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Matsqui First Nation Submissions to the Expert Panel: Review of Environmental Assessment Processes

Matsqui First Nation (Matsqui) is an independent, autonomous tribe located along the lower Fraser River. Matsqui Territory stretches from Sumas Mountain to Crescent Island. Matsqui has five reserves located west and north of Abbotsford: Matsqui no.4 (24.3 hectares [ha]), Matsqui Main no.2 (129.7 ha), Sahhacum no.1 (20.2 ha), and Three Islands no.3 (246.3 ha), and the shared Pekw'xe:yles (Peckquaylis) (10.3 ha). Matsqui is a signatory to the Framework Agreement and governs reserves in accordance with the *First Nation Land Management Act* ("*FNLMA*"), Matsqui's Land Code and Matsqui's Environmental Assessment Law ("EA Law").

Matsqui's recent experience with the National Energy Board ("NEB") assessment of the Trans Mountain Expansion Project ("TMX") raised significant concerns about the failure of the federal government to properly recognize the jurisdiction of First Nations operating under the Framework Agreement and *FNLMA* (together "FNLM Regime"). While the *Canadian Environmental Assessment Act 2012* ("*CEAA 2012*") contemplates consultation and cooperation with other jurisdictions, Matsqui jurisdiction was not recognized in the context of the review of a major project proposed to cross Matsqui reserve lands, and no real efforts were made to harmonize the federal and Matsqui EA process.

Matsqui's experience has broader application, as it serves as an example of the failure of the federal EA regime to properly recognize Operational First Nations' ("OFNs") jurisdiction over their lands. This failure, if not rectified, will continue to have a detrimental impact on the integrity of the FNLM Regime and will create uncertainty for major resource development across Canada.

This submission will:

- Describe the regulatory framework;
- Describe the flaws and gaps in the implementation of the regulatory framework; and
- Provide recommendations for improving the framework and its implementation.

Generally, the experience with the review of the TMX has made it abundantly clear to Matsqui that because no forum exists for reasoned discussion of the appropriate use and management of resources, many citizens and groups - including First Nations - are forced to use the EA process to express their views on petrochemical, mining, transportation, energy, and other projects that are mere components of broad resource use policy. EAs are intended to identify impacts and mitigation measures associated with individual projects, not to assess the broader environmental issues caused by the resource extraction industry. As such, EAs are a poor tool for influencing decisions about how lands and waters are used. Improving the process and content of EAs will be valuable, but the conflicts over projects will continue unless separate

government-sanctioned opportunities are provided to explore, and seek consensus on, resource use. The panel would be well served by examining how the appropriate use of EAs can be defined and understood in the context of planning for resource development that affect the lands, waters and rights of First Nations.

Specifically, this submission will focus on Matsqui's experience with the federal EA process in the context of projects, such as the TMX, proposed to utilize Matsqui reserve lands. In doing so, the submission recognizes that consideration of many the principles that follow, and in particular the relationship between the jurisdictions of the Crown and First Nations in assessing projects, transcend reserve boundaries and are applicable across Matsqui territory. Matsqui focuses here on the reserve interest so as to draw attention to the need to uphold and further the jurisdictional integrity of Matsqui as an Operational Nation, and the integrity of the FNLM Regime in general.

I. Regulatory Framework

Below we provide a brief explanation of the regulatory framework that contemplates a relationship between *CEAA* 2012 and the FNLM Regime in the context of OFNs governance authority vis-à-vis development on their reserve lands. For further general information on the the FNLM regime, please see the Lands Advisory Board Resource Centre (www.labrc.com).

Federal EA law recognizes that the assessing agency or "responsible authority" must work with other jurisdictions to complete a multi-jurisdictional EA. *CEAA 2012* sets out that responsible authorities will consult and cooperate with other jurisdictions:

> 18 The responsible authority with respect to a designated project — or the Minister if the environmental assessment of the designated project has been referred to a review panel under section 38 — must offer to consult and cooperate with respect to the environmental assessment of the designated project with any jurisdiction referred to in paragraphs (c) to (h) of the definition jurisdiction in subsection 2(1) if that jurisdiction has powers, duties or functions in relation to an assessment of the environmental effects of the designated project.

Under subsection 2(1) "jurisdiction" means:

> (a) a federal authority;
> (b) any agency or body that is established under an Act of Parliament and that has powers, duties or functions in relation to an assessment of the environmental effects of a designated project;
> (c) the government of a province;
> (d) any agency or body that is established under an Act of the legislature of a province and that has powers, duties or functions in relation to an assessment of the environmental effects of a designated project;
> (e) anybody that is established under a land claims agreement referred to in section 35 of the Constitution Act, 1982 and that has powers, duties or functions in relation to an assessment of the environmental effects of a designated project;
> (f) a governing body that is established under legislation that relates to the self-government of Indians and that has powers, duties or functions in relation to an assessment of the environmental effects of a designated project;

(g) a government of a foreign state or of a subdivision of a foreign state, or any institution of such a government; and
(h) an international organization of states or any institution of such an organization.

OFNs are not specifically referenced as jurisdictions. OFNs could be determined to be jurisdictions under subsections (b) or (f).

Under the Framework Agreement, First Nations opt out of all the provisions in the *Indian Act* which refer land decisions to the Federal Minister (including the s.35 expropriation provisions). OFNs make their own decisions about development on reserve and develop EA processes to assess projects proposed on reserve.

The Framework Agreement on First Nation Land Management sets out:

> 25.6 The Parties agree to use their best efforts to implement the principle that the First Nation's environmental assessment process be used where an environmental assessment of a project on First Nation land is required by the *Canadian Environmental Assessment Act*.
>
> 25.7 The Parties agree to develop a plan to harmonize their respective environmental assessment processes, with the involvement of the provinces where they agree to participate.

While the Framework Agreement explicitly recognizes the relationship between federal and First Nation EAs, no mention of OFNs is made under *CEAA 2012*.

The *FNLMA* sets out that First Nations will be responsible for EAs on their reserve lands:

> 21 (1) After the coming into force of a land code, a First Nation shall, to the extent provided in the Framework Agreement, develop and implement through First Nation laws an environmental protection regime. The regime must be developed in accordance with the terms and conditions set out in the Framework Agreement.
>
> (2) The standards of environmental protection established by First Nation laws and the punishments imposed for failure to meet those standards must be at least equivalent in their effect to any standards established and punishments imposed by the laws of the province in which the First Nation land is situated.
>
> (3) First Nation laws respecting environmental assessment must, to the extent provided in the Framework Agreement, establish, in accordance with that Agreement, an environmental assessment regime that is applicable to all projects carried out on First Nation land that are approved, regulated, funded or undertaken by the First Nation.

The FNLM Regime enables First Nations to develop their own laws about land use, the environment and natural resources to exercise greater control over their reserve lands. Matsqui has enacted an Environmental Assessment Law ("Matsqui EA Law"). The Matsqui EA Law is appended to this submission. The Matsqui EA Law includes the following provision:

6.1 Matsqui recognizes that federal environmental legislation may apply under certain circumstances and components of Projects on lands adjacent to First Nation Land may be subject to provincial environmental legislation. In these instances, the Land Manager will use best efforts to work cooperatively with other parties to seek agreement on the following issues:

(a) the agency and individual that will be the main contact and coordinator of the environmental assessment for each jurisdiction;

(b) the common requirements under the federal, provincial and Matsqui's environmental assessment process;

(c) the development of a specific work plan for each Project undergoing a multi-jurisdictional environmental assessment;

(d) how the parties will co-ordinate the environmental assessment decision and associated regulatory decisions with respect to a Project; and

(e) for future Projects, how each party will notify the others when an environmental assessment process is initiated under that jurisdictions' law.

6.2 Pursuant to clause 25.6 of the Framework Agreement, Matsqui and Canada will make best efforts to ensure that Matsqui's environmental assessment process will be used where there in overlapping jurisdiction. This priority will be reflected in any environmental assessment harmonization plan developed between Matsqui, Canada and British Columbia under clause 25.7 or the Framework Agreement.

Matsqui submits that the coordination contemplated in s. 6.1 is required to ensure the meaningful harmonization of multi-jurisdictional EAs. The provisions in s. 6.1 serve as a guide toward cooperation, coordination and harmonization of EA processes.

II. Flaws/Gaps in the Regulatory Framework and its Implementation

Despite the fact that the regulatory framework expressly contemplates harmonization of EAs, and despite the fact that the acquisition of interests on reserve is solely within the jurisdiction of OFNs under the Framework Agreement, Matsqui's experience with the TMX EA indicates a failure of federal government assessment agencies to understand the legal significance of the FNLM Regime and Matsqui's EA Law. Matsqui's experience with the NEB hearing process is illustrative of the challenges of coordinating federal and OFN EAs.

The existing Trans Mountain pipeline traverses Matsqui IR 2. The twinned TMX pipeline is also proposed to traverse Matsqui IR 2 (although alternate routes were proposed). The TMX therefore triggered both the TMX EA, with the NEB as responsible authority, and the Mastqui environmental assessment pursuant to Matsqui's EA Law.

The fact that both processes were triggered provided for an excellent opportunity for harmonizing assessments, or at the least for a coordinated approach to timelines, scoping and other matters. for conducting the review. Instead, the lack of clear direction for the responsible authority in the regulatory framework, and the lack of recognition of the role of Matsqui

jurisdiction in assessing the project, resulted in an utter failure to implement any measure of coordination with respect to the two EAs. Some of the most glaring reasons for this failure are set out below:

1. *Matsqui was not notified directly by the responsible authority*

Matsqui learned that it may be able to work with the NEB to assess the TMX through an online notice. The failure to notify Matsqui directly and to begin a dialogue about coordination at an early stage set the process back at a crucial time. It is at the early stages of the assessment process that the best opportunity for coordination exists, in particular with respect to scoping the assessments and setting timelines. By the time that a connection was made between the authorities, the wheels were already in motion on the NEB process. The lack of respect and recognition at the threshold stage was significant.

2. *Matsqui was required to justify its jurisdiction under the FNLM Regime*

The online notice required Matsqui to write to the NEB and "explain" its jurisdiction. Matsqui wrote to the NEB, confirming it is a "jurisdiction" under s.18 of *CEAA 2012*.

The NEB's response indicated a lack of interest in pursuing any cooperation:

> Your letter noted a willingness to engage in dialogue should the National Energy Board (Board) wish to harmonize its process with Matsqui First Nation's process under its Environmental Assessment Law. Please be advised that the Board does not have any specific request at this time.

Matsqui replied to the NEB explaining its jurisdiction, its EA Law and the regulatory context for development on OFN reserve lands. This did not appear to be persuasive to the NEB.

This process placed the onus on Matsqui to justify its jurisdiction despite that jurisdiction being explicitly recognized in federal legislation. Not only that, the clear direction from Matsqui as to what the framework dictated was met by at best disinterest and at worst disdain from the responsible authority.

3. *No efforts were made to coordinate or harmonize the EAs.*

By the time that the NEB finally acknowledged that Matsqui's EA was triggered and that s. 18 contemplates some form of coordination, both assessments were underway, leading the NEB to determine that:

> It appears that the primary opportunity for cooperation between the ongoing Board hearing and any upcoming environmental assessment process undertaken by Matsqui is in the form of an information exchange.

This failure to harmonize assessments led to several practical complications that affected the quality and integrity of the assessment process. These included:

a. Inconsistent Timelines

By the time Matsqui's EA was triggered, the TMX EA was well underway, causing a lack of alignment in timelines. Had the process required the affected jurisdictions to be clarified from the outset, and had a process been developed to coordinate assessments, this inefficiency could have been avoided.

b. Inconsistent standards / scope of assessments

Matsqui's EA was scoped differently than the TMX EA; in particular, Matsqui's EA used different criteria to consider the significance of impacts and cumulative effects.

For example, Matsqui's EA caused the proponent to consider the impacts of a full-bore spill in the Fraser River, an assessment not required by NEB because the likelihood of its occurrence was considered too remote. To be clear, the assessment of an oil pipeline by the NEB did not consider the impacts of an oil spill.

The Matsqui EA allowed for consideration of probability after the significance of an impact has been rated. This meant that while a full-bore spill may not be a likely occurrence, the impacts of such an event were acknowledged and assessed, and appropriate mitigation measures discussed.

For Matsqui, this was an essential component of the assessment, without which the project could and would not be permitted to use Matsqui reserve lands. Given that the impacts of a spill are of interest to the broader community, the integrity of the TMX EA would have been greatly enhanced, and the assessment would have benefitted immensely, from an effort to coordinate scoping of assessments with Matsqui.

c. Uncertainty

Not only did the quality of the TMX EA suffer due to the lack of coordination, but the different scoping caused uncertainty for the proponent, who was forced to conduct two separate assessments. While the proponent eventually included the assessment as expected by Matsqui, there was concern expressed that the assessment itself, and its results, might differ from the TMX EA. The proponent would likely have benefited from understanding, early in the process, what the expectations were for the environmental assessments of the TMX. The failure to coordinate resulted in unnecessary duplication of efforts, and potential for conflict between the expectations for the two processes.

One of the benefits of the FNLM Regime is a streamlined process for development on reserve lands. The lack of any coordination of assessments, however, render these efficiencies void, causing increased uncertainty for projects that cross multiple jurisdictions.

4. An approved Matsqui EA was not a condition in the NEB Final Report

For a project to proceed on Matsqui reserve lands, approval must be provided pursuant to the Matsqui Land Code. One of the requirements for that approval is a completed and approved environmental assessment pursuant to Matsqui's EA Law. Expropriation of reserve land of a Land Code operational Nation is not available to a pipeline company. That means that, Matsqui, as an OFN, must consent to the project for its to be sited on reserve.

Despite all of this, and despite the fact that Matsqui's evidence specifically urged the NEB to recognize this reality, the conditions attached to the NEB recommendations did not include any mention of the requirement for an approved Matsqui EA. Given the NEB's total lack of interest in harmonization or coordination, the least that could have been expected was the recognition of a jurisdictional reality. This did not occur.

In sum, a First Nation with the jurisdiction to approve or reject the project was, in the context of *CEAA 2012,* an intervenor, with an opportunity to provide evidence that was purportedly considered and then rejected by the NEB. This is a failure of the regulatory regime to provide clear direction to the responsible authority, and a failure to implement the direction that does exist. Changes are required to both if the harmonization provisions of *CEAA 2012* are to have any relevance whatsoever.

5. *The Crown Consultation Report failed to comprehend the FNLM Regime*

The utter lack of understanding or consideration for the role of the FNLM Regime became increasingly evidence upon review of the draft Consultation Report prepared by Canada and British Columbia following closure of the NEB review.

In the Draft Report, Canada and the Province mischaracterized the nature of the FNLM Regime entirely, stating:

> …The proponent will be seeking Governor in Council authorization for *Indian Act* s.35 tenures if the proponent is granted rights to expropriate to allow for the expansion of the pipeline.

Even a cursory review of the regulatory framework would have made it clear both that Section 35 of the *Indian Act* does not apply to Matsqui, and that the proponent is not able to expropriate lands from Matsqui IR 2. Not only does the Framework Agreement create the legislative space for First Nations to evaluate projects on their reserves, and to grant authority for projects through the process spelled out in the Land Code, but the *FNLMA* significantly limits how reserve lands can be expropriated. Under the *FNLMA*, land cannot be expropriated except to the federal government. Federal expropriation is only allowed where it is justifiable and necessary for a federal public purpose that serves the national interest and compensation must include provision of equivalent lands.

The characterization that the proponent was seeking Governor-in-Council authorization for an expropriation is not only incorrect, but evidences a complete failure on the part of the Government of Canada to uphold its own legislation. The integrity of the entire regime badly suffers when a Land Code operational Nation is forced to contend with this lack of appreciation and recognition for the jurisdictions that the FNLMA and Framework Agreement provide.

III. Recommendations for CEAA Review

Matsqui makes the following recommendations for consideration of the Review Panel:

1. *Include a provision in CEAA that Jurisdictions require notification prior to developing the Hearing Order for a federal EA*

CEAA 2012 should be amended to include a requirement that all jurisdictions be notified directly prior to the drafting of the hearing order. This would ensure timely coordination between the responsible authority and jurisdictions.

2. *Include OFNs in the definition of "Jurisdiction"*

Currently, under *CEAA 2012*, the responsible authority must offer to consult and cooperate with "jurisdictions" as defined in the Act. Much of the delay in coordinating EA processes was due to a failure to recognize Matsqui as a jurisdiction at an early date. The inclusion of OFNs under the definition of "jurisdiction" in s. 2(1) of CEAA 2012 would relieve the unnecessary burden on OFNs to prove to responsible authorities their role as a jurisdiction.

3. *When multiple jurisdictions are triggered or potentially triggered by a project, require an applicant to confirm a Project Description that confirms the appropriate jurisdictions*

The TMX EA was scoped so as to permit the proponent to prepare an EA without committing to whether it was proposing to construct the TMX on Matsqui reserve; this despite the presence of the existing pipeline on reserve and the proponent's clearly stated intent to install the new pipeline in existing right-of-way wherever possible. This uncertainty prevented Matsqui from commencing its EA Process and effectively eliminated the potential of harmonizing the processes. The lack of clarity over which jurisdictions were triggered by the Proposal served to delegitimize the TMX EA. Requiring the Project Description to confirm the appropriate jurisdictions would create increased certainty and enable coordination of assessments.

4. *Jurisdictions should not be intervenors at the NEB, but should have a specialize role based on their unique responsibility in evaluating a project*

The participation of jurisdictions as intervenors in the hearing process is inappropriate given their unique responsibility in evaluating projects. Consideration should be given to a specialized role for Jurisdictions within the review process that focuses on the coordination of decision making responsibilities.

5. *The responsible authority and the OFN will co-ordinate the environmental assessment workplan and timeline by entering into a joint agreement on the assessment process while retaining independent decision making authority.*

A joint agreement between an OFN jurisdiction and the responsible authority would ensure an efficient process. This would provide clarity to the proponent, the OFN jurisdiction and the government decision making body.

6. *The responsible authority will work with the OFN prior to scoping the EA to establish the common requirements under the federal and OFN EA processes.*

Best efforts would be made at reaching agreement on the scoping of the assessments. If agreement cannot be reached on scoping, a clear statement of the differences would be issued, so as to provide certainty for all as to the expectations of the jurisdictions for the assessments. Collaboration on scoping is likely the single biggest improvement that could be made to the process, one that would create more efficient, stronger assessments, create certainty for all involved, and increase the integrity of the process both for OFNs and for all Canadians.

7. *OFN approval will be a required condition for Governor in Council Approval*

A major milestone in recognition and reconciliation would be the stated requirement for approval of a OFN to be a condition for approval of a project by the Governor in Council. This would require communication between jurisdictions to ensure that approval has been given, consistent with a government-to-government relationship. This would also eliminate the potential for a project to be approved by Canada despite the lack of an approved EA by the OFN, a situation that would essentially cause a project to be removed from reserve or cancelled entirely.

8. *All federal government agencies engaged in lands and resources will be informed of the jurisdiction of OFNs through workshops and courses*

It is clear that there is a great deal of lack of understanding in the federal government in terms of the jurisdiction of OFNs and how the FNLM Regime functions. To properly coordinate EA processes, federal government agencies engaged in EAs and lands and resource development impacting reserves need to understand how the regime works. The Lands Advisory Board has excellent resources available to explain the FNLM Regime. Proactive efforts by the federal government to maintain and enhance the integrity of the regime are required.

IV. Conclusion

This expert panel is an opportunity to examine the common intent to coordinate and harmonize environmental assessments, and to understand why this is not happening in practice. Matsqui's experience suggests that a combination of lack of clarity in the regime and unwillingness to implement the regime's direction combine to create inefficient and ineffective assessments. Opportunities to strengthen assessments, and relationships between OFNs and the Government of Canada exist, and can be realized if the requisite recognition for the OFN regime is built into the federal EA regime.

Matsqui First Nation is willing to work with Canada to develop the recommendations that are set out above; coordination between Canada and OFNs would yield mutually beneficial results.

Encl.