governance; Stimulating the Fisheries Economy; and Predictability and Stability.

CFN is not a holder of Aboriginal Rights and Title. Government regulatory processes have potential impacts on CFN's goals and activities, as well as the Aboriginal Rights and Title of its member First Nations. As we have outlined above, CFN and its members are engaged in a variety of Reconciliation agreements with Canada and BC that include the development of Collaborative Governance and Joint or Shared Decision-Making, and that recognize that each jurisdiction has rights and responsibilities to make resource use decisions. It is within this context that this submission is made.

For the purposes of this regulatory review, CFN is making this submission on behalf of the following members: Old Massett Village Council, Skidegate Band Council, Council of the Haida Nation, Nuxalk Nation and Wuikinuxv Nation. Other CFN members will be making their own submissions. However, as CFN is not a holder of Aboriginal Rights and Title, this submission does not fulfill the Crown's duty to consult directly with rights and title holders.

RECONCILIATION AND ENVIRONMENTAL ASSESSMENT

While our interest in this review is fundamentally based upon our continuing work to govern our own territories, it is also based upon the negative experiences that CFN and many of its member First Nations have identified through government processes and in the courts regarding the CEAA and NEB processes that were used for the proposed Enbridge Northern Gateway Pipelines Project.

CFN has identified three over-riding changes that must be addressed in a new approach to environmental assessment to further the goal of Reconciliation:

1. Implement collaborative governance and joint/shared decision-making;
2. Establish an independent assessment authority; and
3. Develop a new EA process.

We suggest that the environmental assessment process be repurposed and redesigned to build the relationships, structures, processes, understandings and agreements between Aboriginal and Crown governments to ensure collaboration, alignment and effectiveness in reaching decisions. This means refocusing on positive and collaborative Aboriginal and Crown relations that respect the Aboriginal Interests, Rights and Title and Treaty Rights.

This approach to Reconciliation is consistent with the federal government's commitment to a renewed, Nation-to-Nation relationship with Aboriginal peoples, based on recognition of rights, respect, co-operation, and partnership and to implementing the United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"). This is also consistent with both s. 35(1) of the *Constitution Act, 1982* and UNDRIP. First Nations have their own laws and are decision-makers according to their own authority and their own representative institutions. The Government of Canada requires modern legislative tools that respect and acknowledge First Nations' authorities, including Aboriginal Interests, Rights and Title and Treaty Rights.

1. Collaborative Governance and Joint/Shared Decision-Making

It is critical that First Nations are respected and engaged in a government-to-government manner. First Nations that are potentially impacted by a proposed project need to be involved at all stages of decision-making in the environmental assessment process, from the determination of a project's location and scope, to the final decision on whether a project should be approved. Impacted First Nations must be part of decisions regarding whether an environmental assessment is required, the project components that are included in the assessment, spatial scoping for the assessment, the terms of reference for the assessment, the adequacy of the Environmental Impact Assessment, and all final recommendations and decisions.

For impacted First Nations that have proven Aboriginal Rights or Title, or have strong claims of Aboriginal Rights or Title, there can be separate bi-lateral discussions between the Crown and those First Nations to address their specific concerns.

The objective at each stage of the process will be to obtain the consent of potentially impacted First Nations on each decision point (for example, the terms of reference for the assessment). Legislation requires a statutory statement expressing that the Crown's preference is to approve projects where First Nations consent is evident. In cases where consent is not obtained, dispute resolution processes can be utilized. For example, dispute resolution would apply at each of the following stages: type of EA (Screening, Comprehensive Study or Panel Review); EA process technical reviews and associated decisions; draft recommendation report; and post-EA monitoring, compliance, and adaptive management).

Dispute resolution can be initially undertaken at the political level, with First Nation leaders and Ministerial representatives. If political engagement does not resolve the issue, formal dispute resolution processes could be undertaken, such as mediation. In the event that some First Nations consent, and others do not, there would be an opportunity for First Nations to file "majority" and "minority" reports so that Canada has all perspectives on the issues.

Canada needs to fulfill its Constitutional Section 35 duties to consult and accommodate throughout the entire EA process. In addition to fulfilling these obligations, there needs to be legislated collaborative decision-making requirements to avoid infringement on Aboriginal Rights and Title and Treaty Rights.

Ultimately, it is essential that both federal and First Nation decision-making authorities are respected. The federal government may decide to approve a project, whereas First Nation governments may decide to reject it. Neither government will have the authority to fetter the

other's discretion, and, in some cases, the parties may "agree to disagree." In those circumstances, litigation may be the outcome, but the entire process will be designed to make this the exception rather than the rule, given the focus on collaboration at every stage.

2. Establish an Independent Assessment Authority

We recommend that a single, independent body be responsible for conducting all federal EAs. We propose that it be called the Canadian Environmental Assessment Board ("CEAB") and that it be established by Parliament and report directly to the Minister of Environment and Climate Change.

The Board needs to be impartial and free of any executive branch influences and should be established through an open and transparent process. Legislation must also require panels established by the CEAB to be independent, neutral and objective, so they are able to make recommendations free from fear of political influence. In addition, the legislation would specify the criteria, rules and factors that guide assessments, including explicit trade-off rules and factors to inform both CEAB recommendations and subsequent decisions by Canada and First Nations.

3. Develop a New EA Process

The new EA process needs to be tiered, and must require First Nation participation at each stage of the process. It is also critical that the EA process include adequate participant assistance funding to support meaningful engagement of First Nations.

The new process should include three distinct components, two of which take place prior to proceeding with project-specific EAs: (i) Strategic/Regional pre-assessment; (ii) Pre-EA project proposals; and (iii) Project-specific EAs.

3.1 Strategic/Regional pre-assessment

The EA process must be tiered and include strategic and/or regional assessment(s), with the full participation of First Nations, that occur prior to project-specific EAs. Strategic EAs (that focus on specific sectors) or regional EAs (that focus on a particular geographical region) are essential, with project-specific EAs being initiated after broader strategic or regional EAs have been undertaken and the project being proposed is consistent with those EAs.

These broader-level EA processes are also effective mechanisms to address cumulative impacts of multiple projects so that project-specific EAs can be less contentious. Cumulative effects are one of the biggest challenges facing First Nations and clearer statutory requirements related to cumulative effects assessment methodologies are needed.

Regional or strategic assessments, however, cannot be relied upon in perpetuity because baseline and other conditions change. Accordingly, they would need to be regularly updated (e.g. every 5 years) to account for approved and potential future projects that may have cumulative effects.

3.2 Pre-EA process

The decision on whether an EA is required must be made collaboratively with First Nations. The pre-EA process would, for example, include a review of strategic/regional assessments, site selection criteria, adequate spatial scoping, and a recommendation on whether the project should proceed to a project specific-EA.

The intent of this stage is for proponents to reach agreements with First Nations while the project is still in its conceptual stage to avoid lengthy and costly reviews that may result in court challenges. Proponents must also be prepared to walk away from the idea if it is fundamentally unacceptable to First Nations. For example, selecting a project location that is unacceptable to First Nations because of potential impacts to Aboriginal Interests, Aboriginal Rights and Title or Treaty Rights is one of the main sources of conflict between proponents and First Nations.

3.3 Project-specific EA

Once the requirement for a project-specific EA is triggered, First Nations would then be involved in determining the scope of the EA process (including, but not limited to, the type of assessment, the scope of the project, and the scope of the assessment), project timelines and conditions. For example, First Nations input needs to be incorporated into the identification of Valued Ecosystem Components and the collaborative development of risk assessments (including determining the significance of impacts). The CEAB must also be able to require additional studies when necessary.

First Nations must also be involved in overseeing the implementation of EA conditions, including approving management plans, reviewing compliance with conditions, and taking part in ongoing monitoring and reporting. First Nations should also be engaged in ongoing adaptive management where monitoring results indicate impacts inconsistent with the initial assessment.

NOTE: The use of, and reliance on, Transport Canada's voluntary TERMPOL process to assess marine transport is a particular concern for coastal First Nations. Among the inadequacies of TERMPOL are: it is voluntary, lacks meaningful consultation and accommodation, and is limited in its scope and fails to assess potential environmental impacts or impacts on Aboriginal Interests, Rights and Title and Treaty Rights. The inclusion of marine shipping in the scope of projects has been inconsistent and when it is not included in the scope of review, it splits projects and undermines the perceived fairness of the review. The Haida Nation is especially concerned about risks associated with vessel traffic in the Pacific Rim region, (e.g, utilization of the "Great Circle Route" that involves transiting through Haida Gwaii waters off the Pacific north coast), including the impacts of potential accidents and cumulative effects of increased shipping activities.