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Written Submission to the Expert Panel

Michel First Nation

Prepared by Calliou Group

Calliou Group

Suite 100, 1716 – 16th Avenue NW

Calgary, AB T2M 0L7

(403) 453-1405

Michel First Nation

#22-53009 Range Road 20

Parkland County, AB T7Y 2G8

(780) 868-1418

Expert Panel Question #4 - How to ensure that environmental assessment legislation is amended to enhance the consultation, engagement and participatory capacity of Indigenous groups in reviewing and monitoring major resource development projects?

Improving the environmental assessment process and the legislation that guides the execution of environmental assessments for major resource development projects is closely tied to the duty to consult. Improving federal requirements for the execution of an environmental assessment ("EA") process will influence the outcomes and ability of the duty to consult to reconcile effects to Aboriginal and treaty rights.

There is a natural convergence between the regulatory framework governing environmental assessments and the Crown's duty to consult and accommodate negative effects to the rights held by Aboriginal peoples. Terms and phrases that are used in the EA process, within legislation and the duty to consult are similar. All three processes have a similar goal; to balance or reconcile negative effects of a proposed decision on public or unique interests. Involvement in an environmental assessment process invariably means involvement in the regulatory framework, as well as the duty to consult.

Professional firms involved in the execution of an environmental assessment **should have** expertise in both the regulatory framework and the duty to consult. It is therefore important to ensure that terminology, goals and objectives, and learnings from the three areas of expertise are consistent and complimentary.

The following submission makes three points:

1. EA methodology is appropriate to use and can credibly identify negative effects to Aboriginal and treaty rights
2. The regulatory framework can facilitate the reconciliation of negative effects to Aboriginal and treaty rights by requiring identification of effects to those rights for each nation
3. Principles underpinning the duty to consult can improve both the execution of an environmental assessment and regulatory requirements set out by the Crown in legislation

1. **EA methodology is appropriate to use and can credibly identify negative effects to Aboriginal and treaty rights**

It has been suggested by proponents, EA practitioners, Aboriginal peoples and Crown regulators that the identification of negative effects to Aboriginal and treaty rights is 'impossible'. Some maintain the identification of effects to rights is better left to the Crown outside of the regulatory process or to left to Aboriginal nations to identify. We submit that environmental assessment methodology is entirely appropriate for identifying negative effects to Aboriginal and treaty rights and by not using EA methodology, the identification of effects to Aboriginal and treaty rights will either not occur, or will occur in an indefensible manner that undermines confidence in the EA process and the duty to consult.

The primary vehicle for identifying and measuring negative and positive effects to the biophysical and socio-economic matters of interest to Canadians resulting from a natural resource project is the environmental assessment process (using EA methodology) embedded within the regulatory review framework. This process, established and managed by the Crown has a 45-year long history in Canada of considering large scale natural resource projects and gathering predictive information on the consequences of proceeding with an approval of the project. Biophysical and socio-economic valued components are identified, changes to those components are quantified and a public debate ensues over the acceptability of those changes.

The conduct of environmental assessment processes are underpinned by the notion that a rational scientific method provides the basis for their execution and that in order to be credible, the EA process must be based on scientific objectives, modeling and experimentation, quantified impact predictions and hypothesis-testing.

Standardized EA methodology can be summarized into three basic steps:

- Selecting components for study through a credible scoping process;
- Collecting baseline information on those components specific to the project area: and
- Identification of changes on those components resulting specifically from the proposed project.

Standard EA practice and methods applying to these basic steps include:

- Only those components with a high probability for change resulting from the project should be studied;
- Single project EAs are not a regional planning exercise nor are they the appropriate vehicle to identify acceptable levels of change for components;
- The proponent should pay for the conduct of an EA – this costs should not be borne by the public or Aboriginal nations;
- The EA should be free from both political and proponent interference; and
- Opportunities for review and critique using procedural fairness principles are the bedrock of any EA process.

A more detailed description of EA methodology is as follows:

1. Select Valued Components (VC) and Key Indicators (KI)
2. Select measureable parameters
3. Determine Temporal, Spatial parameters
4. Define Standards or Thresholds for Significance of change
5. Establish Baseline Conditions for VCs
6. Describe Potential Change for selected VC & KI
7. Describe Mitigation Measures to offset, manage or eliminate change
8. Determine Significance of Residual Effect
9. Cumulative Effects Analysis
10. Follow up and Monitoring, Environmental Protection Plans

Each step should be followed in a systematic and defendable manner. How each step is executed should available for review and critique, as are the results of the assessment. This is the basis for scientific inquiry.

The prediction of change to Aboriginal and treaty rights deserves this same level of credible examination.

Let's suppose for the sake of argument that EA methodology is not appropriate for the identification of change to Aboriginal and treaty rights. What process would then be used? Currently, the collection of Traditional Environmental Knowledge or Traditional Land Use information, which is the collection of baseline information, is often used as a substitute or a proxy for the use of EA methodology. Or opinions or issues and concerns collected from Aboriginal nations about a proposed development (through meetings, site visits, open houses, etc.) are described and also used as a substitute. Or hiring assistants or monitors for biophysical or archaeological field studies/baseline information collection are thought to substitute an identification of effects to rights. These approaches for collecting information are neither defendable nor standardized ways of identifying change to a component of interest.

Including Aboriginal nations early in the scoping of EAs to select components for study that are capable of accurately predicting changes to their unique rights and interests would ensure that the conclusions of the EA process are informative and relevant to the Crown consultation process and the EA process overall. Project proponents are expected to assess all potential effects of their projects on other components of the environment in a recognized and credible manner; effects on the rights of Aboriginal peoples should be treated no differently. The cost of assessing effects on Aboriginal nations and their rights should similarly be borne by proponents and not by those nations. Increasing First Nation, Metis and Inuit government confidence in the outcomes of the EA process will help lead to mitigation and accommodation of effects to their rights in the Crown consultation process.

EA methodology is used to predict change on many difficult, complex and qualitative socio-economic components of public interest. Public perceptions influence the selection of valued components.. Predicting changes to Aboriginal and treaty rights requires input from Aboriginal nations to select appropriate measurable parameters and indictors that can accurately describe changes to Aboriginal and treaty rights.

2. **The regulatory review framework can facilitate the reconciliation of negative effects to Aboriginal and treaty rights by specifically requiring a clear identification of impacts to Aboriginal and treaty rights for each nation**

The current wording of the *Canadian Environmental Assessment Act, 2012* (*CEAA, 2012*) does not explicitly require the identification of negative effects to the Aboriginal and treaty rights held by Aboriginal nations be considered. Rather than explicitly require an assessment of effects to these rights, the factors sect out in Section 5(1)(c)[1] are used as a proxy. These factors offer an incomplete or inaccurate description of rights, as these factors are not universal indicators or measurable parameters for potential change to Aboriginal and treaty rights. This legislative requirement is unclear and should be replaced with a requirement for an identification of effect to Aboriginal and treaty rights. This identification of effect must be done for each Aboriginal nation potentially affected by a proposed project.

Revision of the 'environmental effects'[2] for consideration must include clarification that the intent of the legislation is to facilitate an identification of effect to Aboriginal and treaty rights. The legislation must be flexible enough to apply wherever Aboriginal and treaty rights exist in Canada.

The current approach to assessing effects on Aboriginal peoples typically focuses first on biophysical components. In other words a project effect to animals, habitats, and natural systems must occur before an effect is identified to "current use of lands and resources for traditional purposes". The selection of measurable parameters for biophysical components is well understood by the biophysical scientific community; unfortunately, the selection of measurable parameters related to Aboriginal and treaty rights are not.

For example, an effect on a right to fish requires a direct effect on fish rather than on the activity of fishing and associated aspects of that activity, including perception, necessary physical attributes, and overall experience. Disruption to travel patterns and the physical presence of projects in preferred harvesting areas may or may not be considered or mitigated based on a project proponent's and environmental assessment practitioner's willingness to do so. Failing to require the assessment of direct effects on rights and the preferred manner in which to such rights are exercised means that the EA process is not fully aligned with the Crown consultation process.

Despite this lack of explicit guidance of how proponents are to identify negative effects to matters of importance to Aboriginal peoples, the Crown primarily uses the results of the EA process to predict and manage adverse effects to Aboriginal and treaty rights; that is, the Crown does not, on its own, undertake a systematic identification of effects resulting from a project on Aboriginal and treaty rights

1(i)health and socio-economic conditions,

physical and cultural heritage,

the current use of lands and resources for traditional purposes, or

Any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.

[2] *Canadian Environmental Assessment Act*, 2012 S.C. 2012, s. 5

parallel to the ongoing project assessment undertaken by the proponent. Therefore, it is critical that the information collected and presented to the Crown by the proponent accurately and credibly identifies the size, scope and nature of the effect to ensure meaningful Aboriginal consultation, mitigation and accommodation.

Additionally, Aboriginal and treaty rights are specific to each individual Aboriginal nation and information must be captured for each nation. The common assumption that all Aboriginal nations have the same interests is problematic; each Aboriginal nation will have unique relationship with a proposed project area, and unique harvesting practices, including preferred methods, timing, and locations. An explicit regulatory requirement for an effects assessment for each potentially affected Aboriginal nation's unique rights and interests would result in less resistance from proponents and less time wasted in the EA process as a result.

3. Principles underpinning a meaningful duty to consult can improve both the execution of an environmental assessment and regulatory requirements set out by the Crown in legislation

The Crown's duty to consult is triggered when the Crown, as represented by Canada and/or a provincial government, has knowledge, real or constructive, of the potential existence of the Aboriginal right or title and contemplates conduct that might adversely affect that right. The Crown's duty to accommodate is triggered when there is a strong possibility that a Crown decision may require taking steps to avoid irreparable harm or to minimize the effects of infringement. The duty to consult has the same goals and objectives of the environmental assessment and regulatory review process; that is, identify effects and figure out what to do about those effects.

The **Technical Guidance for Assessing the Current Use of Lands and Resources for Traditional Purposes under the *Canadian Environmental Assessment Act, 2012*** recognizes this lack of alignment when it sets out that:

> The information gathered under paragraph 5(1)(c) **may** also assist other kinds of assessments needed to meet other kinds of obligations that may arise in the course of implementing CEAA 2012. For example, the information collected may overlap with the information needed to assess potential adverse impacts on Aboriginal or Treaty rights which in turn may inform any consultation or treaty implementation requirements that may arise. However, **this Guidance document is <u>not directed at informing these other kinds of assessments or obligations</u>** that may arise in relation to the implementation of CEAA 2012.[3]

The constitutionally mandated 'other kinds of assessments' (i.e. those on Aboriginal and treaty rights) must take place as part of the Crown consultation process, but are currently being conducted separately from those carried out under *CEAA 2012*, **if at all**. For example, with respect to the Northern Gateway project, the majority of the Federal Court of Appeal wrote that:

[3] Stantec, Technical Memorandum "Reference: Effects of Changes to the Environment on Physical and Cultural Heritage" at 2. (emphasis added)

> The inadequacies—more than just a handful and more than mere imperfections—left entire subjects of central interest to the affected First Nations, sometimes subjects affecting their subsistence and well-being, entirely ignored. Many impacts of the Project—some identified in the Report of the Joint Review Panel, some not—were left undisclosed, undiscussed and unconsidered. It would have taken Canada little time and little organizational effort to engage in meaningful dialogue on these and other subjects of prime importance to Aboriginal peoples. But this did not happen.[4]

Several main principles have emerged from Supreme Court direction for executing the duty to consult in a meaningful way that can also be used to improve the execution of the EA process and the regulatory process. Examples include:

For EA methodology:

- Provide enough time for the consultation process to unfold;
    - Specifically for EA scoping efforts, the proponent must involve Aboriginal nations in the selection of valued components for study. This may require proponents to involve Aboriginal nations prior to public disclosure of their project, or to not finalize selection of valued components until after public disclosure.
- Public consultation is similar, but not the same as Aboriginal consultation efforts;
    - Most proponents understand seeking input from Aboriginal nations is a separate exercise; Aboriginal nation input into scoping of the EA would help to satisfy this principle.
- Aboriginal consultation must be direct and with the representatives of each Aboriginal collective;
    - Effect results must be made for each Nation potentially affected by the project; results cannot be done on a pan-Aboriginal approach.
- For Aboriginal consultation to be meaningful, accommodation cannot be disregarded at the onset;
    - Mitigation measures developed by the proponent must be open to describe compensation for residual effects to rights.
- Aboriginal nations must be able to influence the outcome and not just 'blow off steam';
    - The proponent must be able to answer the question, "How did the Aboriginal nation(s) influence major EA milestones?"
- The capacity of the Aboriginal nation influences consultation;
    - The collection of baseline information for each valued component from each Aboriginal nation is neither an economic development exercise nor a benefit for that Nation. Aboriginal nations should not bear the costs of their involvement in an EA; the proponent should bear all reasonable costs.
- Aboriginal nations have reciprocal responsibilities to participate in consultation

[4] *Gitxaala Nation v Canada*, 2016 FCA 187.

- If provided opportunity and capacity, Aboriginal nations must participate in the execution of the EA in a timely fashion.

For the regulatory process:

- Provide enough time for process to unfold;
  - *CEAA, 2012* introduced mandatory capping of regulatory review timelines. Timelines must be flexible enough to allow for Aboriginal nation input at every major regulatory milestone. Regulators should be able to answer the question, "How did the Aboriginal nation affect this regulatory milestone?"
- Public consultation is similar, but not the same as Aboriginal consultation efforts.
  - Adequate capacity funding must be available from the regulator for Aboriginal nations to participate in the review process.
- Consultation must be direct and with the representatives of the Aboriginal collective.
- For Aboriginal consultation to be meaningful, accommodation cannot be disregarded at the onset.
  - Regulators must be open to the possibility that efforts to avoid, reduce or eliminate effects to rights may involve compensation from the Crown, in addition to proponent's efforts to mitigate effects.
- Aboriginal nations must be able to influence the outcome and not just 'blow off steam'.
  - The regulator must be able to answer the question, "How did the Aboriginal nation(s) influence major EA milestones?"
- The capacity of the Aboriginal nation influences consultation;
- Aboriginal nations have reciprocal responsibilities to participate in consultation.
  - If provided opportunity and capacity, Aboriginal nations must participate in the regulatory review process.

Finally, some provincial legislative frameworks, such as Alberta and Saskatchewan, have attempted to limit an Aboriginal nation's participation in the regulatory process by requiring "site-specific" evidence of use of particular spots within an Aboriginal nation's traditional territory in order to demonstrate the potential for effects.[5] For example, in a letter decision from 2014, the Alberta Energy regulator found that the Mikisew Cree First Nation was not directly and adversely affected by an exploratory drilling program within its traditional territory as, "the AER does not consider that Mikisew has demonstrated actual use of land and other resources in the program area by its members and a potential for those to be directly affected by the program".[6] Revisions to CEAA must include the requirement that when a project is proposed within an Aboriginal nation's traditional territory, a proposed project's effects on that Aboriginal nation's section 35 rights will be assessed in such a way that does not require site-

[5] See for example November 18, 2014 letter decision of the AER in Regulatory Appeal No. 1802855.
[6] November 18, 2014 letter decision of the AER in Regulatory Appeal No. 1802855 at 4.

specific evidence of current use to demonstrate effect. This change could be affected with the deletion of factor 5(1)(c)(iii) in its entirety with the replacement of "Aboriginal and treaty rights" in its place.

It should also be made clear in a revised CEAA, that where Joint review panels are struck, the inclusion of Aboriginal nations cannot be diminished through the application of restrictive provincial standing tests in Joint review panel terms of reference.[7]

Conclusion

EA methodology is appropriate and flexible enough to identify the effects of proposed projects on Aboriginal and treaty rights. When Aboriginal nations are included in the scoping of environmental assessments they can inform the selection of biophysical and human components studied in the assessment process. Information about Aboriginal and treaty rights should be collected from each nation with the intended result of an identification of change using EA methodology. By updating the definition of environmental effects that must be considered in section 5 of CEAA to include the Aboriginal and treaty rights, recognized and affirmed in section 35 of the *Constitution Act, 1982*, and clear direction from regulatory authorities, it will be established that environmental assessments must include an assessment of project effects directly on the rights of Aboriginal peoples.

Recommendations:

1. Recognize the goals of environmental assessment process and the duty to consult and if necessary accommodate are complementary
2. Clarify that the definition of "environment" includes human components
3. Clarify information collected about Aboriginal and treaty rights does not depend on a 'site-specific' approach to show impact
4. Require an identification of effect to the rights for each Nation in a disaggregated fashion
5. Include "Aboriginal and treaty rights" as a component of the environment for study

Suggestions for Changes to *CEAA*, 2012

Definitions

- A definition must be included which specifies "Aboriginal and treaty rights"
    - This could include a reference to Sec. 35 of the *Constitution Act, 1982* or a more defined list of Aboriginal and treaty rights.
- The definition of 'environment' needs to be explicit in including people, and interactions amongst people. This would then include Aboriginal and treaty rights. This will ensure that effects on the rights of Aboriginal peoples are included as a component for study in the assessment of project effects.

[7] See January 20, 2015 letter from O'Chiese First Nation to CEAA. Online: http://www.ceaa.gc.ca/050/documents/p61436/101109E.pdf.

- This will allow the Minister to designate, under section 14(2), projects which are not prescribed by regulation but may cause adverse effects to Aboriginal and treaty rights.
- It would also allow the inclusion of Aboriginal and treaty rights in the factors to be considered under section 19(1) as components which must be properly assessed using accepted methodology.

Purposes

- include identification of effects on Aboriginal and treaty rights to broaden the purpose of the act beyond promoting communication and cooperation with Aboriginal peoples

Environmental Effects

- Aboriginal and treaty rights should be classified under 5(1)(a) instead of separately under 5(1)(c)
- "Current use of lands and resources by Aboriginal peoples for traditional purposes" is an incorrect and narrow description for an assessment of Aboriginal and treaty rights. This term should be deleted or replaced to recognize past and future use.
- This could be accomplished by adding the following text to section 5(1)(a): the existing Aboriginal and treaty rights as defined in Section 35 of the *Constitution Act, 1982*
- Or by adding Aboriginal and treaty rights as recognized and affirmed in Section 35 of the *Constitution Act, 1982* to Schedule 2

Environmental Assessment by Review Panel

- When review panels are struck, section 43(1) makes their terms of reference controlling.
- The Agency has previously adopted provincial standing tests into JRP terms of reference, and this has the potential to narrow the scope of participation.
- The Act should be amended to make it clear that the test for standing for participation in JRP processes cannot be narrowed by JRP terms of reference.