THE FIRST NATIONS OF MAA-NULTH TREATY SOCIETY

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December 22, 2016

Expert Panel
Review of Environmental Assessment Processes

Via e-mail: EAreview_participation@canada.ca

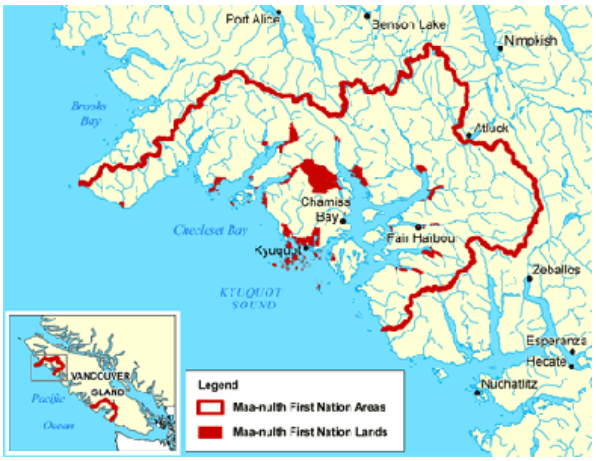
Re: Review of the Canadian Environmental Assessment Act, 2012, S.C. 2012, c. 19, s. 52 ("CEAA 2012") Submissions of the Huu-ay-aht First Nations, the Ka:'yu:'k't'h'/Che:k'tles7et'h' First Nations, the Toquaht Nation, the Uchucklesaht Tribe and the Yuułuʔiłʔatḥ First Nation (the "Maa-nulth Nations")

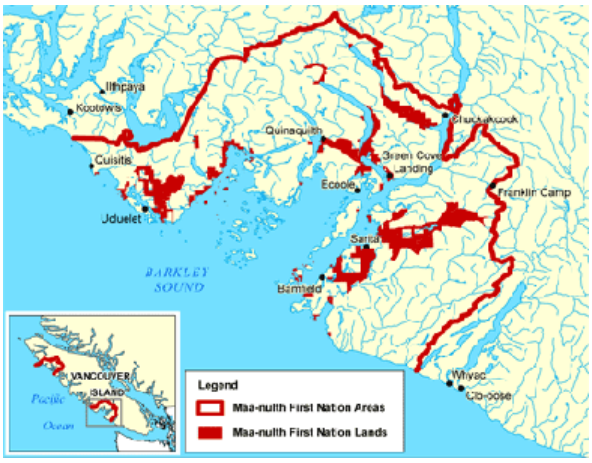
Dear Panel Members:

Background

The Maa-nulth Nations are modern Treaty First Nations pursuant to the second treaty entered into under the British Columbia Treaty Process, namely the Maa-nulth First Nations Final Agreement (the "Maa-nulth Treaty"). The Maa-nulth Treaty took effect on April 1, 2011.

Since time immemorial, the Maa-nulth Nations have occupied and utilized lands, waters and resources in and around Kyuquot Sound and Barkley Sound on the West Coast of Vancouver Island. Pursuant to the Maa-nulth Treaty, they became the fee simple owners of approximately 24,550 hectares of lands within their respective traditional territories, with various law-making authorities over those lands and their respective citizens. The Maa-nulth Nations' traditional territories, referred to in the Maa-nulth Treaty as "Maa-nulth First Nation Areas", as well as their treaty lands are shown in Figures 1a and 1b.





Figures 1a and 1b

Among other rights and interests, pursuant to Chapter 10 (Fisheries), Chapter 11 (Wildlife) and Chapter 12 (Migratory Birds) of the Maa-nulth Treaty, the Maa-nulth Nations have a right

i. to harvest inter-tidal bivalves for food, social and ceremonial purposes on several beaches adjacent to or near their respective treaty lands,
ii. to harvest all species of fish and aquatic plants other than inter-tidal bivalves for food, social and ceremonial purposes within two Domestic Fishing Areas, one extending southwest from Kyuquot Sound and the other extending southwest from Barkley Sound,
iii. to harvest wildlife and migratory birds in two Wildlife Harvest Areas and two Migratory Birds Harvest Areas, the on land boundaries of which are similar to those for the Domestic Fishing Areas, and
iv. to trade and barter, among themselves and with other aboriginal people of Canada, any resource harvested pursuant to those Chapters.

Chapter 22 (Environmental Assessment and Environmental Protection) of the Maa-nulth Treaty provides that no project subject to an environmental assessment under CEAA 2012 may proceed on the treaty lands of a Maa-nulth Nation without the consent of that Maa-nulth Nation. The Maa-nulth Treaty also establishes certain Maa-nulth Nation rights respecting environmental assessments conducted under CEAA 2012 where the project being assessed is within a Maa-nulth Nation's traditional territory or may reasonably be expected to adversely affect a Maa-nulth Nation's treaty rights. Specifically, the Maa-nulth Treaty provides

i. a right to timely notice of the environmental assessment,
ii. a right to a project description with sufficient detail to permit a Maa-nulth Nation to determine if it is interested in participating in the environmental assessment,
iii. a right to comment on all aspects of the environmental assessment, including scoping, environmental effects, mitigation measures and follow up programs,
iv. a right to information in the public registry maintained pursuant to CEAA 2012,
v. an obligation on Canada to give full and fair consideration to any comments made by the Maa-nulth Nations,
vi. an obligation on Canada to respond to any comments made by the Maa-nulth Nations before making a decision on the project,
vii. a right to recommend individuals for appointment to any review panel established in accordance with CEAA 2012 to assess the project,
viii. a right to formal standing before that panel.

The Maa-nulth Nations also have a right, pursuant to the Maa-nulth Treaty, to enact laws establishing their own environmental assessment processes for proposed projects within their respective treaty lands; however, none of the Maa-nulth Nations have yet to draw down this law making authority.

The Maa-nulth Nations' rights under the Maa-nulth Treaty, including those outlined above, are given the force of law under the Maa-nulth First Nations Final Agreement Act S.C. 2009, c. 18, and constitutionally protected under section 35 of the Constitution Act, 1982.

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Review Process

Given the previous government's complete lack of consultation with the Maa-nulth Nations respecting the repeal and replacement of CEAA in 2012, the Maa-nulth Nations were pleased to learn that the current government is conducting a review of CEAA 2012, and providing funding to First Nations to help cover the costs of their participation in that review. However, unreasonable timelines imposed by Canada and the Panel have thus far hindered the Maa-nulth Nations' ability to fully participate in the review.

The federal government did not inform the Maa-nulth Nations of their funding allocation for the review until early November. Given the multiple deadlines on related federal projects around the same time, including Roberts Bank

Terminal 2 Project submissions (October 28th), Trans Mountain Expansion Project final submissions (November 15th), Fisheries Act submissions (November 30th) and Navigation Protection Act submissions (December 7th), as well as the fact that submissions to the Panel on CEAA 2012 were due on December 23rd, a time when Maa-nulth Nation administrative offices are either closed or winding down for the holidays, the Maa-nulth Nations have not had the time to adequately consult with their representatives or review the volume of information regarding deficiencies with CEAA 2012 and how it may be improved. This does not constitute meaningful consultation.

The Maa-nulth Nations understand that, despite the December 23rd deadline for comments to the Panel, the Minister of Environment and Climate Change will be accepting comments from First Nations until the end of March 2017, following which the federal government will consider recommendations and develop proposed new environmental assessment legislation. The Huu-ay-aht First Nations intend to make independent written submissions to the Minister. However, the Maa-nulth Nations submit that prior to enacting legislation amending, repealing or replacing CEAA 2012, the federal government must engage in deeper, meaningful, government-to-government consultations with the Maa-nulth Nations. The Maa-nulth Nations further submit that additional funding must be made available to the Maa-nulth Nations to participate in the second phase of consultations, occurring after March 31, 2017.

Recommendation 1: **Prior to enacting legislation amending, repealing or replacing CEAA 2012, the federal government must engage in deeper, meaningful, government-to-government consultations with the Maa-nulth Nations.**

Recommendation 2: **Additional funding must be made available to the Maa-nulth Nations to participate in the second phase of consultations, occurring after March 31, 2017.**

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Purpose of CEAA 2012

The Maa-nulth Nations do not have significant concerns with the purposes of CEAA 2012 as set forth in the Act. However, the Maa-nulth Nations echo submissions made by other participants in this review process that ensuring projects are consistent with the principles of 1) environmental protection and 2) sustainable development should be the core purpose of the Act and adjustments to the Act should be made, where appropriate, to reflect this core purpose. These principles are broadly defined, however, so should be guided by detailed plans, including regional studies and strategic environmental assessments (discussed below), to guide decision makers in demining whether a project is consistent with them.

Recommendation 3: **Ensuring projects are consistent with the principles of environmental protection and sustainable development should be the core purpose of the Act and adjustments to the Act should be made, where appropriate, to reflect this core purpose. These principles are broadly defined, however, so should be guided by detailed plans, including regional studies and strategic environmental assessments (discussed below), to guide decision makers in demining whether a project is consistent with them.**

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Triggers and Streams

Under CEAA 2012, only "designated projects" trigger an environmental assessment. The list of projects currently designated under CEAA 2012 only includes certain mega projects, for example dams, railways and large mines, with the result that several types of projects previously assessed prior to the repeal and replacement of the Act in 2012 are no longer subject to an environmental assessment. The Maa-nulth Nations acknowledge that it would be impracticable for every project under federal jurisdiction to be subject to an environmental assessment; however, we submit that the narrow list of designated projects under CEAA 2012 tips the balance too far the other way.

A number of significant projects that, in the Maa-nulth Nations' view, may warrant a federal environmental assessment are not included on the list, for example pulp and paper mills, fish farms and oil and gas fracking projects. Further, minor projects and projects that fall somewhere on the continuum between minor and major may nonetheless have direct or indirect environmental effects depending on their size, nature and location. The Maa-nulth Nations submit that not all small and medium projects should be completely exempt from federal environmental assessments, although in some cases it may be appropriate to subject them to a less onerous environmental assessment than is required for a major project.

As such, the Maa-nulth Nations recommend expanding the number of projects subject to a federal environmental assessment to include all major projects that require a federal permit, are located on federal lands, receive federal funding or have a federal proponent, as well as small and medium projects that because of their size, nature and location warrant a federal environmental assessment. The Maa-nulth Nations further recommend reintroducing at least two levels or streams of federal environmental assessments, with major projects subject to a comprehensive environmental assessment, small and medium projects subject to a less onerous environmental assessment and, where appropriate, a process for moving medium projects up to a comprehensive environmental assessment.

The exact balance between which projects are completely exempt from environmental assessments, which are subject to a less onerous environmental assessment and which are subject to a comprehensive environmental assessment, as well as the model used to implement that balance (e.g. all in unless exempted, list of designated projects, etc.), must be determined in further consultation with the Maa-nulth Nations. As a general principle though, the Maa-nulth Nations submit that there should be clear and transparent direction in the Act or regulations as to which category a project falls within, as opposed to leaving this determination solely to the discretion of a federal representative.

Recommendation 4: **The number of projects subject to a federal environmental assessment should be expanded to include all major projects that require a federal permit, are located on federal lands, receive federal funding or have a federal proponent, as well as small and medium projects that because of their size, nature and location warrant a federal environmental assessment.**

Recommendation 5: **The new Act should include at least two levels or streams of environmental assessments, with major projects subject to a comprehensive environmental assessment, small and medium projects subject to a less onerous environmental assessment and, where appropriate, a process for moving medium projects up to a comprehensive environmental assessment.**

Recommendation 6: **There should be clear and transparent direction in the new Act or regulations as to whether an environmental assessment is triggered and, if so, which level or stream it falls within, as opposed to leaving this determination solely to the discretion of a federal representative. Any language in the new Act or regulations specifying which level or stream a particular type or class of project falls within must be determined in further consultation with the Maa-nulth Nations. If there is discretion in the new Act or regulations regarding that determination, the Maa-nulth Nations must be consulted prior to the exercise of that discretion where the proposed project is within a Maa-nulth Nation's traditional territory or may reasonably be expected to adversely affect a Maa-nulth Nation's treaty rights.**

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Environmental Effects

CEAA 2012 requires environmental effects to be taken into account when assessing a project; however, defines "environmental effects" narrowly. Under CEAA 1992, environmental effects included any change a project may cause to the environment, including effects on health, socio-economic conditions, cultural heritage and the current use of lands and resources for traditional purposes by aboriginal people. CEAA 2012, on the other hand, limits environmental effects to effects on certain components of the environment within the jurisdiction of the federal government, such as fish, fish habitat, migratory birds, and only requires effects on health, socio-economic conditions, cultural heritage and the current use of lands and resources for traditional purposes by aboriginal people to be taken into account with respect to aboriginal peoples.

The Maa-nulth Nations submit that all four pillars of the environment – namely the natural environment, health, socio-economic conditions and cultural heritage – should be taken into account when assessing a project, regardless of which population is impacted, and that effects on the natural environment should include effects on all components of the natural environment, not just the narrow list currently set forth in CEAA 2012.

Further, the Maa-nulth Nations note that the definition of "environment" in CEAA 2012 does not include all four pillars of the environment, just the natural environment. If that definition is carried forward in the new Act, the Maa-nulth Nations propose reflecting that it is a definition of "natural environment", so the distinction between the other pillars of the environment is clear.

With respect to the requirement to take into account effects on the current use of lands and resources for traditional purposes by aboriginal people when assessing a project, the Maa-nulth Nations submit that this must be broadened to include effects on treaty rights, not just current use. The Maa-nulth Nations' treaty rights are not dependent on current use. They are as set forth in the Maa-nulth Treaty. For a variety of reasons, a Maa-nulth Nation may not currently harvest a resource permitted to be harvested under the Maa-nulth Treaty, or to the extent permitted under the Maa-nulth Treaty, or in lands or waters permitted under the Maa-nulth Treaty. A project that impacts that resource, or those lands and waters, would however impact the Maa-nulth Nations' ability to exercise their treaty rights in the future.

Recommendation 7: **All four pillars of the environment – namely the natural environment, health, socio-economic conditions and cultural heritage – should be taken into account when assessing a project, and effects on the natural environment should include all components of the natural environment, not just the narrow list currently set forth in CEAA 2012.**

Recommendation 8: **If the current definition of "environment" is carried forward in the new Act, the Act should reflect that it is a definition of "natural environment", so the distinction between the other pillars of the environment is clear.**

Recommendation 9: **The requirement to take into account effects on the current use of lands and resources for traditional purposes by aboriginal people when assessing a project must be broadened to include effects on treaty rights, not just current use.**

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Factors and Scope of Factors

In addition the environmental effects of the project and the significance of those effects, CEAA 2012 specifies certain factors that must be taken into account when assessing a project, including

i. malfunctions or accidents that may occur in connection with the project,
ii. cumulative effects that are likely to result from the project,
iii. comments of interested parties,
iv. mitigation measures that are technically and economically feasible,
v. follow up programs,
vi. the purpose of the project, and
vii. alternate means of carrying out the project.

The Act also permits, but does not require community knowledge and aboriginal traditional knowledge to be taken into account when assessing a project.

Based on the Maa-nulth Nations' experience with federal environmental assessments to date, the Maa-nulth Nations submit that the Act should contain further guidance on the extent to which potential malfunctions or accidents should be assessed. Specifically, the Maa-nulth Nations submit that the Act should be clear that low probability, high consequence malfunctions or accidents should be assessed, not just those that have a greater likelihood of occurring in the event the project proceeds. In many cases, cumulative effects assessments at the project level have lacked the rigour necessary to fully understand those effects. As discussed below, the Maa-nulth Nations propose greater utilization of regional studies and strategic environmental assessments to better understand cumulative effects, and feeding the results of those studies and assessments into assessments at the project level. The Act should also contain further guidance regarding the determination of which mitigation measures are "technically and economically feasible", rather than leaving this to the discretion of the proponent and federal representatives. And rather than merely permitting community knowledge and aboriginal traditional knowledge to be taken into account when assessing a project, the Maa-nulth Nations submit that the Act should require this knowledge to be taken into account.

In addition to the factors currently set forth in the Act, the Maa-nulth Nations submit that the need for the project and alternatives to the project, both of which were required to be taken into account for certain projects under CEAA 1992, as well as the effects of the project on climate change, should be added as mandatory factors to be taken into account when assessing a project. These additional factors would assist in ensuring the information gathered and presented to decision makers is sufficient to assess whether a project is consistent with the principles of environmental protection and sustainable development, which as noted above the Maa-nulth Nations submit should be the core purpose of the Act.

Further, CEAA 2012 currently permits the applicable review body or the Minister, if the environmental assessment is referred to a review panel, to determine the scope of the factors to be taken into account when assessing a project. Based on the Maa-nulth Nations' experience with federal environmental assessments to date, this power has been used to exclude matters from environmental assessments that in the Maa-nulth Nations' view should be included, for example the exclusion in the National Energy Board ("NEB") hearing for the proposed Trans Mountain Expansion Project of the environmental and socio-economic effects associated with upstream activities, the development of oil sands and the downstream use of oil transported by the pipeline. The Maa-nulth Nations recommend limiting this discretion by providing further direction on key matters relating to the scope of the factors in the Act itself, including a requirement that upstream and downstream activities be considered, a requirement that an assessment of potential malfunctions or accidents include low probability, high consequence accidents or malfunctions and further direction regarding the determination of which mitigation measures are "technically and economically feasible", as noted above. The Maa-nulth Nations further submit that in accordance with the Maa-nulth Treaty, for any project within a Maa-nulth Nation's traditional territory or that may reasonably be expected to adversely affect a Maa-nulth Nation's treaty rights, the Maa-nulth Nations must be consulted regarding any determination of the scope of the factors to be considered into the environmental assessment for that project, and full and fair consideration must be given to any comments made by the Maa-nulth Nations in relation to the scoping. To help ensure this treaty

obligation is complied with, the Maa-nulth Nations propose including a reference to it in the section of the new Act dealing with scoping.

Recommendation 10: **The Act should be clear that low probability, high consequence accidents or malfunctions should be assessed, not just those that are more likely to occur in the event the project proceeds.**

Recommendation 11: **The Act should contain further guidance regarding the determination of which mitigation measures are "technically and economically feasible", rather than leaving this to the discretion of the proponent and federal representatives.**

Recommendation 12: **Rather than merely permitting community knowledge and aboriginal traditional knowledge to be taken into account when assessing a project, the Maa-nulth Nations submit that the Act should require this knowledge to be taken into account.**

Recommendation 13: **The need for the project, alternatives to the project and the effects of the project on climate change should be added as mandatory factors to be taken into account when assessing a project.**

Recommendation 14: **The discretion of the review body or the Minister, as applicable, to determine the scope of the factors to be considered in an environmental assessment should be limited by providing further direction on key matters relating to the scope of the factors in the Act itself.**

Recommendation 15: **In accordance with the Maa-nulth Treaty, for any project within a Maa-nulth Nation's traditional territory or that may reasonably be expected to adversely affect a Maa-nulth Nation's treaty rights, the Maa-nulth Nations must be consulted regarding any determination of the scope of the factors to be considered into the environmental assessment for that project, and full and fair consideration must be given to any comments made by the Maa-nulth Nations in relation to the scoping.**

Recommendation 16: **To help ensure this treaty obligation is complied with, the Maa-nulth Nations propose including a reference to it in the section of the new Act dealing with scoping.**

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Regional Studies and Strategic EAs

Canada is still struggling to establish a meaningful way of addressing the threats posed by cumulative adverse environmental effects, and the lack of baseline data necessary to fully assess those effects. At the same time, much of Canada remains as uninhabited or sparsely inhabited rural lands where the net footprint of human activity is steadily increasing. Thus, there is much potential for cumulative effects to manifest in these areas over time.

We typically think of cumulative effects as those that are the direct or indirect result of human actions. For example, falling one tree is sustainable in most cases, as is falling 10, or even 1000. But at some point, the act of falling a single tree added together over and over in time can lead to deforestation (direct effect) and the cascading changes to the ecosystem that can follow (direct and indirect effects). If we envision a single project in isolation, we might conclude that it will not have unacceptable impacts on the environment. Yet if we consider multiple such projects in that same landscape at the same time the conclusion regarding such cumulative effects might be much different.

Dealing with the issue of cumulative effects on a project-by-project basis in which an individual proponent has no sway over actions taken beyond their own project has proven fruitless. At the very core of the subject, cumulative

effects assessment is a forward-looking, regional-scale system of trade-offs that informs a course of action under which the opportunities and impacts of a given condition or course of action are predicted with some certainty. There are probably many reasons why cumulative effects have yet to figure meaningfully into governmental approaches to impact assessment. For one thing, change brought about by human activities often happen so slowly that their effects are not apparent until after many values have been seriously jeopardized or lost all together. Also, over a period of decades or longer, environmental changes brought about by those effects can bring economic prosperity that makes the environment more "hospitable" for many people. In other words, the environmental changes, though not entirely intentional, may be welcomed by many. For example, today's bustling metropolis of Greater Vancouver with all its highways, high-rises and high-end restaurants is a far cry from the coastal marshlands and giant Douglas-fir forests that not so long ago supported a thriving community of grizzly bears, Roosevelt elk, spotted owls, salmon and First Nations peoples. With the passing of time, subsequent generations of humans adapt to their new environments, losing sight of what was lost along the way.

As a general rule, the more closely a person is connected to the land or sea and the more they depend on it for their day-to-day existence, the more in-tune they tend to be with the environment's sensitivity and the changes that humans can inflict upon it. And because those changes can have outcomes that are at once both positive for some (e.g. jobs) and negative for others (e.g. diminished opportunity for traditional pursuits), informed decision making regarding those trade-offs is essential in order that a society retains control over its identity and ability to govern itself into the future. Informed decision making is the basis for effective cumulative effects assessment, which in turn can be informed by strategic plans that clearly set out societal and/or governmental goals and objectives regarding environmental values, including health, socio-economic and cultural heritage values. In recognition of this fact, witness the numerous marine and land use plans that have been developed by Canada, BC and numerous First Nations in recent years.

CEAA 2012 currently permits regional studies to be undertaken to study the effects of existing or future physical activities carried out in a region, and to gather baseline data that can be used to assess the effects of a proposed project within that region. However, the Maa-nulth Nations understand that regional studies are rarely carried out in practice. Pursuant to a Cabinet Directive, the federal government may also undertake a strategic environmental assessment of a proposed policy, program or plan to ensure the potential environmental effects of that policy, program or plan are considered. However, again, the Maa-nulth Nations understand that environmental assessments triggered under the Cabinet Directive are either not being done or not being done well. The Maa-nulth Nations support the submissions of other participants in this review process that regional studies and strategic environmental assessments should be utilized more frequently to better understand cumulative effects, and gather baseline data necessary to fully assess the effects of a project on all four pillars of the environment (see Recommendation 7), and the results of those studies and assessments should be fed into assessments at the project level. Specifically, the Maa-nulth Nations make the following recommendations in relation to regional studies and strategic environmental assessments:

Recommendation 17: The new Act should contain a provision triggering a mandatory environmental assessment for any plan, policy or program currently covered by the Cabinet Directive.

Recommendation 18: The new Act should contain a provision triggering a mandatory regional study in certain circumstances, for example in regions where there is currently or it is anticipated that there will soon be significant development pressure, in regions with high ecological value or where a new type of development is proposed in an area.

Recommendation 19: The new Act should contain a provision authorizing and requiring the review body to put a project-level environmental assessment on hold pending the completion of a strategic environmental assessment or regional study in certain circumstances, for

example where additional baseline information is needed to fully assess the cumulative effects of that project and it would be unreasonable to require the proponent alone to gather that additional information or where a regional study is currently underway and its completion would not unreasonably delay the project-level assessment.

Recommendation 20: The Maa-nulth Nations should be consulted regarding, and provided capacity funding to participate in, any strategic environmental assessment or regional study that is within or has the potential to impact the Maa-nulth Nations respective traditional territories or treaty rights.

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Coordinated EAs

As noted above, none of the Maa-nulth Nations have yet to enact a law establishing an environmental assessment process for projects within their respective treaty lands. However, at some point in the future they may. The new Act should thus contain provisions authorizing the federal government to collaborate with the Maa-nulth Nations where an environmental assessment is required under both the Act and a Maa-nulth Nation law enacted in accordance with the Maa-nulth Treaty.

The Maa-nulth Nations also support the submissions of other participants in this review process that the new Act should not provide for the complete substitution of a federal environmental assessment with a provincial one, but rather should contain provisions authorizing the federal government to collaborate with the applicable province where an environmental assessment is required under both the Act and that province's laws. In the event substitution is carried forward in the new Act, the Maa-nulth Nations submit that they must be consulted regarding any decision to substitute a federal environmental assessment with a province one where the project being assessed is within a Maa-nulth Nation's traditional territory or may reasonably be expected to adversely affect a Maa-nulth Nation's treaty rights.

Recommendation 21: The new Act should contain provisions authorizing the federal government to coordinate any environmental assessment conducted under the new Act with any environmental assessment conducted by a Maa-nulth Nation in accordance with the Maa-nulth Treaty and its own laws.

Recommendation 22: The new Act should not provide for the complete substitution of a federal environmental assessment with a provincial one, but rather should contain provisions authorizing the federal government to collaborate with the applicable province where an environmental assessment is required under both the Act and that province's laws.

Recommendation 23: In the event substitution is carried forward in the new Act, the Maa-nulth Nations submit that they must be consulted regarding any decision to substitute a federal environmental assessment with a province one where the project being assessed is within a Maa-nulth Nation's traditional territory or may reasonably be expected to adversely affect a Maa-nulth Nation's treaty rights.

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Review Body and Scientific Expertise

CEAA 2012 currently authorizes the NEB and the Canadian Nuclear Safety Commission ("CNSC") to conduct federal environmental assessments for projects under their respective jurisdictions. Based on the Maa-nulth Nations' experience in the NEB hearing for the proposed Trans Mountain Expansion Project, the Maa-nulth Nations are concerned that these bodies lack the expertise necessary to weigh the multiple factors that must be considered when conducting an environmental assessment. The NEB has expertise in the energy sector, but lacks broader

environmental expertise. Further, concerns have been raised that the NEB is not sufficiently independent from the industry it is charged with regulating, one example being the appointment of a Kinder Morgan consultant to the NEB while the NEB hearing for the proposed Trans Mountain Expansion Project was underway.

The Maa-nulth Nations support the submissions of other participants in this review process that federal environmental assessments should be undertaken by a single, permanent federal review body with the expertise necessary to assess a proposed project's impacts on all aspects of the environment, or a review panel appointed for the purpose of assessing that project. Correspondingly, the NEB and CNSC should not longer have conduct for environmental assessments within their respective jurisdictions.

In accordance with the Maa-nulth Treaty, the Maa-nulth Nations must be provided an opportunity to recommend individuals for appointment to any review panel tasked with assessing a project within the Maa-nulth Nations' respective traditional territories or that has the potential to impact their treaty rights. To help ensure this treaty obligation is complied with, the Maa-nulth Nations propose including a reference to it in the section of the new Act dealing with appointment of review panels.

To help ensure that the review body or review panel, as applicable, has access to independent science on technical matters relating to a proposed project, the Act should enable the review body to commission a report on those matters, independent of but funded by the proponent, and require any federal government department or agency with scientific expertise relevant to those matters to share that expertise with the review panel within a specified period, as opposed to upon request as currently provided for in CEAA 2012.

Recommendation 24: Federal environmental assessments should be undertaken by a single, permanent federal review body with the expertise necessary to assess a proposed project's impacts on all aspects of the environment, or a review panel appointed for the purpose of assessing that project. Correspondingly, the NEB and CNSC should no longer have conduct for environmental assessments within their respective jurisdictions.

Recommendation 25: In accordance with the Maa-nulth Treaty, the Maa-nulth Nations must be provided an opportunity to recommend individuals for appointment to any review panel tasked with assessing a project within the Maa-nulth Nations' respective traditional territories or that has the potential to impact their treaty rights. To help ensure this treaty obligation is complied with, the Maa-nulth Nations propose including a reference to it in the section of the new Act dealing with appointment of review panels.

Recommendation 26: To help ensure that the review body or review panel, as applicable, has access to independent science on technical matters relating to a proposed project, the Act should enable the review body to commission a report on those matters, independent of but funded by the proponent, and require any federal government department or agency with scientific expertise relevant to those matters to share that expertise with the review panel within a specified period.

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Meaningful Participation

As discussed further above, the Maa-nulth Treaty establishes certain participation rights for federal environmental assessments where the project being assessed is within the Maa-nulth Nations' respective traditional territories or has the potential to impact their treaty rights. To date, however, inadequate funding and unreasonable timeframes have limited the Maa-nulth Nations' ability to meaningfully participate in such environmental assessments.

Early engagement on a project is critical to ensuring the Maa-nulth Nations can fully assess the impacts of that project on their rights and interests, and meaningfully participate in any federal environmental assessment of that project. The Maa-nulth Nations submit that this engagement should begin before the environmental assessment has commenced. Specifically, to assist in ensuring their treaty right to timely notice of an environmental assessment is complied with, the Maa-nulth Nations propose requiring the proponent to provide the review body a preliminary project description 180 days in advance of officially filing a project description with that review body, and requiring the review body to provide a copy of the draft project description to the applicable Maa-nulth Nation within 14 days of receipt, if the project is within that Maa-nulth Nation's traditional territory or has the potential to impact that Maa-nulth Nation's treaty rights. In accordance with the Maa-nulth Treaty, the project description should contain sufficient detail to permit the applicable Maa-nulth Nation to determine if it is interested in participating in any environmental assessment of that project.

Unlike CEAA 1992, CEAA 2012 establishes a 45 day deadline for determining whether or not an environmental assessment should be conducted for a project, a 20 day deadline for commenting on that determination and deadlines ranging from 1 to 2 years for an environmental assessment to be completed, depending on the review body responsible for conducting that review. These legislated timeframes have resulted in shortened timeframes for the First Nation and public participation components of an environmental assessment, one example being the short timeframe in the NEB hearing for the proposed Trans Mountain Expansion Project for reviewing the 15,000+ page project application and submitting information requests in relation to that application.

The Maa-nulth Nations acknowledge that federal environmental assessments should not drag on for unreasonable periods. However, the Maa-nulth Nations suggest that for major projects the balance has shifted too far in favour of expediency, thereby compromising the rigour of environmental assessments for those projects. To help address these concerns, the Maa-nulth Nations recommend changing the deadline for determining whether or not an environmental assessment should be conducted for a project from 45 to 60 days, changing the deadline for commenting on that determination from 20 to 30 days and adding provisions allowing those deadlines to be extended to provide greater opportunity for meaningful consultation with affected First Nations regarding that determination. In addition to the current power under CEAA 2012 permitting the review process to be put on hold in certain circumstances, the Maa-nulth Nations also recommend requiring the deadline for completing an environmental assessment to be put on hold in certain circumstances, including those set forth in Recommendation 19 (Regional Studies and Strategic EAs) and pending the completion of a study referred to in Recommendation 26 (Review Body and Scientific Expertise).

If a determination is made to refer a project within the Maa-nulth Nations' respective traditional territories or that has the potential to impact their treaty rights to a review panel for an environmental assessment, in addition to the Maa-nulth Nations' right to recommend appointments to that review panel, the Maa-nulth Nations must also be given an opportunity to meaningfully participate in the establishment of the terms of reference for that review panel.

Both proponents and the federal government spend, and have access to, significantly greater financial resources than are made available to First Nations to participate in federal environmental assessments for major projects. Without sufficient funding from the proponent and/or the federal government, the Maa-nulth Nations and many other First Nations cannot afford to retain experts to review and respond to the volumes of information, data, studies and reports led by the proponent in relation to the project. The funding provided to the Maa-nulth Nations in the NEB hearing for the proposed Trans Mountain Expansion Project, for example, only enabled the Maa-nulth Nations to participate in some components of that hearing, left the Maa-nulth Nations out of pocket for a large portion of their costs associated with the hearing and was not sufficient to lead expert evidence on technical aspects of the project. As a result, much of the scientific evidence before decision makers is proponent led, untested by individuals and groups with an interest in the project. The Maa-nulth Nations submit that, in addition to Recommendation 26 (Review Body and Scientific Expertise), in order to ensure the information before decision makers is balanced and

the Maa-nulth Nations have an opportunity to meaningfully participate in all components of federal environmental assessments that affect them, significantly more funding should be made available to the Maa-nulth Nations under the review body's participant funding program.

Recommendation 27: **The new Act should contain a requirement that the proponent provide the review body a preliminary project description 180 days in advance of officially filing a project description with that review body, and a requirement that the review body provide a copy of the draft project description to the applicable Maa-nulth Nation within 14 days of receipt, if the project is within that Maa-nulth Nation's traditional territory or has the potential to impact that Maa-nulth Nation's treaty rights.**

Recommendation 28: **The deadline for determining whether or not an environmental assessment should be conducted for a project should be changed from 45 to 60 days, the deadline for commenting on that determination should be changed from 20 to 30 days and provisions should be added to the Act allowing those deadlines to be extended to provide greater opportunity for meaningful consultation with affected First Nations.**

Recommendation 29: **In addition to the current power under CEAA 2012 permitting the review process to be put on hold in certain circumstances, the deadline for completing an environmental assessment should be required to be put on hold in certain circumstances, including those set forth in Recommendation 19 (Regional Studies and Strategic EAs) and pending the completion of a study referred to in Recommendation 26 (Review Body and Scientific Expertise).**

Recommendation 30: **The Maa-nulth Nations must be given an opportunity to meaningfully participate in the establishment of the terms of reference for any review panel tasked with conducting an environmental assessment within the Maa-nulth Nations' respective traditional territories or that has the potential to impact their treaty rights.**

Recommendation 31: **In addition to Recommendation 26 (Review Body and Scientific Expertise), in order to ensure the information before decision makers is balanced and the Maa-nulth Nations have an opportunity to meaningfully participate in all components of federal environmental assessments that affect them, significantly more funding should be made available to the Maa-nulth Nations under the review body's participant funding program.**

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Compliance Monitoring and Follow-up Programs

In the event a project in authorized to proceed, compliance monitoring and follow up programs are critical to ensuring the proponent complies with any conditions imposed by the review body, verifying any predictions or assumptions made in the environmental assessment for the project, determining the effectiveness of any mitigation measures undertaken by the proponent and, where appropriate, ensuring long-term monitoring of specific components of the project or the environment. The Maa-nulth Nations submit that the applicable review or regulatory body must be provided sufficient funding to enforce any conditions it imposes. The Maa-nulth Nations further submit that where the project is within a Maa-nulth Nation's traditional territory or may reasonably be expected to adversely affect a Maa-nulth Nation's treaty rights, the applicable Maa-nulth Nation must be provided sufficient funding and a reasonable opportunity to participate in any follow up program in relation to that project, and that the federal government should explore areas in which that Maa-nulth Nation may assist in monitoring conditions imposed by the review body. If the current definition of "follow-up program" is carried forward in the new Act, the Maa-nulth Nations propose adding a new subsection (c) to that definition to capture a program for "conducting long-term monitoring of specific components of the designated project or the environment".

Recommendation 32: **The applicable review or regulatory body must be provided sufficient funding to enforce any conditions it imposes.**

Recommendation 33: **Where the project is within a Maa-nulth Nation's traditional territory or may reasonably be expected to adversely affect a Maa-nulth Nation's treaty rights, the applicable Maa-nulth Nation must be provided sufficient funding and a reasonable opportunity to participate in any follow up program in relation to that project.**

Recommendation 34: **Where the project is within a Maa-nulth Nation's traditional territory or may reasonably be expected to adversely affect a Maa-nulth Nation's treaty rights, the federal government should explore areas in which that Maa-nulth Nation may assist in monitoring conditions imposed by the review body.**

Recommendation 35: **If the current definition of "follow-up program" is carried forward in the new Act, the Maa-nulth Nations propose adding a new subsection (c) to that definition to capture a program for "conducting long-term monitoring of specific components of the designated project or the environment".**

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Public Rights versus First Nations Rights

In multiple instances throughout CEAA 2012, the Act establishes rights of the "public" to participate in certain components of a federal environmental assessment, for example in sections 10(a), 34(1) and 38(2). In recognition of their constitutionally protected aboriginal and/or treaty rights, the Maa-nulth Nations submit that these provisions should also reference the rights of affected First Nations (as distinct from the public) to participate in those components.

Recommendation 36: **Any provision in the Act establishing a right of the public to participate in any component of a federal environmental assessment should also reference the rights of affected First Nations to participate in that component.**

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Summary

The Maa-nulth Nations submit that the above recommendations should be incorporated into any Act amending, repealing or replacing CEAA 2012. The Maa-nulth Nations must be further consulted prior to the enactment of any such legislation, as well as following its enactment, when developing regulations and policies and whenever the Maa-nulth Nations' rights and interests are engaged. We look forward to continued discussions with the federal government on this matter.

Yours truly,

Maa-nulth Treaty Society
Per:

Chief Charlie Cootes
President, Maa-nulth Treaty Society

cc: The Honourable Catherine McKenna, Minister of Environment and Climate Change
Heads of Government of the Maa-nulth Nations