REWORKING FEDERAL ENVIRONMENTAL ASSESSMENT PROCESSES

DENE THA' FIRST NATION'S SUBMISSIONS TO ENVIRONMENTAL ASSESSMENT REVIEW PANEL: A BETTER PATH FORWARD

A. INTRODUCTION

Dene Tha' First Nation ("Dene Tha'") makes these submissions to the Environmental Assessment Review Panel because of our grave concerns about the lack of proper assessment of impacts from development in our Traditional Territory.

Dene Tha' is not opposed to development. We know the importance of economic opportunities, and strive to obtain those for our own members. However, development needs to be sustainable. In our experience, sustainability - including the sustainability of our Treaty 8 rights as long as the rivers flow - is not being achieved through current environmental assessment processes. We are hopeful that this review process will result in meaningful and substantive changes to federal environmental assessment approaches so that sustainable development occurs in the context of reconciliation of the Aboriginal and Treaty rights of Aboriginal peoples in Canada. With a better approach, there can be more certainty for all players - government, First Nations and proponents.

Our submission is organized into four sections:

- The Dene Tha' - Our People and Our Lands
- Summary of problems with current federal EA processes
- A Better Approach to Environmental Assessment
- Concluding Remarks

In our view, key issues to be addressed in environmental assessment reform include:

- Strategic, regional and cumulative effects assessments
- Aboriginal impact assessments

- Collaboration with impacted First Nations
- Independent Canadian Environmental Assessment Board

B. THE DENE THA' - OUR PEOPLE AND OUR LANDS

Dene Tha' have lived on our lands in northwestern Alberta, northeastern British Columbia and the southern Northwest Territories since time immemorial. We have just under 3,000 members, many of whom continue to rely extensively on the resources in our Traditional Territory to feed themselves and their families, maintain their culture, and live as Dene Tha' people. As Dene Tha' people, it is our responsibility to take care of the lands and resources within our Traditional Territory for current and future generations. We are stewards of our lands, and have a cultural imperative to protect them.

Dene Tha' is an adherent to Treaty 8. One of the sacred promises made to us under Treaty 8 was that we would be able to continue our traditional livelihoods of hunting, fishing, trapping and gathering as long as the rivers flow and the sun shines. Unfortunately, our ability to continue to exercise our Treaty rights is seriously threatened. Our Territory has been heavily impacted by development since the 1950s. Conventional oil and gas infrastructure such as well pads, pipelines, processing plants and seismic lines cover most of our Territory, and more recently unconventional oil and gas development has been introduced to our Territory, including shale gas/LNG and shale oil in areas that had until recently remained relatively undeveloped. We have suffered the consequences of over a dozen pipeline spills in the last five years alone. Thousands of abandoned and orphan wells 'dot' our territory, worse – we have been told that government and industry have insufficient funds to clean these up. Standard operating practices for oil and gas wells include the routine flaring of non-salable cancer-causing oil and gas by-products into the air. Many of these by-products of the oil and gas industry are persistent toxins that accumulate within the same water, soil and living systems that our communities rely upon for dietary and cultural sustenance. Clear cutting of the boreal forest has occurred throughout our Territory, displacing wildlife, leaving our trappers' cabins with only a fringe of trees around them and blocking access to important harvesting sites as a result of scarification. There are currently two hydro-electric dams in our Territory, with Site C currently being constructed as the third dam, and a fourth dam being

proposed further downstream on the Peace River, all of which affect our ability to navigate in our Territory, access important cultural sites, and eat fish without fear of methyl mercury contamination. Agriculture land expansion and urban development processes throughout our Traditional Territory continually convert public Crown lands into privately held free-hold/fee-simple lands. Free-hold/fee-simple lands are areas where our Treaty rights have been extinguished, and we can no longer exercise our Treaty rights or use these lands to support the Dene Tha' way of life. We are surrounded by development.

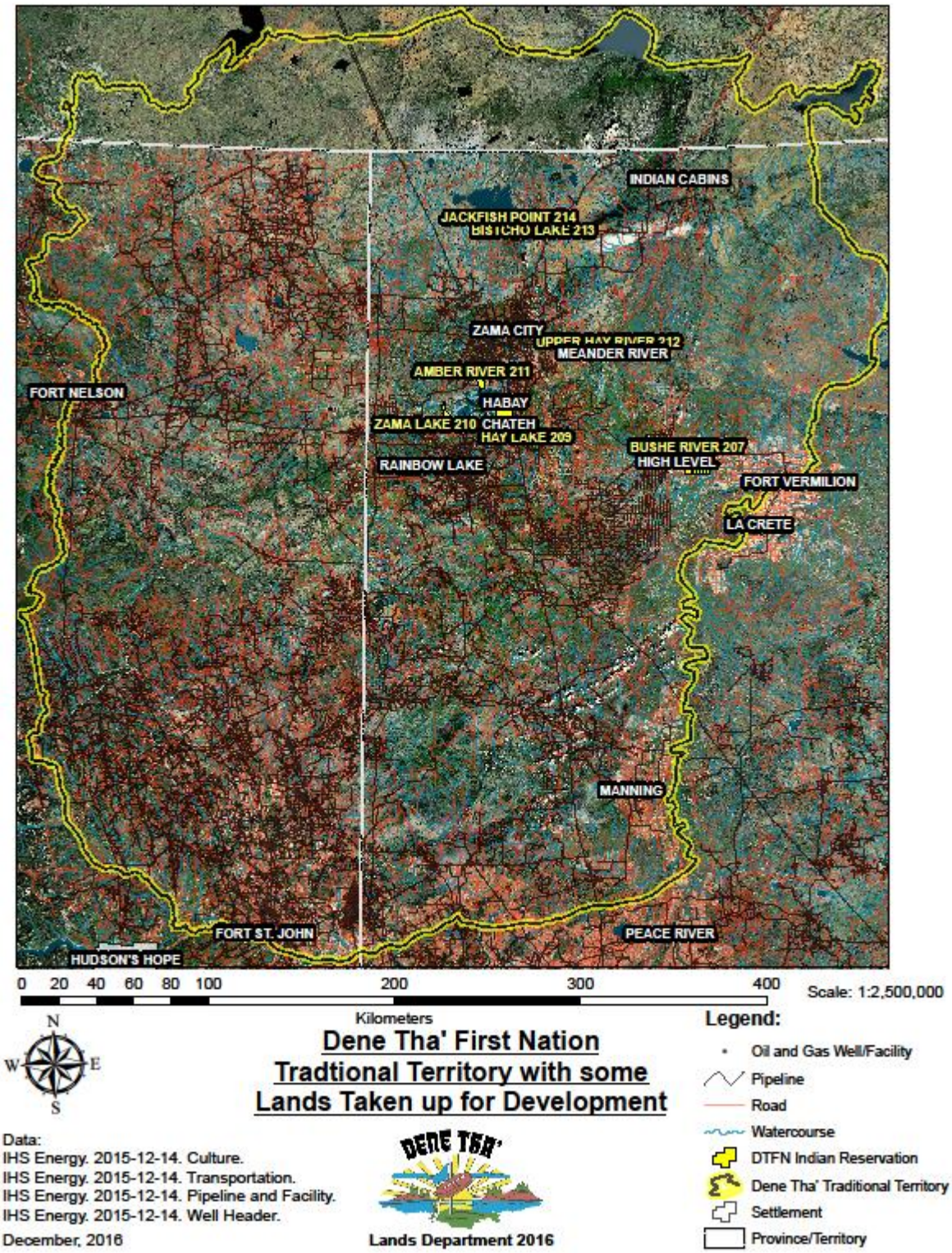
Dene Tha' has taken an active role in several environmental assessment and regulatory processes, including federal and provincial environmental assessments and National Energy Board processes in relation to pipelines and processing plants, and the federal and British Columbia environmental assessment for the Site C Dam on the Peace River. We have done so in defence of our Treaty rights and our ability to continue to live as Dene Tha' people, and in order to protect the lands and resources in our Territory. We have learned much through those experiences. However, at the end of the day, development continues in our Territory unabated, and without any due regard to the sustainability of the environment or the exercise of our Treaty 8 rights.

Presently, the Dene Tha' First Nation membership is expanding at a population rate increase twice that of the national average. As more land is "taken-up" for oil/gas production, forestry, agriculture, mining, hydro-electric projects and settlement, the Dene Tha' will increasingly need to conserve more lands in order to protect the environmental and biodiversity integrity necessary for the meaningfully ability to exercise our Treaty and Aboriginal rights.[1]

A map of some lands "taken-up" by development and settlement within our Traditional Territory can be found on the next page, as *Figure 1*. Notably, most of the impacts shown on map are related to oil/gas development. Due to a lack of spatial data relating to forestry clear cuts, logging roads, and cut/seismic line data within Alberta and BC, and a lack of spatial data generally within the NWT, the degree and extent of impacts within Dene Tha's Traditional Territory, as displayed on *Figure 1*, are likely significantly understated.

[1] Stevenson, M. (2015). The Evolution of Dene Tha' Traditional Territory. (for the Dene Tha' First Nation).

Figure 1: Dene Tha' First Nation Traditional Territory with some Lands Taken up for Development



C. SUMMARY OF PROBLEMS IN CURRENT FEDERAL ENVIRONMENTAL ASSESSMENTS

In our experience, current federal environmental assessments do a poor job of adequately assessing environmental effects, particularly cumulative effects. They do an even poorer job of assessing impacts to our constitutionally-protected Treaty rights.

Given the level and extent of development in our Territory, our ability to exercise our Treaty 8 rights and to continue to live as Dene Tha' people are seriously threatened. We are truly facing "death by a thousand cuts." Cumulative effects are eroding our Treaty rights and ability to live off the lands.

One of the most serious problems in the current approach under *CEAA, 2012* is that so few projects being proposed in our Traditional Territory actually trigger a federal environmental assessment. Most development is taking place without any environmental assessment, or consideration for cumulative effects.

Even for projects that do trigger a federal environmental assessment, cumulative effects are not being properly considered or addressed. In our experience, the approach to cumulative effects in current environmental assessment processes is fundamentally flawed and is completely ineffective in addressing, let alone assessing, cumulative effects. The treatment of cumulative effects is a chronic failing in all environmental assessments in which we have participated.

Under the current approach, environmental assessments focus primarily on residual impacts only from the project being reviewed which, on their own, may not appear to be significant. However, when these residual effects are considered in the broader context of all the other development which is impacting the environment and Aboriginal and Treaty rights, they are often quite significant and require appropriate consideration and mitigation.

One of the current problems with cumulative effects assessment is inappropriate baselines. Rather than use a pre-industrial baseline, proponents often attempt to assess cumulative effects by comparing the situation at the time they filed their EA applications with the post-project situation. Such an approach ignores the already serious impacts of development in an area. Dene Tha' raised that concern throughout the Joint Review Panel process for the Site C Dam, including in relation to the draft Environmental Impact Statement ("EIS") Guidelines and the draft EIS itself. Unfortunately, the Canadian Environmental Assessment Agency ("Agency") did not require the proponent to

address this issue. As a result, the EIS did not present any data or assessment of the true cumulative effects of the Site C Dam together with the already existing impacts from development, including both the existing dams and extensive oil and gas development in the region.

Proponents are not doing a good job with cumulative effects assessments, and the Agency is not requiring the proponents to do a better job. In recognition of this problem, the Joint Review Panel ("JRP") for Site C recommended that government undertake a regional environmental assessment and land use planning for the Peace River region around Site C. We have raised this same recommendation with government several times since, but no regional environmental assessment or land use planning initiatives have been undertaken.

Another serious problem in current environmental assessments is the analysis of potential impacts to Treaty and Aboriginal rights. There are also problems and confusion stemming from the lack of clarity in *CEAA, 2012* with respect to the need to consider project effects to Aboriginal and Treaty rights, and not just current uses. Government and proponents appear to be under a misapprehension that current uses are the equivalent of Aboriginal and Treaty rights. This is not the case. Our current uses of an area are just one element of our Treaty rights. We also have historical and cultural connections to areas. Our uses are also not static. We need to move around to different areas in our Territory as circumstances require - either because wildlife have moved from a particular area, hunting pressures have increased in an area, particular species can no longer be found in the same areas, or we are pushed out of harvesting areas because of development. Our Treaty rights are not just rights to be exercised today; they were promised to us forever. As a result, our future exercise of rights needs to be considered in the assessment of project effects.

In addition, proponents often use biophysical indicators as proxies for Treaty and Aboriginal rights. That is, if the proponent finds there were no significant effects expected to a certain species, such as moose, it automatically concludes that there would be no significant effects to the exercise of rights to hunt that species. This approach completely ignores that there are preferred locations for the exercise of our rights, cultural and spiritual connections to particular places, and access requirements and aesthetic considerations that affect where we harvest. As a result, even if a species population as a whole may not be significantly affected by a project, our rights may nonetheless be adversely affected if the project is located in an important harvesting area, takes

away key habitat, blocks access to another area, or results in noise, smells or sights that create disincentives for our members to harvest in the area.

There is a critical need for criteria and thresholds to be identified for the assessment of impacts to Aboriginal and Treaty rights. Currently, there is little guidance, which has resulted in a lack of meaningful assessment. In many environmental assessment processes, data about our Treaty rights is merely collected and treated as a stand-alone repository of information. There is no incorporation or integration of that data into the overall assessment of project effects.

Another failing in current environmental assessment processes is that the proponent often assumes that we can "go elsewhere" to exercise our Treaty rights even if there is a finding that our ability to exercise our Treaty rights at the project site would be adversely affected. This assumption is made without any analysis of the number of "elsewheres" left in our Territory. Given the level of development in our Territory, there are fewer and fewer intact habitats left in which we can exercise our Treaty rights. However, because no proper cumulative effects assessment is ever required, each project is assessed in isolation and without any regard for the broader impacts of development to the environment or our Treaty 8 rights. We are gravely concerned that we are close to a tipping point with respect to being able to exercise our Treaty 8 rights now and into the future. However, that key question is never considered or assessed in current environmental assessments. In addition, there are often critical information gaps or unaddressed issues in proponents' applications. Typically, when we identify these gaps, our concerns are not addressed and the proponent is permitted to file inadequate terms of reference or applications. This creates conflicts later on in the environmental assessment process. In addition, by the time First Nations are brought into the process, critical decisions have already been made in relation to the project location, types of studies to be undertaken, and timelines for filing materials. Early and more collaboration with First Nations throughout the environmental assessment process is needed to address these concerns.

D. A BETTER APPROACH TO ENVIRONMENTAL ASSESSMENT

For the purposes of this submission, we would like to highlight five areas which we think need to be addressed in new federal environmental assessment legislation:

1. Strategic, regional and cumulative effects assessments
2. Aboriginal rights impact assessments
3. Full participation of impacted First Nations
4. Independent Canadian Environmental Assessment Board
5. Additional EA issues

(1) Strategic, Regional and Cumulative Effects Assessments

A critical part of a robust environmental assessment process is an effective approach to cumulative effects. First Nations' relationships with the land and resources, and their ability to exercise their Aboriginal and Treaty rights, are at stake. Dene Tha' has reiterated to government many times that there is a need to address the larger scale impacts from resource development across a geographical region rather than only focusing on specific projects individually. Cumulative effects are not easily addressed in project-specific environmental assessments. As a result, dealing with these broader effects only in the context of a project-specific environmental assessment creates frustrations for First Nations and other participants, as well as proponents, and can lead to conflict and increased controversy in relation to a proposed project. For First Nations, these strategic, higher level issues are often the essential first questions that need to be addressed, but project-specific environmental assessments are not a good place to address them. The limits and constraints in relation to cumulative effects assessments is one of the biggest and most troubling flaws in the current environmental assessment process - the broader and very real threats to First Nations' rights, culture and way of life are not addressed in project-specific environmental assessments.

One of the best ways to address this flaw is to mandate strategic (sector-based - for example, for all proposed shale gas projects in an area) or regional (geographically-based, for all sectors) environmental assessments, with full First Nation (and, ideally, provincial/territorial) participation. These types of broad scale environmental assessments are better suited to assess cumulative effects and to inform land-use planning as well as project-specific environmental assessment processes. These types of environmental assessments can take into account a more comprehensive

set of sustainability considerations than project-specific environmental assessments. They could be used by the government to determine the suitability of projects (i.e. fracking for shale gas or shale oil in a particular area, or pipeline and road corridors in a region). These higher level types of environmental assessments are better suited to assess and address cumulative effects, as they can set the stage and parameters for a long-term understanding of environmental effects within a region or sector, consider broad alternatives for development, and identify protective measures to ensure sustainable development.

This approach would result in a "tiered" approach to environmental assessments that will result in better information, more stream-lined project-specific environmental assessments where strategic or regional environmental assessments have been conducted, better balancing of interests, fewer conflicts and ultimately more informed decision-making. For example, they could lead to the abandonment of a proposed project before considerable time, money and energy are spent on a project-specific environmental assessment, the relocation of a project which will result in a less controversial project-specific environmental assessment, or the identification of overarching issues that need to be addressed before a project can be considered for approval. The results of strategic or regional environmental assessments would inform project-specific environmental assessment processes, and would be very helpful in considering linear projects such as pipelines in which several First Nations have interests. With the results from strategic or regional environmental assessments available, project-level decision-making can be more efficient as the more contentious issues will have been worked out at the broader-scale level. It is also a useful mechanism to help achieve reconciliation - through those processes, First Nations' visions for their lands and resources can be fully considered and incorporated into recommendations and land use planning initiatives.

To the extent the federal government is concerned about potential jurisdictional issues around conducting strategic or regional environmental assessments, the new legislation could create incentives for provinces or territories to participate in, or undertake, strategic or regional environmental assessments. For example, statutory provisions could provide that where a strategic or regional environmental assessment has been conducted, and the proposed project is not inconsistent with the results of that strategic or regional environmental assessment, a more stream-lined federal environmental assessment process for that project could be undertaken. In cases

where no strategic or regional environmental assessment has been conducted, the stream-lined process would not be utilized for projects in the absence of First Nations' consent to the project.

In our view, cumulative effects assessments should still be required in project-specific environmental assessments, but where a strategic or regional environmental assessment has been undertaken, it could be more stream-lined at the project-specific level. For project-specific environmental assessments, clear statutory requirements related to cumulative effects assessments methodology are needed. For example:

(a) pre-industrial baselines should be required in a cumulative effects assessment, with exceptions only being permitted where pre-industrial data, including from Traditional Ecological Knowledge ("TEK"), is unavailable or cannot be gathered;

(b) with respect to the assessment of cumulative effects on First Nations, "go elsewhere" assumptions should not be permitted; proponents cannot be permitted to assume that First Nations can go somewhere else to exercise their rights when they are displaced by a project, and must be legislatively required to gather information to inform an assessment of the true cumulative effect of development on First Nations and the availability and suitability of other places for the exercise of rights, considered from the Aboriginal perspective; and

(c) the Aboriginal perspective, including TEK, must be given equal weight to the non-Aboriginal/western perspective in all aspects of environmental assessment, including cumulative effects assessments.

(2) Aboriginal Impact Assessment

Potential project impacts to Aboriginal and Treaty rights should be expressly included in the factors that are legislatively-mandated to be considered in the environmental assessment. As noted earlier in this submission, the current legislation does not expressly reference impacts to Aboriginal or Treaty rights as "environmental effects," which has created confusion in environmental assessments and lack of proper assessments of impacts to these constitutionally-protected rights in environmental assessments. This is a critical defect in the current approach to environmental

assessments that must be addressed. Otherwise, parallel Crown consultation processes will need to address this significant gap, in order to fulfil the Crown's duty to consult. In consultation processes, the Crown cannot continue to rely blindly on ineffective environmental assessment processes that do not expressly assess impacts to constitutionally-protected rights. A requirement for project effects to Aboriginal and Treaty rights to be analyzed would also encourage proponents to undertake early engagement with potentially affected First Nations.

It is also critical that the Aboriginal perspective be a required consideration in relation to all stages of an environmental assessment. TEK must also be required information to be collected and assessed, and given as much weight in assessing Project effects as western science. For example, there are specific provisions in the *Mackenzie Valley Resource Management Act* that require TEK to be taken into account. TEK should also inform the type, design and scope of other environmental assessment-related studies.

There should be statutory provisions for environmental assessment applications to include a stand-alone section containing an Aboriginal Impact Assessment ("AIA"). Considering current uses for traditional purposes is not sufficient to adequately inform First Nations, proponents or governments of potential project effects. An AIA that assesses the environmental, health, cultural and heritage, and socio-economic impacts of a proposed project on Aboriginal and Treaty rights is more comprehensive. An AIA can also assist proponents to propose measures, and make commitments, that will prevent, mitigate or compensate for potential adverse impacts and effects to Aboriginal or Treaty rights, where possible, thereby reducing conflict in environmental assessment processes.

The legislative provisions need to require that AIAs provide sufficient information to assess the extent to which the project could potentially affect a First Nation's ability to meaningfully exercise its rights now and in the future. As such, the regional study area needs to be the entire First Nation traditional territory.

In addition, there needs to be statutory or regulatory requirements in relation to the methodology to be used in the AIA. Appropriate criteria and thresholds that take into account all aspects of Aboriginal and Treaty rights, including historical connections to areas, harvesting activities, access

needs, aesthetic considerations and other indicators of "usability" of harvesting sites, future potential uses, constraints to the exercise of rights elsewhere, and cultural and spiritual elements of the rights.

The types of information to be studied in an AIA also needs to include: (a) quantitative information on impacted First Nations' Traditional Territories; (b) socio-economic information on impacted First Nations; (c) health information on First Nations; and (d) quantitative and qualitative information on current and historical traditional uses (hunting, fishing, plants and medicines, spiritual use) in the project area.

It goes without saying that First Nations need to be fully involved in the undertaking of an AIA, with sufficient capacity funding being provided to permit them to do so. The collection of information for an AIA should not be treated as less important from the collection of biophysical and other data that proponents are required to pay for and collect. The onus cannot be on First Nations to bear the costs associated with work that the proponent requires.

(3) Collaboration with Impacted First Nations

One of the fundamental principles underlying the federal environmental assessment regime needs to be reconciliation with First Nations. First Nations' rights and interests - including their right to have a voice in what transpires in their respective Traditional Territories - needs to be respected and reflected in environmental assessment processes. In addition, incentives need to be created for proponents to involve and engage with impacted First Nations early and meaningfully so that issues can be addressed whenever possible, and conflicts reduced. The consent of impacted First Nations needs to be a primary consideration in government decision-making processes on a project. Accordingly, mechanisms and incentives need to be included in the new environmental assessment process to increase the chances that consent will be granted.

To achieve a goal of reconciliation, potentially impacted First Nations need to be involved at each and every step of the environmental assessment process, including prior to the proponent filing an application. However, the fulfillment of Canada's constitutional duties needs to be de-linked from the environmental assessment process itself. If the environmental assessment process is undertaken in a collaborative manner with First Nations, the process can inform concurrent

consultation processes and First Nation and Canada decisions. That consultation needs to be undertaken throughout the process, and not just at the end of the process when it is too late to change information requirements for the environmental assessment process, explore mitigation measures, or identify accommodation measures that require alterations to the project design.

The best way to ensure that projects do not become mired in regulatory and legal conflict is to create as collaborative a process as possible. First Nation participation needs to be legislatively mandated as part of the environmental assessment process, with First Nation collaboration or engagement happening at each stage.

First Nations must have a role at each step of the environmental assessment process, including:

- Need for an environmental assessment. Potentially affected First Nations should be involved in the decision on whether a federal environmental assessment on a proposed project is required. This would both ensure that projects potentially adversely impacting Aboriginal or Treaty rights are subject to an environmental assessment and would provide an incentive for proponents to consult with First Nations to identify and address concerns before they decide to proceed with their project. This would permit considerations such as whether a proposed project is located in an environmentally or culturally sensitive area, and whether environmental or cultural values are at stake, to be identified early and addressed where possible. Such an approach would also help ensure that the Aboriginal perspective and TEK are properly considered in determining whether an environmental assessment is required.

- Scope of the Project. The new Act should expressly require projects to be scoped to include all project components and corollary or related projects, in consultation with potentially affected First Nations. This will help ensure that the entire project's overall impacts to the environment and to Aboriginal and Treaty rights are taken into account.

- Type of Assessment. The previous approach in *CEAA* to have three types of environmental assessments should be reinstated: screenings, comprehensive

studies, and review panels. The decision on the type of assessment should include potentially affected First Nations and be determined in light of the potential adverse impacts to Aboriginal and Treaty rights. Where strategic or regional environmental assessments have been undertaken and the proposed project is consistent with those, and where potentially impacted First Nations consent to a project, a more streamlined environmental assessment process could be undertaken. This would provide an incentive both for strategic and regional assessments, and for proponents to work collaboratively with First Nations as early as possible in their project planning. Provisions should also be included in the Act to require coordination with First Nations who conduct their own environmental assessments (similar to s. 41(4) of the current Act, requiring coordination with assessments conducted under the *Mackenzie Valley Resource Management Act*). Further, the Act should include a provision allowing for the nomination of Joint Review Panel members by affected First Nations.

- Scope of Assessment. There needs to be statutory provisions requiring collaboration with potentially affected First Nations on the spatial scoping for the environmental assessment. This will help ensure that proponents collect sufficient information in appropriate geographical areas for each valued component and that the assessment of all project effects is comprehensive. Otherwise, the environmental assessment can end up being restricted to an area arbitrarily chosen by a proponent, rather than the complete geographical area potentially affected by a project. This was an issue of concern repeatedly raised by First Nations, including Dene Tha', in the Site C JRP process.

- Completeness of EIS Guidelines and EIS. Potentially-affected First Nations also need to have a voice in relation to the adequacy of the EIS Guidelines and the draft EIS. Guidelines and applications that do not include adequate information or address key issues result in review participants spending more resources re-reviewing materials that are filed later, longer reviews, pressures to meet government timelines and conflict.

- Recommendations on approval. First Nations' views on whether a project should be approved need to be seriously taken into account. If First Nations do not consent to a project, the federal government needs to be mandated to justify any approval, based on specified considerations and criteria. Otherwise, litigation is likely to continue to arise.

- Dispute Resolution. Where disputes arise at any of these stages, there needs to be a dispute resolution process that must be undertaken so that *bona fide* attempts are made to resolve contentious process-related issues prior to the formal review of the EIS.

(4) Independent Canadian Environmental Assessment Board

There needs to be a single "expert" agency responsible for conducting environmental assessments in all sectors. Agencies like the National Energy Board ("NEB") should not be conducting environmental assessments as it does not have the requisite expertise to conduct environmental assessments. Having a single environmental assessment agency will help ensure that individuals with the requisite expertise and competence in relation to the types of issues and concerns arising in environmental assessments are presiding over environmental assessment processes, rather than individuals who may have a skill-set more attune to sector-specific agencies.

In order to restore confidence in the environmental assessment process, a "Canadian Environmental Assessment Board" needs to be established. It is critical that this new Board be truly independent - i.e., manifestly impartial and free of any executive branch influences over appointments of Board members (i.e., no patronage appointments). There should be an open and transparent process for appointing Board members. Legislation should also require panel independence, neutrality and objectivity. There can be no potential for "retaliation" from government for Board members' recommendations in environmental assessments so as to avoid political influence on those recommendations. Members cannot be concerned about whether they will be able to preside over future EA processes if they do not make the recommendation that government may be hoping to receive. There also needs to be mechanism for First Nations to nominate individuals to sit on the Board.

To ensure the Board is truly independent, the criteria, rules and factors that must guide environmental assessments need to be legislated, including explicit trade-off rules and factors to guide both Board recommendations and Cabinet decisions in the event the project will have residual adverse effects.

In addition, the Board needs to have the means to deal with conflicting expert opinions in a robust and transparent manner, including through referring the issue to an independent board, taking the issue to mediation or hiring its own experts, including cultural anthropologists or First Nation elders where appropriate to help understand the Aboriginal perspective. The experts available to the Board must include experts capable of undertaking independent peer review of the studies and supporting literature presented in support of the project, in order to ensure that the information adheres to generally accepted scientific methods and principles.

(5) Additional EA Issues

Based on our experience in other review processes, we have the following additional comments in terms of improving federal environmental assessments.

Project Conditions

First Nations are currently shut out of work relating to the proponent's satisfaction of the conditions placed on a project by the Environmental Assessment Certificate ("EAC"). This is particularly troubling given that a considerable amount of project planning is often deferred until after project approval, including for example the preparation of spill response plans and habitat restoration plans. For oil and gas projects, oversight of the project conditions is currently left to the NEB, a body which does not consult with First Nations. This means there is no consultation with First Nations on key project decisions made after project approval, including the final design and implementation of measures intended to avoid, mitigate, or accommodate impacts to Aboriginal and Treaty rights. To address this concern, federal decision makers must consult with affected First Nations on whether project conditions have been met. Consultation should include hearing First Nations' views on whether additional steps are required to properly avoid, mitigate, or accommodate impacts to Aboriginal and Treaty rights.

An analysis is required at the regulatory permitting/authorization stage as to whether the EAC condition(s) are capable of addressing the relevant impacts and concerns, or whether any new conditions need to be imposed by the permitting agency as a permit/authorization condition to address unforeseen or unaddressed impacts or concerns. In making this determination, the permitting agency must be required to consult with affected First Nations. EAC conditions represent an early stage of framing opportunities to avoid, mitigate, and accommodate impacts to rights, and must not be the final word. Regulatory agencies should view EAC conditions as a starting point to identify appropriate opportunities for mitigating, avoiding, and accommodating impacts and not be constrained to existing EAC conditions or the scope of their mandates. This is incredibly important as often concerns only become knowable once a proponent applies for a project-related regulatory approval and the scope of these activities becomes known to First Nations, post-EAC decision.

Given that regulatory permitting agencies are ultimately responsible for issuing any approvals for project-related activities on the ground, regardless of higher-level approvals (such as an EAC at the Minister level), there must be a continuity between project-level conditions (like EAC conditions) that filters down to subsequent activity-specific regulatory approval phases (such as specific permits and authorizations required by legislation) so that ultimately, activities on the ground are consistent with what was predicted in the EIS/AIA and that there exists a mechanism to incorporate a necessary check and balance into the process to ensure that conditions, EAC and regulatory permits and approvals in combination, are sufficient to address the concerns and maximize the probabilities of properly avoiding, mitigating, and accommodating the rights of potentially impacted First Nations.

Our experience with BC Hydro's Site C Clean Energy Project and provincial regulators suggests to us that Statutory Decision Makers, at post-EAC regulatory approval stages, over-rely on a proponent's own EIS submissions and existing project-level EAC conditions, and fail to add to or adapt project conditions even if the face of new information about potential adverse impacts. This results in many concerns and potential impacts to Aboriginal and Treaty rights being inadequately addressed or completely unaddressed by the Crown.

A standard condition should also be attached to all projects requiring that the final versions of any construction, management and/or mitigation plans related to potential impacts to Aboriginal or

Treaty rights (as identified in the AIA) must be specific to future regulatory approvals be should be subject to Ministerial approval. Consultation with affected First Nations should be required in relation to the Ministerial approval of any EAC condition-related construction, mitigation or management type plans.

There should also be a legislative requirement that the design of measures intended to avoid, mitigate, or accommodate impacts to Aboriginal and Treaty rights cannot be deferred to future regulatory approval or permitting stages. If put off until then, the ability to add any necessary project conditions is greatly reduced, and in our experience landscape level and overarching concerns with a project cannot effectively be addressed by permitting bodies, as they either fall outside of their statutory mandates or get diluted among the many (tens and hundreds) of individual applications or permits that could relate to a project.

Statutory Decision Makers at post-EAC regulatory approvals stages should not be allowed to rely solely upon citations directly from the proponent's EIS or solely upon project-level EAC conditions, as rationale not to undertake its own assessment of the concerns. This same assessment may result in the need to impose additional application-specific conditions, if after meaningful engagement with potentially impacted First Nations at the permit/authorization stages, the EAC conditions fall-short.

Need For the Project

There should also be a legislative requirement for proponents to include in the project's terms of reference and application a thorough assessment of the need for the project, including any alternatives to the project and a cost-benefit analysis of alternatives over the life of the project. Simply put, if provincial processes are not going to require a proper needs assessment, then the federal process must.

This suggestion comes from our experience with the review of the Site C Dam, where the proponent never clearly demonstrated that the project was in fact needed. Indeed, legislative amendments immediately preceding the commencement of the formal EA process, exempted the Site C Project from a previously-routine BC Utilities Commission review - resulting in the most expensive utilities project in BC's history going unassessed by the Province's own utilities commission including a

proper economic assessment and needs assessment for the project. Where the need for the project cannot be established, we would submit that the adverse impacts of the project on Aboriginal and Treaty rights cannot be justified. Merely asserting that the project is in the public interest is not enough; actual need for the project, and an absence of alternatives, must be demonstrated.

Harmonized EAs

If harmonized EAs are to be used, it should be a legislative requirement to use the more stringent between the federal and provincial requirements. We are concerned about seeing EAs where weak provincial requirements are being applied instead of more robust federal ones, and this practice should not be allowed.

Participant Funding

The ability of First Nations to meaningfully participate in environmental assessments and consultation processes is often dependent on the availability of participant funding. Without sufficient and timely funding, many First Nations are unable to fully participate in these processes, leading to significant gaps in the assessments. It should be a legislated requirement that First Nations must be provided with sufficient funding to fully participate in any reviews where their Aboriginal or Treaty rights could potentially be affected. This funding could be provided through a combination of proponent and federal funding.

E. CONCLUDING REMARKS

Federal environmental assessment processes are not working. Not only are they ineffective in assessing project effects to the environment, especially cumulative effects, they are not addressing impacts to Aboriginal and Treaty rights. They are creating conflicts with First Nations, rather than advancing reconciliation.

There are effective means to address these problems in a new environmental assessment regime. By creating incentives for strategic and regional environmental assessments to be undertaken, explicitly requiring potential project effects to Aboriginal and Treaty rights to be analyzed and assessed, and creating a process that requires collaboration with potentially affected First Nations

at every step, a new independent Canadian Environmental Assessment Board can do a better job of assessing project effects and advancing reconciliation, for the benefit of government, proponents and First Nations.