



# **NORTH PEACE TRIBAL COUNCIL**

BEAVER – DENE THA' – LITTLE RED RIVER - TALLCREE

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### **WRITTEN SUBMISSION FOR THE REVIEW OF THE ENVIRONMENTAL ASSESSMENT PROCESSES**

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**HEAD OFFICE**

North Tallcree Indian Reserve #173

A

Box 820 Fort Vermilion, AB ToH

iNo

(780) 926-3446 Fax: (780) 926-4075

**ADMINISTRATION OFFICE**

Box 1889

High Level, AB ToH 1Z0

(780) 926-3446 Fax: (780) 926-4075

**EDMONTON OFFICE**

#106, 17707 - 105 Ave.

Edmonton, AB T5S 1T1

(780) 455-0304 Fax: (780) 451-0116

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## Executive Summary

NPTC First Nations have been calling on the Federal and Provincial Governments to reform the Environmental Assessment Processes for several years. Both Federal and Provincial Environmental Assessments Processes have continued to ignore Section 35.1 rights. It is appalling that we are in the 21<sup>st</sup> Century and First Nation rights can be unjustifiably infringed in favour of large industrial Projects. Moreover, NPTC First Nations feel that Counties and Municipalities have more of a say when it comes to resource development. This is completely wrong given that NPTC First Nations hold constitutionally protected Section 35.1 rights!

The current Environmental Assessment processes in Canada have failed First Nations for years by minimizing impacts to Section 35.1 rights and excluding First Nations in processes. The Federal Crown has done very little to protect the interests of NPTC First Nations and other First Nations in Canada.

NPTC First Nations believe that Environmental Assessment Processes are broken in Canada. These processes have forced timelines on First Nations, not respected Traditional Ecological Knowledge, and provide inadequate funding for First Nations to participate. Moreover, cumulative effects assessment and management has not been undertaken at a regional scale, nor has the pace and scale of development in Alberta slowed. In addition, there have been no long-term benefits flowing back to First Nations from industrial proponents who are destroying the landbase and thus destroying the traditional mode of life of Treaty 8 First Nations.

The good news is that Environmental Assessment Processes can be fixed in Canada, if First Nations and Governments collectively implement the United Nations Declaration on the Rights of Indigenous People, update federal and provincial legislation, structure a parallel Environmental Assessment Process for First Nations, give equal weighting to Traditional Ecological Knowledge, implement a guardianship program and work closely with industry on pre-engagement and long-term benefits on projects.

The Liberal Government's commitments to renewing the relationship with First Nations needs to start with an acknowledgement and respect for Treaty #8 and the rights conveyed under Treaty #8. Treaty and Aboriginal rights need to be acknowledged and respected when the Crown contemplates any decision that may impact the exercise of Treaty and Aboriginal rights. Furthermore, the Crown needs to reconcile the rights and interests of First Nations in Canada.

The NPTC First Nations provide this written submission with the understanding the Crown will take our shortcomings and recommendations seriously and will work with the NPTC First Nations on designing more robust Environmental Assessment Processes.

## **I. North Peace Tribal Council**

The North Peace Tribal Council represents four Treaty 8 First Nations in northwestern Alberta. The North Peace Tribal Council was incorporated in 1987, by the Beaver First Nation, Dene Tha' First Nation, Little Red River Cree First Nation, and Tallcree First Nation. The four First Nations hold constitutionally protected Treaty rights pursuant to Treaty Number 8 and continue to exercise Treaty and Aboriginal Rights and other interests throughout Treaty 8 territory.

### **Beaver First Nation**

Beaver First Nation (“BFN”) is governed by a Chief and four-member Council, and controls two reserves northwest of Fort Vermillion: Boyer 164 and Child Lake 164A. Party to Treaty No. 8 and a member of the North Peace Tribal Council, BFN has a registered population of 1064, over half of whom live off reserve.

### **Dene Tha’ First Nation**

The Dene Tha’ First Nation (“DTFN”) is governed by a Chief and an eight-member Council and controls three reserves: Bushe River, Meander River, and Chateh (formerly known as Assumption). Party to Treaty No. 8 and a member of the North Peace Tribal Council, DTFN has a registered population of approximately 2,400 members, with approximately 1,800 members living on reserve.

### **Little Red River Cree First Nation**

The Little Red River Cree First Nation (“LRRCN”) is governed by a Chief and a ten-member Council and controls three reserves: Fox Lake, Garden River and John D’Or Prairie. Party to Treaty No. 8 and a member of the North Peace Tribal Council, LRRCN has a registered population of over 5,000 members, with more than 75% of membership living on reserve.

### **Tall Cree First Nation**

Tall Cree First Nation (“TCFN”) is governed by a Chief and a four-member Council and controls seven reserves near Fort Vermillion, Alberta. Party to Treaty No. 8 and a member of the North Peace Tribal Council, TCFN has a registered population of 1,044, over half of whom live off reserve.

## II. Broken Promises

The four NPTC First Nations signed Treaty #8 with the understanding that members would be able to continue their traditional mode of life with no forced interference and free from white competition for as long as the grass grows, sun shines and rivers flow. Treaty #8 also guaranteed that land would only be taken up from time-to-time for lumbering, mining, trade and settlement.

Today, the landscape in northwestern Alberta has changed significantly. There has been massive agricultural expansion, clearcutting by forestry companies, oil and gas development and large tracts of wetlands destroyed; thereby diminishing the traditional mode of life for Treaty 8 First Nations. Roadways have also opened up areas to overfishing and hunting, further degrading the mode of life promised in Treaty #8. Furthermore, air quality and water quality has decreased the quality and value of fish (i.e. methyl-mercury) and wildlife (i.e. contaminants) consumed by Treaty 8 First Nations.

## III. The Duty to Consult

Following the 2004 Haida and Taku River decisions, and the 2005 Mikisew Cree decision, the Canadian Government released the “Aboriginal Consultation and Accommodation: Updated Guidelines for Federal Officials to Fulfill the Duty to Consult” (Government of Canada 2011). In the aforementioned decisions, “the Supreme Court of Canada held that the Crown has the duty to consult and, where appropriate, accommodate when the Crown contemplates conduct that might adversely impact potential or established Aboriginal or Treaty rights”. The guidelines provide federal departments and agencies with information on determining when the duty to consult has arisen and how to fulfill the duty to consult. “The courts have generally left to government the detailed exercise of implementing process that seek to fulfill the duty to consult” (2011). Consultation often occurs in the context of environmental assessments and regulatory processes. The document makes it clear that the Government of Canada expects Aboriginal people to reciprocate in the consultation process (2011).

The majority of activities that trigger the need for consultation are third-party industrial development Projects. These guidelines state that third parties do not have a legal obligation to consult Aboriginal groups, but the Crown can delegate aspects of the consultation process (such as inquiring about potential project impacts) (2011). However, “the ultimate responsibility for consultation and accommodation rests with the Crown as the Honour of the Crown cannot be delegated” (2011). Accommodation means, “to avoid, eliminate, or minimize the adverse impacts on potential or established Aboriginal or Treaty rights” (2011). If this is not possible, Aboriginal communities are to be compensated for adverse

impacts or in some cases, the proponent will not be allowed to proceed with proposed developments. The Crown is able to rely on the third party's activities to fulfill the Crown's duty to consult and accommodate (2011).

#### **IV. Province of Alberta and the Duty to Consult**

In 2005, the Supreme Court of Canada ruled in favour of the Mikisew Cree Nation who argued that the Federal government had failed to adequately consult with the Mikisew Cree Nation regarding the use of land to construct a winter road in the Wood Buffalo National Park. This case established the obligation for the Crown (both provincial and federal) to ensure Aboriginal consultation regarding potential impacts from industrial development to Crown lands. Alberta assumes a managerial role in the consultation process through the Aboriginal Consultation Office, deciding which First Nations should be consulted, and determining the adequacy of consultation, but delegates project specific activities to project proponents.

#### **V. United Nations Declaration on the Rights of Indigenous People (UNDRIP)**

On May 10, 2016, the Federal Crown endorsed the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). UNDRIP includes the standard of free, prior and informed consent of Indigenous Peoples. Several articles provide details on what is required including Article 32, which states:

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Although UNDRIP was endorsed on May 10, 2016, the Federal and Provincial Governments have done little to ensure its implementation. Furthermore, in order to implement free, prior and informed consent, processes need to be structured to measure, monitor and enforce its implementation.

## **VI. Shortcomings in Environmental Assessment Processes**

For years now, NPTC First Nations have continuously stated that Federal and Provincial Environmental Assessment Processes are broken. Legal experts and Non-government organizations have also voiced similar concerns. There are several reasons why Environmental Assessment Processes are broken including:

### **1. Timelines**

NPTC First Nation timelines don't align with Federal or Provincial timelines. There is no engagement with NPTC First Nations on an adequate amount of time to review an Environmental Assessment. Furthermore, timelines are usually set through the regulatory process, which NPTC First Nations are not involved in. NPTC First Nations have protocols that must be followed for engaging with membership including Chief and Councils, Elders, and Land Users. The process associated with each NPTC First Nation's protocol can take many days to months to ensure adequate engagement with membership.

### **2. No Process for Pre-Engagement prior to Environmental Assessment Processes**

NPTC First Nation engagement prior to submitting an application through an Environmental Assessment Process would enable NPTC First Nations to pre-screen applications and identify potential impacts to the exercise of Treaty and Aboriginal rights up front. There is no such process in place near the outset of any of the Environmental Assessment Processes. If such a process were in place, NPTC First Nations could address some of the potential issues up front and this would make the Environmental Assessment Process more meaningful for NPTC First Nations.

### **3. Pace and Scale of Industrial Development**

The pace and scale of industrial development in Alberta has been unprecedented. Industrial Proponents continue to apply daily for dispositions in Alberta without there being a plan in place for where industrial development may or may not occur. NPTC First Nations were to be guaranteed to practice their traditional mode of life on a daily basis; however, many of the preferred areas for the exercise of Treaty and Aboriginal rights have been decimated by industrial activity. Moreover, NPTC First Nations have been bombarded with trying to keep up with the pace and scale of industrial development by having to review and respond to many dispositions, as well as Environmental Assessments.

#### **4. Cumulative Effects not Assessed on a Regional Scale**

One of the major problems with Environmental Assessments is that cumulative effects assessment and management is not undertaken on a Regional scale. Environmental Assessments only base cumulative effects assessments at the local level and do not look at past, present and future impacts. Moreover, cumulative effects should be assessed using a pre-industrial baseline; however, industry and government refuse to spend considerable time and resources trying to pull together baseline information. All proposed industrial development also has a cumulative impact on the exercise of Treaty and Aboriginal rights. Nowhere in Environmental Assessments is this looked at fully nor is there any monitoring or follow-up from Federal or Government agencies.

#### **5. Capacity Funding for First Nations to Participate Fully in the Process**

Another major problem with Environmental Assessment Processes is that First Nations are not given adequate funding to participate in the process. The Federal and Provincial Governments often provide funding based on proximity to reserve. However, this formula does not work for NPTC First Nations because the exercise of Treaty and Aboriginal rights extends far beyond reserve boundaries. In addition, NPTC First Nation representatives need to engage fully with membership including Chief and Council, Elders and Land Users on the proposed impacts to the exercise of Treaty and Aboriginal rights. This process can take months and is time consuming and costly for each NPTC First Nation. Quite often NPTC First Nations are required to use funding from other program areas, which then in-turn creates a funding shortfall to other important services for each First Nation.

#### **6. Traditional Ecological Knowledge Equal to Western Science**

NPTC First Nations have become frustrated with even engaging in Environmental Assessment processes, because Traditional Ecological Knowledge is not given equal weight with Western Science. Traditional Ecological Knowledge is a compilation of thousands of years of knowledge on the land base. Moreover, Traditional Ecological Knowledge is holistic in that it covers wildlife, furbearers, land, water and air. For Environmental Assessment Processes to be more inclusive, Environmental Assessments need to give the same weighting of Traditional Ecological Knowledge to Western Science.

#### **7. No Consideration of Alternatives**

When industry submits their Environmental Assessment Application, industry is set on moving forward with their proposed Project. Unfortunately, because of this, there is a lack of consideration of alternatives to their proposed Project. Alternatives need to involve NPTC First Nations when determining the highest and



best use of lands. Furthermore, when NPTC First Nations propose alternatives to a Project, industry and governments are quick to jump on the “why an alternative will not work”. Instead, a more inclusive process should focus on the “how to make an alternative work”.

## **8. No First Nation Representation on Panels**

NPTC First Nations are becoming increasingly concerned that there is no First Nation representation on the Panels related to Environmental Assessments. Panelists that are representing First Nation interests should have lived off of the land, be accustomed to the traditional seasonal round and understand First Nation experts (i.e. Elders and Land Users). Panelists not having the appropriate First Nation expertise will not be able to understand fully the impacts on the ability for Treaty 8 First Nations to exercise their Treaty and Aboriginal rights.

## **9. Project Opportunities in relation to Environmental Assessments**

Project opportunities are a part of Environmental Assessment Processes. However, NPTC First Nations are very disheartened to learn that most contract opportunities have been pre-determined, prior to the awarding of the Project Certificate. This directly affects the benefits flowing back to each of the NPTC First Nations and often finds NPTC First Nations having to spend considerable time and resources on more meaningless short-term contracts. Furthermore, NPTC First Nations are not part of the process in relation to awarding contracts for large-scale Projects, so typically the long-term benefits flow to outsiders from other areas outside the region.

## **10. First Nations Co-Design the Environmental Assessment Process**

To date, the Federal and Provincial Governments have designed the Environmental Assessment Processes based on western science themes and outcomes. NPTC First Nations need to be a part of designing the Environmental Assessment Process. These processes may differ depending on the proposed activity. For example, an Environmental Assessment Process for a mining application would be different from a renewable energy application. Moreover, the process would need to take into consideration, for example, but not limited to: the size of the operation, the location, the proposed construction timing, the status of the current ecosystem, and the proposed impact to the exercise of Treaty and Aboriginal rights.

## **VII NPTC Recommendations for a more Robust Environmental Assessment Processes**

In order for Environmental Assessment Processes to work for NPTC First Nations the following recommendations need to be implemented as soon as possible:

### **1. Implement Free, Prior and Informed Consent**

The Federal Crown has endorsed the United Nations Declaration on the Rights of Indigenous People. Given this, processes need to be structured for free, prior and informed consent. Furthermore, these processes must involve NPTC First Nations in their development.

### **2. Revamping of Federal and Provincial Legislation and Regulation**

Given that the Federal Crown has endorsed the United Nations Declaration on the Rights of Indigenous People, Canada and the Provincial Governments need to reform their current legislation and regulations. Furthermore, given all of the relevant First Nation Case Law, such reform would need to be consistent with First Nation Case Law. Such a reform would need to include NPTC First Nations in the drafting of the new legislation and regulations.

### **3. Parallel Process for NPTC First Nations Review**

Given NPTC First Nations hold constitutionally protected Section 35.1 rights, a separate parallel process for NPTC First Nations and other First Nations should be structured for reviewing Environmental Assessment related applications. This process would include studies identified and conducted by NPTC First Nations with funding provided by the Federal Crown. This parallel process would also provide NPTC First Nations with adequate funding and mutually agreeable timelines.

### **4. Traditional Ecological Knowledge Equal to Western Science**

In order for NPTC First Nations to be supportive of Environmental Assessment Processes, NPTC First Nations demand that Traditional Ecological Knowledge be given the same weight as Western Science. Traditional Ecological Knowledge is a culmination of thousands of years of knowledge on our territory. Moreover, many First Nation Dreamers and Prophets predicted what our territory would look like today. Had Federal and Provincial Governments listened, less destruction of our territory would have been evident today.

## **5. Guardianship Program for NPTC First Nations**

NPTC First Nations hold constitutionally protected Section 35.1 rights throughout Treaty #8 territory. Furthermore, NPTC First Nations continue to be the eyes and ears on the landbase. Given this, NPTC First Nations request that the Federal Crown provide funding for a Guardianship Program for NPTC First Nations. The NPTC First Nations guardians would work closely with compliance and enforcement officers on reporting and delivering fines for infractions on the landbase. In addition, the NPTC First Nations guardians would be responsible for ensuring First Nations permit conditions are being adhered to in relation to industry permits.

## **6. Pre-Engagement Process with Industry**

A Pre-Engagement Process with Industry needs to be structured with NPTC First Nations. This Pre-Engagement Process would allow for industry meeting with NPTC First Nations before submitting their Environmental Assessment Application to governments. The Pre-Engagement Process would allow for the NPTC First Nations to identify potential impacts to the exercise of Treaty and Aboriginal rights early on. This would then allow for NPTC First Nations and industry to work together and mitigate and/or accommodate any potential impacts to the exercise of Treaty and Aboriginal rights, prior to industry submitting their application to the Federal and Provincial Governments.

## **7. Real Benefits for NPTC First Nations**

Once NPTC First Nations have provided consent on a project there needs to be long-term benefits flowing back to the NPTC First Nations. This may be in the form of long-term opportunities such as, but not limited to, joint ownership in a project, equity in a project, or long term Impact Benefit Agreements. Furthermore, NPTC First Nations need to be involved in the reclamation/remediation of a project at the end of its life, to ensure that the area has been put back to as close to its natural state as possible. Furthermore, NPTC First Nations need to be a part of post-reclamation for monitoring the area and ensuring that it becomes a functional part of the ecosystem.

## VIII Conclusion

With the Year 2016 coming to a close, NPTC First Nations are gearing up for another busy year of dealing with dispositions and Environmental Assessment related Projects. Meanwhile, the landbase for our membership to exercise our Treaty and Aboriginal rights continues to shrink at an unprecedented rate. NPTC First Nations have no choice but to protect ecosystems so our children and their children's children have the ability to exercise Treaty and Aboriginal rights across the territory for decades to come.

In order for NPTC First Nations to support Environmental Assessment Processes moving forward, there needs to be first of all an acknowledgement and respect for our Treaty and Aboriginal rights. Both the Federal Government and the Provincial Government have an important role to play. Furthermore, the relationship amongst First Nations, the Crown and industry needs to be founded on the basis of respect, fairness, transparency and shared decision-making.

NPTC First Nations remain optimistic that if we can collectively implement UNDRIP, revamp Federal and Provincial Legislation, structure a parallel Environmental Assessment Process for First Nations, give Traditional Ecological Knowledge the standing that it deserves, implement a guardianship program and work closely with industry on pre-engagement and long-term benefits on projects, then the Environmental Assessment Process may work for First Nations. However, if very little of the aforementioned is implemented, NPTC First Nations will have no choice but to be adversarial towards Projects in Treaty 8 territory.

Minister Trudeau has made big promises to First Nations during his current term. However, very few of these promises have trickled down to NPTC First Nations. 2017 will mark the 118<sup>th</sup> Anniversary of our ancestors signing Treaty #8. 2017 can also be the year that the Federal and Provincial Governments step up to the plate and move from litigation to reconciliation with First Nations. The time to act is now!