

Metlakatla Oral Presentation to CEAA Review Panel, Dec. 9, 2016

Hello, and on behalf of the Metlakatla First Nation, welcome to the Panel and other visitors to Metlakatla territory today. As members of the nine tribes of the Coast Tsimshian, the Metlakatla share this territory with Lax Kw'alaams.

Clearly, I am not Chief Leighton. He sends his sincere apologies, he was unable to return from the AFN meeting in Ottawa in time for this presentation but he sends his welcome, greetings and regards. It is unfortunate he is unable to attend, because he has somehow managed to steward his Nation through an onslaught of increasingly complex and controversial EAs in the past few years and would deliver his key messages to the Panel in a much clearer, short winded and effective way than I will.

But, for today, I will do my best to deliver Metlakatla's messages, but in my own words.

I am Anna Usborne. I have been an employee of the Metlakatla Stewardship Society for the last six years as their Environmental Assessment Coordinator. I have been involved in all aspects of executing Metlakatla's role in EAs, from early engagement with the proponent to scrutinizing final certificate conditions. I have done my best to integrate Metlakatla members' insights and concerns into each EA process. I am now supporting Metlakatla to further develop and engage in strategic stewardship initiatives which includes thinking about how to improve their approach to environmental assessments, so I am happy to be here today and have this opportunity to present to the panel, hear from my colleagues, and ideally dialogue on some best ways forward together.

To bring the Chief into the room just a little bit, I want to start with some of his words, as delivered to the NEB Northern Gateway Joint Review Panel when they held their hearings here on Coast Tsimshian Territory in 2013:

"The ayaawx Coast Tsimshian traditional law is clear that the territory owners of each generation have both the right to dictate use of the resources of their watershed and an obligation to protect living things in the stewardship areas, a duty which the Coast Tsimshian people recognize and their leaders are obligated to respect."

In addition to Enbridge Northern Gateway project, Metlakatla has been or is currently involved in over a dozen environmental assessments since 2010—under old and new CEAA legislation— [Avanti Kitsault Mine; Fairview Phase II Container Terminal; Canpotex Potash Terminal; Westview Pinnacle Pellet Terminal; Altagas Propane Terminal; Pacific Futures Energy Refinery; Kitimat Clean Refinery; Pacific Northwest LNG Terminal (PNWLNG); LNG Canada Terminal; Prince Rupert LNG; Aurora LNG; Woodside LNG; WCCLNG], and that's not including BC-only environmental assessments.

The Metlakatla leadership, and those who work for them, have been working to uphold the responsibility bestowed upon them by their ancestors throughout *all* of these environmental assessments. Our experiences with the federal and provincial EA process have been challenging. But at the very least, we can say we have substantive experience from which we can suggest needed changes to Canada's approach to conducting environmental assessments with First Nations.

At the Enbridge Panel, Chief Leighton also described the work Metlakatla has been pursuing in order to further cement Metlakatla's strength of claim in the territory. He described the DNA studies being done that show results of a direct genetic connection from human remains found at a Coast Tsimshian Ancient Village sites over 6000 years old to modern day Metlakatla members, still living in Metlakatla Village. So it is no surprise when Chief Leighton responds in frustration when asked by CEAA, (and I quote from the initial forms requesting input into a proposed project), "*If* you expect the proposed Project may impact your asserted or established Aboriginal rights, please describe how".

Well, of course a project in Metlakatla territory will impact Metlakatla rights and title.

So let's leave that question behind for EAs—we all know there will be impacts to Metlakatla if a major project is proposed in the territory.

We also know that Metlakatla Governing Council's authority is identified in their strength of claim under the treaty process and affirmed within the Canadian Constitution, and has governing rights over its lands and waters. With this governing right, Metlakatla has the right to engage in a government to government relationship with their elected counterparts at the provincial and federal governments.

We further know that the Metlakatla Governing Council and the federal government of Canada has supported and endorsed the *UN Declaration on the Rights of Indigenous Peoples* as well as the report and calls to action of the Truth and Reconciliation Commission. We know that the *Declaration* says that Metlakatla has "the right to free, prior and informed **consent**" to a project. This means that Metlakatla has the right to make a sovereign decision to accept or reject a project in their territory.

To reflect the facts I have just spoken to, the federal approach to EAs needs to be restructured, remade, and redesigned to encompass our goals of reconciliation and to support both governments to make properly informed, rigorous, respectful, respected and sovereign decisions on environmental assessments, together. To do this, there must be the following:

1. We must establish a formalized, proactive structure for government to government relationships at all levels during an EA—technical, management, and leadership, throughout all aspects of EAs, from the initial stages to the final decision.
2. The UN Declaration should be used a framework for Reconciliation with First Nations. The tenants of the declaration should guide development of a new EA process and associated governance structure. Each government should have the right to make its own, sovereign decision on a project that will be respected and upheld by legislation. If consent is not granted, a project shall not proceed. This means that the EA process no longer receives and considers "input" from First Nations. It must serve, inform and answer to First Nations' and Canada's decision making processes. With a strong government to government structure, it should also mean consensus decisions must happen at each procedural decision point throughout the EA, which will strengthen the entire process, leading to rigorous and transparent decisions on the project as a whole.
3. Consultation must start well before the beginning of an EA process, by the proponent *and* Canada. Too often Metlakatla is asked to "participate" in an EA for a project proposed for land

that has already been disposed through a tenure to the proponent, without proper consultation. Without consultation at these opening stages, the entire EA can be undermined.

4. To have a meaningful government to government decision-making structure, First Nations must be resourced comparative to those undertaking the same work in Canada's bureaucracy. We have the same work to do, including: engaging and meeting with the proponent; reviewing the project; commissioning our own studies; informing and involving and answering to the Metlakatla community; coordinating with other First Nations and jurisdictions; attending to the provincial and federal processes; and, providing sound, rigorous and defensible recommendations to leadership, etc; it only makes sense that we need support to grow our own bureaucracies to effectively execute all aspects of an EA project to support the Metlakatla government's own decision; and,
5. If a project is approved, Canada and Metlakatla must continue their relationship post EA certificate to ensure EA commitments and Metlakatla's consent to the project are upheld throughout the lifetime of the project.

Keeping these five points in mind, I'm going to move onto some other key highlights that Metlakatla would like to convey to the panel, based on our experience in recent EAs.

As you surely know, this region has recently seen an EA become dominated by frustrated communities, political wrangling, media battles, protestors, rights and title debates, court filings, etc. We understand that an Environmental Assessment is supposed to use science and experts to understand, deliberate, and make recommendations on the potential impacts of a project. And though this process is far from perfect, as EA professionals I think we can fulfill this mandate. But it seems of late that collectively as governments and public, are expecting the EA process can also deal with highly complex, high level and overarching issues steeped in history and infused in almost all aspects of First Nations relations on the north coast such as impacts to title, community rights, accommodation, jurisdiction, governance, etc. We suggest that parallel to EA process, there must be a formal, structured, proactive, government to government venue for the federal government to engage on high level consultation and reconciliation issues that arise during project reviews. Without these structured and parallel processes, we will see these overarching, non-project-specific and highly difficult issues seep into the only formal process established—the EA process. We will see further frustrations and delays at EAs unless there is a venue for addressing all the other components that fulsome consultation should entail between two governments on a major project.

We recognize the Enbridge Northern Gateway panel was an NEB process, but CEAA 2012 uses panels as well. In Metlakatla's experience, panels cannot be considered adequate "consultation" and does not lead to fulsome accommodation. Consultation by definition includes productive dialogue, listening, and addressing each parties' concerns in a respectful, appropriately timely and meaningful manner. As the Chief has said before, "panels must have been invented by a lot of lawyers"—as soon as an EA is referred to a panel, it immediately becomes adversarial. Participating in a panel for a First Nation is by definition convoluted, expensive (financially and in employee and leadership time), does not contribute to the Nation's capacity or understanding of the project, limits the ability to have meaningful government to government relationships at all levels, and results in much poorer final project conditions

than can be generated by a productive, dedicated technical working group. If CEAA continues to make use of panels, at the very least, to respect a government to government relationship, the impartial panel should have to provide their reports and recommendations to a collaborative working group of experts including First Nations and provincial and federal agencies for input and improvement, and to a government to government leadership forum for further scrutiny and refinement before being forwarded to decision makers.

Aside from panels, Metlakatla has recently witnessed several EAs that should probably not have ever started as they did. After thousands of man hours of studies, reviews, expert input, regulatory scrutiny, technical meetings, leadership meetings, agreements, commitments, court filings, and millions upon millions of dollars, the issues that were identified on day one of the environmental assessments in question still exist today. These fundamental issues are not those that could be solved through an EA process by identifying mitigations and developing conditions. Instead, they are high level and overarching issues of location, community risk tolerance, rights and title and prior consultation.

Given this recent experience, Metlakatla suggests that perhaps accepting a project for an EA just because a project is deemed “reviewable” under CEAA 2012 and an application has been submitted, is the cause of many of our concerns. Metlakatla proposes that before a project is permitted to enter the EA process, some fundamental questions need to be asked:

- Are the First Nations whose territory the project is proposed for been properly involved and informed to date, and are *they* supportive of the project proceeding to an Environmental Assessment? If not, the proponent must conduct further work to advance the project to a place where an EA will be a useful and productive exercise.
- Can the proponent produce a thorough alternatives assessment for the location and siting of their project and transparently show that their proposal is defensibly the most feasible and logical? Can the proponent show that the project is needed?
- Have all associated works supporting or forming part of the proposed project (e.g. the pipeline to their terminal) been sufficiently described to understand their associated impacts and can they, if not be examined under one EA, proceed through the EA process at concurrent times with the same working group so governments and communities can fully understand the extent of impacts associated with what is essentially one project?

If these, and perhaps other important “screening” questions cannot be answered affirmatively, let the proponent continue to work in the background to develop their plans so a productive EA can occur. We believe that EAs will then go faster, be less controversial, be cheaper, be procedurally more certain, and be more publicly supported. If a project can be accepted by all governments to enter the EA process, Metlakatla will gladly work in a government to government capacity to fully understand its impacts, work to mitigate or avoid them, develop conditions, and move the project to a decision.

Finally, some elements of the EA process here on the North Coast cannot achieve their desired purpose because other parallel and reliant federal processes are not advancing as they should— for example, marine planning; establishment of marine protected areas; shipping and emergency response;

waterway management and governance; regional cumulative effects studies with clearly defined and collaboratively established thresholds; and clarity where jurisdictional overlap occurs, particularly with BC led EAs. Working effectively across federal, provincial and First Nations jurisdictional boundaries is essential to having success in these arenas. The federal government has to go beyond “commitments” and do better to coordinate, support, and invest in achieving results in these cross-jurisdictional exercises. In turn, doing so will resolve many issues present at EA tables on the north coast of BC.

Here on the North coast, we have the opportunity to look retrospectively at an extremely intense period of proposed resource development and environmental assessment activity and to learn. The final message Chief Leighton shared with me yesterday as we discussed this presentation was that we must learn from our mistakes. We must examine the experiences we’ve just had and fix the problems rather than allow them to be repeated, which they will be if the current system is allowed to perpetuate through the next series of environmental assessments on the north coast—which are shaping up at this time to be just as controversial as those we’ve already seen. In the final rush of the PNWLNG assessment, we saw some novel improvements to the federal approach to engaging with Metlakatla: iterative and meaningful workshopping of conditions together; meaningfully incorporating First Nations third party expert input; engaging in genuine dialogue at the leadership level; and establishing a commitment for long term monitoring of the project by Metlakatla in concert with federal and provincial regulators. These were all big steps forward. But we still have a long way to go.

At the end of the day Metlakatla is trying to manage all of these development proposals while honouring the responsibility bestowed by their ancestors and expected by their community members and it is really, really difficult. Through implementing some of the changes discussed today, we may both be able to meet the expectations of our respective governments and serve our communities and our lands and resources with the respect they deserve.

In the interest of time, I invite you to please read Metlakatla’s written submission to the panel for further details and local examples and experiences to illustrate the topics I’ve touched on today, and for additional points that focus further on the technical and procedural aspects of EAs.

We thank you very much for listening, considering our input, and traveling to Coast Tsimshian territory today. Metlakatla expects and looks forward to further consultation and ongoing dialogue with the federal government for improvement of the EA process. Thank you.