

Written Submission to the CEEA 2012 Expert Review Panel

Metlakatla Stewardship Society

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Without Prejudice

## Executive Summary

Over the past decade, the Metlakatla First Nation on the northwest coast of British Columbia has witnessed intense resource speculation in their territory. As a result, the Metlakatla Stewardship Society, as delegated by the Metlakatla Governing Council to represent Metlakatla's interests in the protection of their lands, waters and resources, has input into over a dozen environmental assessments (EAs) both pre- and post- implementation of CEAA 2012. Over the past four years, Metlakatla has concentrated its efforts on reviewing multiple EA applications for liquefied natural gas (LNG) pipelines and terminals, including the recently approved application for the Pacific Northwest LNG (PNWLNG) project.

The following document contains a series of recommendations from Metlakatla to be considered by the Expert Panel reviewing federal EA processes. The recommendations are organized thematically, with examples from Metlakatla's experiences provided for context. The overarching themes are summarized below.

- *Governance:* To honour the UNDRIP and recent court rulings, Canada must re-design the EA process such that it can support government to government engagement and sovereign decision making for First Nations involved in a project review. To do so, the federal government approach to First Nation's rights and title, consent, capacity, and governance must all be re-examined (see Section 2 for details).
- *Scope and Elements of the EA:* To truly consider all of the impacts of a proposal on a First Nation's community, the project needs to be examined holistically, including all of its associated elements over space and time, and all potential impacts including socio-economic, cultural, and cumulative. Benefits must be examined on a net benefit basis and scrutinized similarly to impacts. Scientific rigour needs to be increased for transparency and credibility. Alternatives assessments must also occur prior to the full project review and become more transparent. Finally, First Nations should play a key role in deciding whether a project is sufficiently described to be *accepted* into the EA process before significant resources are spent preparing, reviewing, and adjudicating on a project proposal (see Section 3 for details).
- *Jurisdiction and Related Processes:* On the North Coast, projects invariably are proposed for areas of overlapping provincial and federal jurisdiction, including lands and waters managed by the Prince Rupert Port Authority and overlapping First Nations' claims. For effective, defensible, and more efficient EAs, coordination across levels of governments needs to be improved. Further, for processes outside the standard EA—from joint review panels to section 67 reviews, further guidance must be developed to ensure adequate consultation and meaningful involvement of First Nations (see Section 4 for details).
- *Additional Processes and Considerations:* Environmental Assessments occur in the context of larger planning and policy processes. The advancement of other federally-led or supported process such as marine planning and marine emergency response will greatly aid in the effective execution of EAs on BC's North Coast. Further, the findings of EA reviews need to be transparently and efficiently communicated across programs, agencies and to the public. As governments, we also collectively have an opportunity and a responsibility to ensure the learnings gained from EAs executed on the North Coast contribute to a growing body of scientific knowledge and ecosystem understanding for continuous learning, stronger EAs and better future decision making (see Section 5 for details).

Metlakatla commends the federal government on undertaking a review of their approach to environmental assessments and shares the hope that collectively, we can improve the current system to both better recognize the rights of First Nations peoples in decision making as well as ensure a more sustainable future for next generations. However, we believe the changes necessary will require further dedication and collaboration amongst governments. Metlakatla expects ongoing engagement with the federal government in response to this review, and looks forward to supporting future legislative change.

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# 1 Introduction

People of the Metlakatla First Nation have occupied and used the resources of the Skeena watershed, the Tsimshian Peninsula and offshore islands, Portland Inlet and coastal areas surrounding modern day Prince Rupert since time immemorial. With the City and Port of Prince Rupert lying in the heart of Metlakatla territory, the Nation has witnessed a consistent increase in development since European contact. This development has severely impacted the Nation's ability to manage their lands, waters and resources, leading to incremental loss of quality and quantity of valued and accessible areas and resources for exercise of their rights.

Since the early 2000s, the Metlakatla First Nation has been an active contributor to numerous federal and provincial environmental assessments in their territory<sup>1</sup>. Since 2012, the Metlakatla Stewardship Society (MSS) has been delegated authority from the Metlakatla Governing Council to assess projects proposed for Metlakatla territory, contribute to all aspects of the environmental assessment processes, and provide recommendations and advice to Council as to the nature and extent of impacts from proposed projects. Council considers the advice provided by the MSS as they engage with government regulators and proponents, and consider the overall effect of a proposed project on Metlakatla's rights and title and on the community's responsibility to maintain a healthy environment for future generations.

The following submission is a product of considering the questions posed by the CEEA Expert Review Panel and reflecting on both the improvements and significant setbacks witnessed by Metlakatla through participation in environmental assessments on the North Coast both pre- and post- CEEA 2012. Comments are organized under four general themes of Governance, Scope and Elements of EAs, Jurisdiction and Related Processes, and Additional Processes and Considerations.

## 2 Governance

The majority of questions posed by the CEEA expert review panel under the heading of "Indigenous Considerations" largely relate to the overarching question of governance. A properly structured governance arrangement between the Federal Government and First Nations can support an EA process that fulfills both governments' needs to understand impacts. Governance is a broad topic, but as it relates to environmental assessments on First Nation territories, questions of consent, government to government relationships, rights and title and capacity all arise. Discussions of each of these topics are below with examples of successes and failures as witnessed by Metlakatla during recent federal environmental assessments.

### 2.1 Consent

Implementation of guidance provided by the *UN Declaration on the Rights of Indigenous Peoples* and court decisions such as *Tsilhqot'in Nation v. British Columbia, 2014 SCC 44* mean that free, prior and informed consent by First Nations to projects in their territories is essential.

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<sup>1</sup> Complete and ongoing Federal Environmental assessments under CEEA (including screenings, comprehensive reviews and panel reviews) and CEEA 2012 (including Section 67 reviews) with participation from the Metlakatla First Nation include: Pacific Northwest LNG Terminal (PNWLNG); LNG Canada Terminal; Enbridge Northern Gateway Joint Review Panel; 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; Prince Rupert LNG; Aurora LNG; Woodside LNG; WCCLNG.

### **2.1.1 Example from Metlakatla territory regarding Consent**

In Metlakatla's most recent experience with the federal environmental assessment process, (Pacific Northwest LNG), we note that the federal government and its agencies worked harder than we had witnessed on previous EAs to ensure Metlakatla had sufficient information to inform decisions on the project. More meetings were held at the technical and leadership levels, more technical information was exchanged, and additional requirements were placed on the proponent to answer First Nation inquiries. Consent, however, at least from Nations holding the strongest rights and title in the territory of the proposed project, was not sought through a formalized and transparent process.

### **2.1.2 Guidance to CEAA regarding Consent**

In re-evaluating how consent can be achieved through the EA process, consider the following:

- Free, prior and informed consent is a product of a long term, productive, mutually considerate relationship between parties.
- Working to gain consent of a First Nation should not just be an end goal of an EA, it should permeate each stage of an EA. Decisions are made throughout an EA, from accepting a project for review, to accepting a full application, to managing timelines, to issuing a certificate, to ultimately undertaking compliance and enforcement. With a robust governance structure (see section 2.2) efficient decisions based on consent should be made between parties at all stages. In effect, an EA process should be co-designed and co-administered.
- Consent most specifically and fundamentally must be sought in relation to a project's potential impacts on a First Nations rights, title and interests.
- As witnessed on the PNWLNG project, for projects with predicted significant impacts under CEAA 2012, a decision is made by the federal cabinet as to whether the impacts are "justified". As a federal decision on a project, this decision should also be subject to consultation and consent of the other governing parties.
- Following the completion of an EA, all parties must work to maintain any consent offered on a project and ensure the project is meeting the conditions of consent throughout the project lifespan.

## **2.2 Government to Government Structure**

Fundamental to the idea of consent is that two (or more) governments need to make sovereign decisions on an EA, and a project. Governments must relate to each other throughout the process on a government to government (G2G) level. This means that CEAA cannot just solicit "input" into their EA and final decision. Governments must each collectively assess a project to support each party's respective decision. In order for each government to reach its own well-informed decision, different structures, processes, and EA products need to be instituted.

### **2.2.1 Example from Metlakatla territory regarding G2G**

In most EAs, a relationship between technical representatives of both the federal government and Metlakatla Stewardship Society existed during project review. The quality of these relationships vary by project, but were strong, productive, and effective on the PNWLNG project, largely due the growing technical capacity of Metlakatla and the dedication of CEAA and their Crown Consultation Coordinator. Due to the complex nature of the PNWLNG project and associated issues that arose during the EA, a relationship between higher levels of CEAA and Metlakatla also began to form. This relationship took multiple forms during the EA, (e.g. "Principal's Dialogue"; One-off meetings to explain technical findings to higher level decision makers; meetings between Chiefs and high level federal officials to discuss the project as a whole and potential approvals, etc). Though we can look to PNWLNG as an example of some G2G cooperation, the G2G relationships above the technical level were reactive

rather than proactive, lacked formal structure, were often rushed and ill-prepared, and thus did not meet either party's expectations for the forums to generate effective high-level clarity and solutions.

### **2.2.2 Guidance to CEAA regarding G2G**

Considering the above, find below considerations to improve CEAA's approach to honouring Canada's obligation for effective government to government relationships with First Nations during EAs:

- G2G needs to be formally structured at all levels—a strong relationship between parties should be established at the technical, management, and leadership levels to support decision making throughout the EA, resolve disputes, and support consent. Such a structure should be formalized and confirmed for each EA through a Terms of Reference or equivalent process.
- G2G needs to be based on respect for each other's processes, values, and limitations, including capacity limits (see section 2.3.2).
- Formal G2G engagement should begin at initiation of the project idea, not at the inception of the EA process. This will allow time for appropriate structuring of the G2G relationship and for preparatory discussions to occur, including: conversations regarding G2G structure and process; needed parallel processes (see Section 5.1.2); alternatives to the project (see Section 3.2.2); and capacity (see section 2.3.2).
- Though G2G engagement at the decision making level should occur throughout the EA process, each government should be unfettered in their final decision on a project
- Dispute resolution tools should be identified should governments reach conflicting decisions throughout the EA process
- Engagement of the management and leadership levels should occur in particular when the federal government must make a cabinet decision on "justification" of significant impacts.

## **2.3 Capacity**

Establishing strong government to government structures and ensuring consent will require increased capacity at all levels of an engaged First Nation. Though proponent funding can often provide for effective First Nation involvement during the EA process, support for effective government to government relationships will have to come from Canada. In addition to financial considerations, solutions to capacity shortfalls will have to take multiple forms.

### **2.3.1 Example from Metlakatla territory regarding Capacity**

Metlakatla and other First Nations have faced huge capacity challenges in the last several years of increased resource speculation and development on BC's North Coast. The challenges have manifested in a number of ways:

- Due to the lengthy CEAA review of the PNWLNG EA following the BC decision, due to the need for increased expert consultant and legal involvement, and due to the increased engagement with CEAA towards the end of the EA process, funding provided by PNWLNG was expended well before the end of the CEAA review. Though CEAA did provide extra capacity funding in recognition of the extended timelines, Metlakatla, who has the ability to largely rely on in-house resources, still spent much more than what was available on this project. The spending was essential, but non-recoverable—damaging and compromising the Metlakatla Stewardship budget for future years.
- Due to the multiple, overlapping environmental assessments occurring simultaneously in Metlakatla territory (for example, we saw PRGT pipeline, Spectra Pipeline, PNWLNG, and LNG Canada all concluding simultaneously), both staff and leadership time and abilities were stretched beyond an acceptable

maximum. Though Metlakatla managed to increase its staff and supporting consultant capacity to some degree, there are no options to hire increased leadership. Rigorous decisions at the leadership level take time, attention, and full understanding—none of which were available options for Metlakatla's leaders during 2015.

### **2.3.2 Guidance to CEAA regarding Capacity**

- For Metlakatla to consider consent and be part of a true government-to-government relationship, the playing field must be leveled. Metlakatla has demonstrated how a Nation can grow its capacity to effectively engage in EAs, but is still experiencing a capacity deficit. Sufficient funds, support for long term bureaucratic development, support for leadership education, etc, are all needed
- Despite the need for certainty in timelines during an EA review process, the CEAA process must acknowledge First Nation leadership capacity challenges and design appropriate timelines to allow for First Nation leadership to execute their due process to reach a decision on a project. Timeline flexibility is especially needed when multiple projects are progressing through the EA process simultaneously in one First Nation's territory.
- An Environmental Assessment only marks the beginning of a project, and the beginning of a relationship between the proponent, First Nations, federal and provincial government regulators. Though effort has been expended to ensure capacity for involvement of First Nations exists during an EA, a tremendous need for capacity exists post-EA. Capacity is not only needed for near term requirements such as: engaging in consultation for execution of conditions; review and approval of management plans; designing monitoring programs, etc; for large projects there is also a growing need to be involved in the long term construction and operations monitoring of the project (see Section 3.5.2). The relationship and decision at the EA stage must be sufficiently supported financially to ensure a long term, positive and proactive relationship between Canada and Metlakatla to appropriately regulate throughout the lifespan of a mega-project.
- To support the increased workload of a government to government environmental assessment, increased staff and capacity in CEAA as well as other key federal agencies will also be required.

## **2.4 Consideration of Rights and Title**

Impacts to rights and title form the very basis for First Nation interest in projects developing in their territory. Though environmental assessments endeavour to assess impacts of a project on First Nations rights and title, the question is far larger than can be answered in an EA.

### **2.4.1 Example from Metlakatla Territory regarding Rights and Title**

A strong decision regarding whether a project's impacts to rights and title are acceptable requires multiple inputs. At Metlakatla, the Metlakatla Governing Council holds the ultimate responsibility to determine acceptable levels of impact to rights and title. However, their decisions are informed by input from community members and hereditary leaders, the Metlakatla Stewardship Society (responsible for assessing project impacts on rights and title through the lens of the environmental assessment and associated permits), the Metlakatla Development Corporation (responsible for negotiating Impact Benefit or Project Agreements as for growing the economic opportunities for Metlakatla members), the Treaty Office (responsible for negotiating a final treaty agreement), and other departments such as the Coastal Training Centre (responsible for developing and delivering training and employment programs). This approach respects that the issue of rights and title is large, complex, multifaceted, and dynamic and well surpasses the limits of what can be considered in an environmental assessment alone.

### **2.4.2 Guidance for CEAA regarding Rights and Title**

- A project sited within a First Nation's territory will impact their rights and title. Each environmental assessment should begin with this central tenant.
- The holistic question of whether and to what degree a project impacts First Nation rights and title cannot be answered through an EA process alone. The EA process must have a clear mandate to assess the impacts of the project on specific aspects of the exercise of rights and title related to environmental, social, economic, health and heritage impacts, but must be combined with other, formalized processes of consultation between the federal government and the First Nation to reach conclusions on overall impacts to rights and title.
- Without a formal G2G venue established between First Nations and the federal government to address political issues associated with rights and title, political motives infiltrate the EA process, eroding its integrity, lengthening its process and creating controversy. We saw this starkly in the recent PNWLNG environmental assessment (and now subsequent judicial filings).
- For Nations such as Metlakatla who are participating in the BC Treaty process, the federal government must work across agencies to understand, communicate, and consider the various impacts a proposed project will have on a First Nation's negotiations, treaty aspirations, and process. All too often, decisions on major projects are out of alignment with Treaty commitments and processes, causing impediments to both EA and Treaty processes, and confusion and delays for the project proponent.
- For areas facing multiple current and future development pressures, clarity as to the consultation obligations for the federal government and proponents is necessary. For areas like the North Coast, with multiple, overlapping claims of rights and title, ambiguous and discretionary direction to the proponent regarding consultation obligations and inconsistency of the approach of the federal government as they consult First Nations directly, causes confusion and frustration for all parties, undermines the EA process, and ultimately discourages investment. In addition to establishing a government to government relationship with Nations and establishing avenues for addressing Rights and Title and other high-level issues the EA process is ill-suited to manage, clarity as to the consultation expectations for all parties prior to, during, and following an EA is necessary.
- Consultation on land or water dispositions, including for investigative purposes, must happen well before and separate from the EA process.
- For those rights that can be assessed for impacts from a project during an EA, CEAA must recognize that rights have a social, economic, cultural, heritage, environmental and political component. The CEAA 2012 definition of "impacts" severely limits the federal EA from appropriately assessing the range of impacts associated with development on First Nations rights and title (see Section 3.1.2 for further discussion).
- Impacts do not just occur to the, "current use of resources for traditional purposes" by First Nations, as currently guided by CEAA, they impact the history, and the future of exerting that right, of passing it onto the next generation, of having the right to rejuvenate and exercise that right in the future. Assessment of current use also almost always begins with a modern day, compromised baseline but should instead acknowledge and incorporate the incremental loss of areas and/or abilities of First Nations to access and exercise their rights in their territories over time.
- During an EA, the authority to decide the level of significance of impacts of a project on First Nations rights and title must be determined by the First Nation in a supported G2G fashion, not by the proponent or the government.

### **3 Scope and Elements of EAs**

The below sections address issues relating to the scope of assessments included in CEAA's mandate as well as various elements of EAs under CEAA 2012 that have created issues in Metlakatla territory.

## 3.1 Scope

The scope of “environmental effects” to be assessed under CEAA 2012 was greatly reduced from previous legislation. For First Nations, a project must be assessed as a whole—including all of its components, throughout the lifespan of the project, and including a range of potential impacts including intangible socio-economic and cultural impacts.

### 3.1.1 Example from Metlakatla Territory regarding Scope

When LNG proposals first arrived in Metlakatla territory, Metlakatla held a number of workshops with their members to understand members’ main concerns regarding the large scale terminal and pipeline projects proposed. Though several strictly environmental concerns were at the forefront (for example, protection of fish habitat), the majority of values identified by the community were social, economic and cultural. Key values identified included access to health services, personal safety, adequate housing, and Metlakatla local capacity/human resources. Since these workshops, Metlakatla tried to incorporate membership’s main values into federal environmental assessments, but to no avail. The federal EA process does not ensure the true impacts of mega-projects on indigenous communities are rigorously assessed. Arguably, socio-economic impact assessment is the largest weakness, and the biggest need for improvement in the technical execution of environmental assessments in Canada.

### 3.1.2 Guidance for CEAA regarding Scope

Scoping a project is complex and multifaceted and includes high level and extremely technical decisions. Specific points regarding various aspects that fall under the broad heading of “scoping” are listed below for CEAA’s consideration:

- Federal EAs must focus on impacts of the project, not just those impacts under federal jurisdiction. Through collaboration with other agencies and governments (including the province of British Columbia, see section 4.2.2), CEAA must exercise their leadership role by ensuring through a coordinated, cross-jurisdictional review, impacts spanning multiple sectors and multiple jurisdictions are assessed and fulsomely described to inform rigorous decision making.
- The discretionary nature of asking CEAA to address “environmental” effects and “an effect occurring in Canada of any change that may be caused to the environment” allows proponents to avoid the broad range of potential social, economic or cultural impacts of the project on First Nations if they can argue the effect is not “environmental” in nature. Federal legislation must require the fulsome analysis of social and economic effects in an EA (as potentially experienced *on and off* reserve), along with environmental, cultural, health, and other potential impacts attributable to a proposed project.
- Data paucity should not warrant a social or economic issue being absent from an assessment. Rather, it should be a trigger for increased efforts by proponents and governments to improve socio-economic data collection. Metlakatla is an example of a Nation successfully gathering their own, relevant and appropriately scoped social, economic, and cultural information from their membership. The federal government should consider supporting additional First Nation-based data collection for ongoing improvement of socio-economic assessments and *require* this data to be fulsomely assessed in a proponent’s EA application.
- Federal EAs must examine all aspects of a project—temporally and geographically. Project splitting, or effectively eliminating certain elements of a project to avoid assessing them in an EA environment or avoid triggering an EA altogether, is unacceptable and contrary to federal and First Nations goals for sustainable development. For example, if project cannot exist without a pipeline, railway, or shipping component, the assessment should include these components. If not possible, the associated components should trigger their own, individual EAs and should be required to advance on the same timelines with the

same working groups so reviewers can understand the impacts of the full project scope. This idea is central to First Nations who desire to view a project holistically before considering the scale and consequence of its potential impacts.

- Specifically, shipping as a project element is often eliminated from assessment unless under care and control of the proponent, which rarely occurs. Furthermore, with responsibility for shipping (and associated accidents and malfunctions) unclear between the proponent, the Pacific Pilotage Authority, the Coast Guard, oil spill response companies, provincial emergency response, and Transport Canada, impacts, mitigations, and follow-up programs related to shipping are consistently under addressed in current EAs (see section 5.1.2), creating voids in a fulsome assessment of impacts on coastal First Nations.
- To understand the real state of a value to be impacted, an assessment must consider past impacts to the value, their baseline condition, their trend (improving or declining) as well as the future stresses that could be placed on that value with and without the proposed project. This consideration is especially critical when assessing impacts to resource access for First Nations to their preferred areas to undertake preferred practices in preferred ways, at preferred times.
- Values need to be scoped appropriately to the geographic range of a VC to be able to consider the context of that value and the potential relative magnitude of effect of the project on the value. This is particularly important for the assessment of cumulative impacts on a particular species with a range that is larger than that of the project assessment boundaries.
- The probability of accidents and malfunctions in EAs invariably hangs on the explanation that anything catastrophic will be an, “extremely unlikely event”. CEAA must develop clearer guidance on the requirements of the accidents and malfunctions section to not only consider the likelihood and magnitude of an event (e.g. risk), but also factor in the specific impact of the event on First Nations, the capacity for response of the local communities, as well as the *risk tolerance* of the communities to such an event. Certain projects are fundamentally opposed on the premise that a community is unable to accept the risk of the project, however small. This sentiment is valid and can be described in an assessment and should be transparently studied, assessed and treated as a valid input to decision making.
- Canada has committed to international climate targets. Impacts of climate change must be scoped into and assessed in all projects in a rigorous fashion and realization of Canada’s targets must factor into final decisions regarding projects in a transparent way. CEAA must generate clearer guidance and policy to ensure proponents are required to assess the potential impacts of their projects on climate change, as well as the potential adverse effects climate change may have on their projects. Lack of certainty or data cannot be cited as reasons to avoid this analysis.

## **3.2 Acceptance of a Project and Alternatives Assessments**

Metlakatla has identified two separate but related issues with the Alternatives Assessment required under CEAA 2012. Currently, the alternatives assessment is required only as a part of a full application submitted for review, creating several issues:

- The alternatives assessment often does not require the proponent to share or consult on some of the preliminary but most fundamental and critical aspects of their project. For example, project location, size, routing, purpose, etc., are all defined without input well before application submission.
- The Alternatives Assessment that is included is too often an exercise in justifying the project as designed by the proponent after great investment in the project has already occurred, effectively eliminating the ability for reviewers or the working group to influence the project design.

### **3.2.1 Example from Metlakatla Territory regarding Alternatives Assessment**

From the beginning of the PNWLNG environmental assessment, reviewers and the public questioned the choice of location of the project. Because the project was deemed “reviewable”, the project as applied for was assessed, without any transparency as to how the project site was chosen among potential alternatives, and without consultation on location, including with First Nations rights holders. Unsurprisingly, after 3 years, millions of man hours and perhaps billions of dollars conducting an environmental assessment for the proponent’s chosen location, the main issue at the end of the EA was the choice of location.

### **3.2.2 Guidance for CEAA regarding Alternatives Assessment**

Given the above example, Metlakatla suggests that before a project is able to be accepted into the EA process and undergo review, an early, transparent, and high level alternatives assessment should be required to be presented to CEAA and First Nation decision makers, and open to public comment and scrutiny. In order for the project to be accepted to enter into a full EA process, some fundamental questions should be affirmatively answered. Ideas for questions to be asked when the project is still at the conceptual stage (e.g. before an EA program has been designed or implemented) could include:

- Have 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 First Nations believe 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? Do the purpose and goals of the project align with local, regional, provincial and national plans?
- 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 can fully understand the extent of impacts associated with one project?

Metlakatla suggests that if a project can be accepted by all governments to *enter* the EA process, then projects accepted for the full EA review will experience faster reviews, be less controversial, be procedurally more certain, and be more publicly supported.

CEAA may also want to consider asking for the kind of “alternatives assessment” currently included in EA submissions earlier in the EA review process (e.g. before a proponent submits a full application). This will allow Canada and the Working group to scrutinize potential project elements, work to understand the proponent’s preferred alternatives, and potentially influence project design decisions *before* the proponent has fully assessed a specific project design and has major disincentives to change their approach.

## **3.3 Cumulative Effects**

Project level EAs are well known to be insufficient to assess the cumulative impacts of a project on a resource or a community. Nevertheless, in places like northwest BC, cumulative effects cannot be ignored. Canada must develop a mechanism to ensure effective cumulative effects assessments occurs during or accompanying EA processes, and enact the tools already at its disposal to ensure cumulative effects assessment are done well.

### **3.3.1 Example Regarding Cumulative Effects from Metlakatla Territory**

Considering the potential for cumulative effects in the Prince Rupert area, PNWLNG’s EA certificate included only one condition under cumulative effects, and that was to require the proponent to partake in any future cumulative

effects processes established. Canada knows that the North Coast of BC is experiencing a speculative resource boom. The lack of proactive planning tools to identify, “how much is too much” is a cause for concern for Metlakatla, other First Nations, and the general population. The inability of a project level EA to assess anything beyond the project’s “contribution” to cumulative effects, which is never deemed significant, is completely ineffective.

However, examples of how cumulative effects assessments can be done are emerging and should be considered by CEAA. Metlakatla Nation itself is undertaking a cumulative effects assessment, complete with collaboratively chosen values and thresholds. First Nations also began working effectively with Environment Canada on their Cumulative Effects Monitoring Initiative (CEMI), a program that has not been renewed by the new Liberal government. A federal commitment must arise to address cumulative impacts to First Nations territories and resources before further individual EAs can be viewed as sufficient.

### **3.3.2 Guidance for CEAA regarding Cumulative Effects**

- With the introduction of thresholds, project level cumulative effects assessment can remain effective. Proponents should be required to identify known thresholds, or work collaboratively with First Nations and public to develop thresholds or limits of acceptability where none exist.
- Regional cumulative effects assessments are essential. Though CEAA 2012 contains a mechanism to undertake strategic regional cumulative effects assessments and repeated calls have been made for regional assessments in northwest BC, none have been actuated. As cumulative effects increase and rigorous establishment of limits of acceptable change are needed, regional environmental assessments must become the norm rather than the exception.
- Proponents often limit their cumulative effects assessments to assessing future projects which have their impacts already fully described. Though a seemingly logical approach, but for projects with long lead or construction times, this approach leaves out real projects that may be carried out concurrently or even before the proponent’s. Guidance should require proponents to conduct cumulative effects assessments considering the full suite of past, present, and future projects, or conduct an assessment of multiple possible scenarios, by using proxies, estimations and sensitivity analyses. Such tools should be incorporated into cumulative effects assessments as a standard to ensure a range of possible outcomes are assessed and appropriate mitigations developed.
- Where thresholds have been developed and a project is assessed to exceed a threshold, an effect must be considered significant.
- Assessment of cumulative effects should also include assessment of the range of impacts not just within one VC or value, (e.g. the cumulative effect on fish habitat), but across values (e.g. the cumulative effect on a First Nation’s harvest from losing fish habitat, losing access to fishing grounds, perceiving decreased safety when navigating waters, and decreasing time to harvest due to increasing community employment). To date, this cross-VC ‘compound’ effect is ignored by proponents, but is perhaps felt most acutely by First Nations and should be assessed as equal to or more importantly than cross-project, VC by VC cumulative effects.

## **3.4 Benefits of the Project**

Ultimately, the federal government reviews a project to determine whether it is in the country’s best interest. To determine the project’s contribution to the national interest is a complex process that must not only identify the potential impacts of the project but weigh these impacts against the potential benefits of the project. Though the EA process currently asks proponents to describe, the “Benefits to Canadians”, this section of the assessment is highly underdeveloped and unrelated to the rest of the EA.

### **3.4.1 Example from Metlakatla territory regarding Benefits of the Project**

Of the thousands of pages containing PNLWNG's environmental assessment application that described baseline, determined the potential impacts of the project, assessed the scale of impacts and determined their significance, only twelve pages were dedicated to describing the benefits of the project.

### **3.4.2 Guidance to CEAA regarding Benefits of the Project**

Because decision makers are asked to consider the benefits of a project as an input into their decision on the project, then:

- CEAA must develop rigorous guidelines on how benefits of a project are to be assessed and communicated.
- Project benefits should be described in such a way as to reflect comparable rigour and structure that is required to assess impacts.
- Benefits should be comparable to impacts on an "apples to apples" basis. Given that most projects focus on the economic benefits of their project, the economic impacts must also be rigorously examined on a full cost accounting basis to ensure *net* economic benefits are factored into the assessment and weighed appropriately against impacts.
- CEAA must share with First Nations and the public in full transparency the assessment of project benefits upon which their final decisions are based.

## **3.5 Conditions and Compliance and Enforcement**

Rigorous, well written conditions grounded in the results of the EA are essential to ensuring a project adheres to its commitments and avoids significant impacts to Metlakatla territory. Therefore, Metlakatla must be fully involved in the development, approval, and compliance monitoring of EA conditions.

### **3.5.1 Example from Metlakatla territory regarding Conditions and Compliance and Enforcement**

Prior to PNWLNG, First Nations would work for years to provide input into the EA review process, but the final comments submitted by First Nations on the federal report and proposed conditions would not be discussed prior to finalization of the federal report. Responses to First Nations' final comments would only be received post-decision. This was incredibly disenfranchising for First Nations and also resulted in an inferior report and conditions. The process employed by CEAA to engage with First Nations to iteratively review and improve the conditions for PNWLNG was a huge improvement in process and resulted in stronger conditions, a better EA, and ultimately will result in a better project.

Further, CEAA's commitment to building and implementing a monitoring program for the PNWLNG project that includes First Nations monitoring capacity at all levels is also a huge step forward.

Future CEAA EAs should incorporate the advances made between CEAA and Metlakatla relating to development of conditions and compliance and enforcement frameworks.

### **3.5.2 Guidance to CEAA regarding Conditions and Compliance and Enforcement**

Though little opportunity has arisen in Metlakatla territory for the implementation of compliance activities by CEAA, the existence of an enforcement capacity is essential when developing conditions for a project and ensuring community expectations of a project will be implemented post-EA.

- Metlakatla remains concerned that, given construction of a mega-project such as an LNG terminal in a complex jurisdictional environment such as the lands and waters of the Prince Rupert Harbour, monitoring, compliance and enforcement capabilities of CEAA and First Nations will be immediately

insufficient. Further capacity development at CEAA, as well as joint capacity development with other regulatory agencies and First Nations is essential going forward.

- Engagement between CEAA and Metlakatla on the development of conditions must begin early in the EA review process and be granted sufficient time for multiple iterations and in-person discussion to develop the highest quality, legally binding conditions that meet federal and First Nation needs.
- Developing a structure for monitoring and enforcement should also begin early in project review (earlier than during the PNWLNG review) to ensure proactive structures are in place and capacity can be built to meet the requirements of a monitoring program.
- Currently, CEAA has no regulatory or policy guidance on the longevity of conditions for a project. For large projects that may not be built for numerous years after a CEAA decision, this fact causes major concern. Environmental and First Nations baseline conditions and the impact of cumulative effects could change drastically between the time of granting the certificate and the project beginning construction. CEAA must develop a policy on how long certificates and conditions are valid, when they must be revisited after a delay in the development schedule, and when an EA certificate becomes void following inactivity on a project.

## **3.6 Rigour**

Given that proponents are responsible for gathering all data to inform their EA application, the validity of their data and conclusions is constantly called into question.

### **3.6.1 *Example from Metlakatla Territory regarding Rigour***

The PNWLNG project required collection of baseline fish habitat and fish utilization data. The methods used by the proponent were deemed unacceptable by many reviewers, causing delay, re-assessment, numerous additional meetings, third-party verification and hundreds of conditions. Had the baseline data been collected in a mutually agreeable, defensible, transparent, verified and inclusive fashion, many issues associated with this EA could have been avoided.

### **3.6.2 *Guidance to CEAA regarding Rigour***

- Consultation with First Nations should be required to occur prior to when baseline studies are conducted to ensure methods, baseline definitions, and scope of studies are agreed upon.
- Introduction of third-party data collection and/or data verification into the federal EA process may help avoid instances of “duelling science” and timeline delays for further data collection. Making third-party verification a requirement of CEAA would remove the burden on First Nations to commission third party expert reviewers, usually for high expense and under restrictive timelines to contribute to the EA process.
- A regional, shared database of environmental information that could inform baseline for all proponents would increase data transparency, reduce the costs of EAs, and promote confidence in the findings. Though a long term endeavour, shared data is a public good that should be promoted and supported by the federal government (see section 5.3.2).
- All data collected by proponents should be considered public and, once appropriate timelines have passed considering corporate competitiveness, raw data should be vetted, shared, and housed for further public use to contribute to the advancement of shared, environmental understanding and to inform the next EA (see section 5.3.2).
- Characterization of effects, particularly socio economic and cultural effects and effects on First Nations are often subjective, based on the proponent’s opinion, and poorly defended in an EA. CEAA and First Nations must work together to develop stronger guidance for proponents assessing effects on First

Nations, and conclusions on characterizations and significance of effects must be a consensus-based or a First Nations-driven exercise.

- Similarly, significance determinations, the most important of EA outcomes, can no longer be discretionary exercises based on the “expert knowledge” of proponents and their consultants. Though criteria for significance are required in an EA, choices as to which criteria equate to significance is largely discretionary. To rectify this issue, significance *thresholds* should be established with First Nations, working groups, public, and all those who may experience the impacts of the project, prior to formal impact assessment. Then when findings are assessed against thresholds, the values, judgements, and assumptions used to determine significance are transparently presented and upheld by those potentially impacted, bringing clarity to the process and ideally elevating the level of public support and acceptance for EA findings.
- Currently, CEAA has no set policy or guidance on when a change in the project design, as originally provided for review, necessitates a new EA process. As witnessed in the PNWLNG project, the CEAA system was ill-equipped to manage proposed project changes. From Metlakatla’s perspective, the lack of preparedness allowed for a major project change to be qualified as a “mitigation” without analysis, consultation, or support from the working group. Further policy needs to be developed to avoid this occurrence in future EAs.
- CEAA’s system to issue Information Requests (IRs) to proponents and for the clock to stop when an IR is issued works well and is a superior system in Metlakatla’s opinion than BC’s approach to managing timelines. The key issue regarding IRs and timelines from Metlakatla’s perspective is to ensure federal agencies are submitting IRs as early as possible during the EA process, and ideally within BCEAO’s timelines for substituted or coordinated EAs. Early IRs allow missing information to be provided to the working group and First Nations for full consideration and as early as possible during EA review and prior to the province making a EA decision.
- Scientific uncertainty is common in EAs. First, proponents should be required to address uncertainty in their applications by transparently sharing the range of potential outcomes of impacts under consideration, conducting sensitivity analyses to their results, and probabilities of potential impacts and consequences in a digestible fashion for the working group and the public to understand. Further, the CEAA approach must ensure that where results and conclusions have a high degree of uncertainty, timelines can be reasonably delayed to address the uncertainty (if possible); or, conditions can be generated to ensure the uncertainty is verified, and Adaptive Management approaches employed, to address unexpected/unintended consequences.

## **4 Jurisdiction and Related Processes**

Metlakatla territory overlaps with provincial and federal lands and waters and the waters managed by the Prince Rupert Port Authority. With new and emerging industries proposed for Metlakatla territory, questions of jurisdiction and responsibility are continuously challenging. Several key issues are explored below.

### **4.1 Section 67 Reviews**

For projects that do not trigger a full EA under CEAA 2012 but are still proposed for federal lands and requiring federal authorizations, a Section 67 review must occur. The process of conducting section 67s is ill-defined, the regulator’s role is unclear, and First Nations have little guidance as to how their input will be considered and addressed.

#### **4.1.1 Example from Metlakatla Territory regarding Section 67s**

To date, only the AltaGas Propane terminal has triggered a section 67 under CEAA 2012. No guidance from CEAA exists as to how federal authorities are required to review the application and consult First Nations before determining the significance of impacts of the proposed project. So far, this has resulted in a low involvement of Metlakatla in the review and great uncertainty as to how Metlakatla issues with the project will be addressed by regulators. Furthermore, for the instance of AltaGas, the federal coordinating agency for the federal review is inexperienced, has little to no EA capacity, and has a financial stake in the success of the proposed project, leading to a clear and unacceptable conflict of interest.

#### **4.1.2 Guidance for CEAA relating to Section 67s**

- CEAA should remain the coordinating regulator on Section 67 reviews.
- Guidance on how to conduct Section 67s reviews (E.g. scope and expected scale of the assessment, requirements of the proponents, guidance on how to characterize impacts including cumulative impacts, etc) should be developed by CEAA in consultation with First Nations and issued to proponents.
- Similar to full-scale EAs, First Nations should be involved by the federal coordinating agency (preferably CEAA) on a government to government basis, as per suggestions in this submission. Clear direction should be developed by CEAA as to how the duty to consult with First Nations can be discharged during a Section 67 review.
- Working groups-- gathering of subject matter experts who can review, dispute, converse and question in a collaborative setting is the basis for good decision making and should form part of all Section 67 reviews.

## **4.2 CEAA- BCEAO Coordination**

Metlakatla respects and supports the idea that environmental assessments should be coordinated and efficient to the extent possible. However, after having participated in several substituted and coordinated EAs Metlakatla notes that a number of improvements need to be made to ensure these cross-jurisdictional EAs are rigorous and efficient.

#### **4.2.1 Example from Metlakatla Territory regarding CEAA-BCEAO Coordination**

We recently witnessed the “coordinated” PNWLNG EA proceed through the CEAA process for almost a year and half after being concluded in the BCEAO process. Metlakatla was of the mind that the work that CEAA and federal agencies did post BCEAO approval was essential. However, the long timeline delays could have been avoided with committed involvement of federal agencies upfront during the BCEAO process. During the LNG Canada substituted process, we saw more efficient approvals of BCEAO and CEAA, but due to the lack of federal involvement during the EA, LNG Canada is now struggling to address key EA-level fisheries issues during the permitting phase. Arguably, these issues should have been addressed by federal agencies during the EA if agencies representatives had been full involved and committed during the BC-led process. .

#### **4.2.2 Guidance to CEAA regarding CEAA-BCEAO Coordination**

- Regardless of the coordinating mechanism with BC, federal CEAA representation during EAs is needed early and throughout the process. CEAA must also use its leadership and coordinating capacity to ensure the appropriate federal departments and experts (e.g. DFO, EC, TC, HC), are participating in the EA process from the beginning—whether substituted or coordinated with BC.
- Current requirements for combining requirements of CEAA and BCEAO related to First Nations impacts in EA applications is awkward, repetitive, difficult to navigate and ineffective. CEAA and BCEAO need to develop a more streamlined way for effects on First Nations interests of importance to both jurisdictions

to be assessed and communicated. Expansion of CEAA's definition of "effects" (see section 3.1.2) to align with the "five pillars" used in the BCEAO process will contribute to a solution.

- CEAA-BCEAO coordination must continue beyond the issuance of certificates through compliance and enforcement and throughout the lifespan of the project.

### **4.3 Review Panels**

Metlakatla's main experience with federal review panels has come through the NEB joint review panel process, though Metlakatla is expecting to partake in several CEAA panels for upcoming oil refinery reviews.

#### **4.3.1 Example from Metlakatla territory regarding review Panels**

In Metlakatla's experience of the Enbridge JRP, a panel process creates a number of problems that do not result in better EAs or projects. The panel structure creates an immediately adversarial process between the proponent, government and First Nations, even if the project creates common ground. Participation in the NEB panel for Metlakatla was difficult to navigate, convoluted, extremely expensive, did not contribute to the Nation's capacity nor understanding of the project, and was highly time consuming. Compared to projects with dedicated technical working groups and regular dialogue between Canada, Metlakatla and the proponent, the quality of the conditions, the confidence in the findings of the EA, and the commitment to next steps were all far inferior.

#### **4.3.2 Guidance to CEAA regarding Review Panels**

- Meaningful consultation requires productive dialogue, listening, and genuinely addressing each parties' concerns. A quasi-judicial setting, designed solely by the federal regulator, adherent to regulator timelines, and reporting solely to the regulator does not allow for meaningful consultation.
- As addressed in section 2.2.2 government to government structures must exist in all EAs. If panel processes continue to be part of CEAA's approach to evaluating large projects, panels must report their findings to a government to government forum for further deliberation, guidance, and recommendations for decision.
- The existence of a working group—a gathering of subject matter experts who can review, dispute, converse and question in a collaborative setting, is the basis for good decision making and productive problem solving. A working group of dedicated experts should be part of any EA review, including panels.

## **5 Additional Processes and Considerations**

Environmental Assessment processes overlap in time and space with multiple other local, regional, and national processes led by a variety of government, NGO and stakeholders. The federal government must advance regional and strategic initiatives to support the work being required at the EA levels. Further, the EA process has a responsibility to be in alignment with, accountable to, and respectful of other ongoing initiatives, as well to ensure that the information generated and relied upon during the EA process is available and useable by all other parties participating in related initiatives.

### **5.1 Parallel Planning Processes**

Executing an environmental assessment on the North Coast is challenged by the fact that many other processes managing natural resources in the region are still in their infancy. Advancing parallel processes with the federal government could expedite and support more rigorous, fulsome, and efficient EAs.

#### **5.1.1 Example from Metlakatla Territory regarding Parallel Processes**

Metlakatla is currently assessing a number of projects that require shipping through federal waters, past areas of high ecological and First Nations value. Questions of cumulative effects of shipping, emergency response, waterway management priorities, protected areas, impacts to marine mammals, etc., arise during every EA. Though separate processes have been established to address the larger questions relating to these issues (e.g. Marine Use Planning; Shipping Tripartite Dialogues; Cumulative Effects Monitoring Initiative (CEMI); the new Oceans Protection Plan; etc) most have barely begun, or the federal government has withdrawn from effective participation. This not only stifles the initiative in question and First Nations goals for participating in these initiatives, it also creates issues in EAs.

### **5.1.2 Guidance for CEAA regarding Parallel Processes**

CEAA should renew support and or commit to completing key regional planning processes with Metlakatla and other Nations to provide a management framework, clear expectations and guidelines, and increased value to Environmental Assessments on the North Coast. Key guidance includes:

- The federal government needs to meaningfully re-engage with First Nations to achieve collaborative, co-governed, and mutually-agreed to Marine Use Plans for BC's coast, including the North Coast Sub-Regional Plan Area.
- Similarly, the federal government needs to deliver on commitments to establish a network of co-governed Marine Protected Areas with First Nations, including on the North Coast of BC.
- The federal government must re-engage to undertake Cumulative Effects assessment and management in a collaborative fashion with North Coast First Nations, including Metlakatla. The federal government has made specific commitments to Metlakatla to address cumulative effects. To uphold these commitments, the federal government through Environment Canada established the Cumulative Effects Monitoring Initiative (CEMI) but despite positive first year results in 2015, has failed to re-engage in 2016. Canada must re-engage and fund CEMI or a similar process, as well as allow for a mandate of Cumulative Effects *Management* with First Nations, rather than limiting the initiative to "monitoring".
- The Federal government must re-invigorate engagement with First Nations and the province of BC on matters of shipping safety, as initiated through the Tripartite Shipping Dialogues process in 2015, with a commitment to timely implementation of priorities.

## **5.2 Outreach and Transparency**

Members of the working group for environmental assessments are privileged with timely information, direct access to regulators and the proponent, and a strong record of how issues identified by working group members are being addressed through the EA review. Non-working group members may not receive full or up to date information until well after the EA is completed, which can cause significant problems.

### **5.2.1 Example from Metlakatla Territory regarding Outreach and Transparency**

Towards the end of the PNWLNG assessment, intense work was focused on the potential for Flora Bank stability to be compromised by the project, thus potentially impacting Skeena River salmon populations. A third party review was commissioned by the Tsimshian Environmental Stewardship Authority, further work was conducted by Lax Kw'alaams Fisheries, DFO and NRCan did detailed modelling review, and PNWLNG updated their marine fish reports. The updated information reached the working group, informed the final CEAA report, and ultimately influenced First Nation and CEAA decisions, but never reached the public nor dedicated non-working group reviewers, such as local NGOs, prior to the CEAA decision. The fact that only non-fulsome and out of date information was available publicly led to the use of this information by NGOs and media influencing public discourse. For Metlakatla, trying to inform their membership with the most accurate information from the EA

working group, with the conflicting and out of date information that was presented by outside sources created great difficulty in ensuring Metlakatla members were properly informed. Countering the constant circulation of out of date information drew down on Metlakatla capacity and caused major issues during final decision making by Metlakatla leadership.

### **5.2.2 *Guidance to CEAA regarding Outreach and Transparency***

- A stronger system of public outreach must be established by CEAA to provide up to date information. Increased information sharing could be supported by:
  - A clear and easily navigable website where documents are posted shortly after receipt
  - Transparent and widely shared assessments and contributions by federal agencies (such as DFO, NRCan, EC and TC)
  - Increasing transparency of working group meetings and review processes which could include reporting out from working group meetings to the public in a real-time or next-day schedule
  - Official avenues for information dissemination to agencies that may not be members of the working group but who would benefit from information such as municipalities and regional districts
  - Support by CEAA and sufficient flexibility in timelines for First Nations to provide outreach services and information to their membership prior to decisions

## **5.3 Continuous Learning**

The North Coast has witnessed numerous federal EAs over the past decade. We have a responsibility and duty to ensure each EA is conducted more rigorously and with better information than the last.

### **5.3.1 *Examples from Metlakatla territory regarding Continuous Learning***

Environmental information and understanding on the North Coast of BC is developing but many of the local ecosystems and processes have not yet been studied. Throughout past EAs, key issues arise where clear decisions are impossible due to lack of ecological or socio-economic systems understanding. Nevertheless, we do not require the federal EA processes nor follow-up and monitoring strategies to contribute to a larger, continuously building, body of scientific knowledge and understanding. For example, though Metlakatla has clear concerns regarding the dispersion of sediment from disposal at sea activities, no EA until the PNWLNG assessment would include a certificate condition for increased monitoring to verify the modelled sediment dispersion predictions above and beyond the responsibilities of Environment Canada. As a result, the same questions and debates arise at each and every EA table due to concern that modeled dispersion predictions are inaccurate in the Chatham Sound area.

### **5.3.2 *Guidance to CEAA regarding Continuous Learning***

CEAA should work with other federal and provincial agencies to ensure environmental assessments, their associated baseline data, and results of monitoring activities are combined with other government and third party gathered and verified data to contribute to a growing body of regional scientific knowledge.

- After an appropriate time that eliminates concerns over commercial competitiveness, proponents should be required to share their raw data in an accessible manner for access, download and use by other scientists.
- All data collected and posted should be peer reviewed/third-party verified (see section 3.6.2)
- In addition to generating conditions for EAs to address potential residual effects, conditions should also be permitted to specifically address the need for verifying EA findings, long term monitoring, and growing the common body of scientific knowledge.

- Ongoing data gathering and compilation should coordinate with any cumulative effects and long term monitoring initiatives (see section 3.3.2).
- CEAA, First Nations, and other science-based federal agencies should maintain an ongoing relationship beyond project-specific EA processes to maintain, enhance, and better coordinate data gathering, verification, compilation, and dissemination.

## 6 Conclusions

To honour the commitments made by the federal government to uphold the *UN Declaration on the Rights of Indigenous Peoples* and the findings of court cases such as *Tsilhqot'in Nation v. British Columbia 2014*, Canada's approach to engaging First Nations prior to, during and following environmental assessments must be redesigned. As described in this document, Metlakatla's experience as a BC First Nation facing multiple proposals for major resource development in their territory has provided some insight into how the process can be improved, including making changes at the governance, management, and technical levels of EA administration. Metlakatla's review also demonstrates how processes outside the EA structure must be established or advanced to ensure the scope of EAs can remain a clear, efficient, and cooperative technical exercise that can ultimately inform well-supported project-level decisions by First Nations and Canada.

Should the federal government's current efforts to review CEAA 2012 result in recommendations for legislative reform, as Metlakatla believes is required, Metlakatla expects further engagement and consultation by the federal government in designing, reviewing, and recommending new legislative guidance. A good opportunity is currently before us to collectively improve the system we use to ensure a sustainable environment for our future generations, and Metlakatla looks forward to taking a meaningful role alongside Canada in these efforts.

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