



Blueberry River First Nations

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October 3, 2014

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Dear Ministers:

**Re: Coastal GasLink Pipeline Environmental Assessment (“EA”)
Blueberry River First Nations (“BRFN”) Separate Submission**

This letter and the attached documents constitute BRFN’s separate submission to the Ministers regarding the proposed Coastal GasLink pipeline project (“Project”), the inadequate EA of the Project and the lack of meaningful consultation with BRFN on the proposed Project. This separate submission expresses BRFN’s rejection of the conclusions of the BC EA Office (“EAO”) with respect to the Project, and our significant concerns with the conduct of both the EA, and the consultation, associated with the Project. In summary, BRFN does not agree with the EAO’s conclusions that the Project will only result in negligible or minor impacts to our treaty rights; these conclusions cannot be reasonably arrived at given the numerous flaws in the conduct of the Project’s EA. Further, the Crown has not meaningfully consulted with BRFN on the Project to date.

No Meaningful Consultation

Given the numerous fundamental flaws in the Project’s EA, on both the consultation and assessment fronts, the Provincial Crown has not discharged its legal obligations to consult with BRFN and accommodate our rights and interests as they have the potential to be infringed by the Project, as set out in the law¹. As such, no approval of the Project should issue at this time.

¹ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at paras. 35, 39, 47; *Mikisew Cree First Nation v. Canada (Minister of Canada Heritage)*, [2005] 3 SCR 388 [*Mikisew*]; *West Moberly First Nations v. British Columbia (Chief Inspector of Mines)*, 2011 BCCA 247 [*West Moberly*].

Aside from the EA process, there has been no engagement by the Provincial Crown in consultation with BRFN on the Project or on the larger LNG development proposed in BC, including on the development that will be induced in our territory as a result of the construction and operation of LNG facilities on BC's Coast, serviced by pipelines from BRFN's territory.

BRFN's numerous and significant concerns with the EA of this Project, and with the lack of consultation with BRFN on the Project, have been set out in detail in several pieces of correspondence provided to the EAO and in a letter dated September 22, 2014 to yourselves as the Ministers responsible for the Project's approval. Enclosed is both a list of this correspondence and a zip-file with all of this correspondence in it, for your convenient reference. While the EAO has provided opportunities to comment on various documents (Application, Draft Assessment Report) during the Project's EA, and BRFN has taken those opportunities up, as is demonstrated by the letters provided, our comments have not been responded to and have not made any real difference in this EA. To the contrary, these have been no more than opportunities to blow off steam², and very few of BRFN's comments have been integrated into the proponent's plans for the Project or into the EAO's assessments or conclusions, with the result that legal requirements for consultation and accommodation with BRFN have not been met.³

BRFN's full participation in this EA has been severely limited by the EAO's decision to exclude our Nation from Schedule B of this EA until February 21, 2014 – a date by which numerous pre-application and foundational steps had already been completed. For example, the EAO had already finalized the Application Information Requirements by that date and only five working days remained in the EAO's sufficiency review of the Project Application. Please see our letter of March 18, 2014 setting out our critical concerns, and the prejudice caused, by this late decision. We highlight that the EAO held information in the form of a study, which clearly indicated the Project would impact our treaty rights and interests, since the fall of 2013.

Given the correspondence and comments on the Project and its EA that have been provided by BRFN to date, we will not repeat much of the relevant detail contained therein in this letter, but provide here only a partial list of some examples of the inadequate and ineffective consultation on the Project to illustrate the problem.

- The Project proponent and the EAO failed to adequately scope BRFN's treaty rights; this is a necessary and foundational step to proper consultation and assessment of impacts.⁴ An inappropriately narrow scope of BRFN's rights, based only on the written text of Treaty 8, was relied on for assessment purposes. This is contrary to the law which clearly sets out that the oral promises made at the time the treaty was negotiated, that our traditional mode of life could continue, are also part of the Crown's solemn promise to us

² *Mikisew*, at para. 54.

³ *Halfway River First Nation v. British Columbia (Ministry of Forests)*, 1999 BCCA 470 at para. 160 [*Halfway River*].

⁴ *Halfway River*, at para. 180.

under Treaty 8⁵. Improperly scoping our treaty rights in this EA constitutes a failure in consultation.

- BRFN received no written responses from the EAO to the letters and comments on the documents (Application, Draft Assessment Report and related materials) we provided. As a result, we were never provided any rationale as to why the vast majority of our comments were not addressed. Often we were not even informed which of our comments were and were not responded to; we were required to glean this from our review of numerous slightly revised documents which constituted hundreds of pages with no track changes incorporated to guide this review. During Application review for the CGL pipeline, BRFN identified 158 concerns with the Application; however, the proponent provided only a handful of sufficient responses and failed to address the vast majority of BRFN concerns. Our analysis of the final tracking table document, which identified 141 of our concerns, found that only approximately 10% of them had been addressed.
- BRFN's Project- and site-specific studies (BRFN's Knowledge and Use Study for the Coastal GasLink Pipeline Project (Olsen & DeRoy, 2013; 2014) and BRFN Socioeconomic Scoping and Baseline Profile for the Coastal GasLink Pipeline Project (Gibson, 2014)) were both provided to the proponent by letter dated January 28, 2014. BRFN provided an interim knowledge land use study (Olsen & DeRoy 2013) to the Proponent in August 2013, and an interim socio-economic baseline profile to the Proponent in early September 2013 (Gibson, 2013). Despite this, these studies, and the BRFN-specific information contained within them, have not informed the EA of the Project. The several hundred documented BRFN use, occupancy, harvesting and other values in the Project's footprint, and local and regional study areas, were not incorporated into the assessment analysis; this is clearly unacceptable and leads to a failure to consult on BRFN's rights and interests.
- Significant issues which BRFN has called on the EAO to address have not been adequately dealt with, with the result that the Project's EA has been conducted without an adequate analysis of cumulative effects or induced development. The further result is that the Crown has not properly informed itself of the infringements to our treaty rights that will result from the Project and from the induced development associated with the Project (and other LNG development initiatives). This induced development is the "reasonably foreseeable future development" that is a key component of a proper cumulative effects assessment that the EAO is mandated to consider.⁶ These issues have been fully canvassed in our earlier correspondence to the EAO and in BRFN's letter dated September 22, 2014, to the Ministers; further information on these critical issues is provided below.
- The EA for the Project has also provided for inadequate consultation due to numerous process problems.

⁵ *Report of Commissioners for Treaty No. 8, West Moberly First Nations v. British Columbia (Chief inspector of Mines)*, 2011 BCCA 247, at paras. 130, 137, leave to appeal refused.

⁶ *Environmental Assessment Act*, [SBC 2002], c. 43 at s. 11(2)(b); Coastal GasLink Application Information Requirements at s. 3.11.

- The overall review timeframe for the Project is too short, apparently driven by the Province's LNG development aspirations, as opposed to the goals of fulsome, effective assessment and meaningful consultation. An example of the insufficiency of the overall EA timeline for this Project is the delivery of an induced development scenario on September 22, 2014, just 11 days before the deadline for First Nations' separate submissions to the Ministers on the Project.
- Information on induced development is critical to assessing impacts to BRFN's treaty rights from the Project and yet has come far too late to inform this EA.
- The timelines for responses set unilaterally by the EAO at various stages in the process did not account for the unique circumstances of First Nations who must consult with members who hold collective rights, and work with technical consultants and legal and other advisers who are not "in-house". The enormous burden placed on BRFN by the Crown to participate in the various regulatory processes associated with LNG development (BRFN is currently dealing with three pipeline EAs, two pipelines in the National Energy Board process, and numerous other pipelines and related development referrals from the Oil & Gas Commission) has not been taken into account in review timelines. BRFN has been subject to simultaneous application reviews; this is obviously problematic and unacceptable, particularly given the near total lack of financial support the Crown provides for this review and the lack of capacity in First Nations' (including BRFN) lands departments, and generally, to deal with this onslaught of development affecting our lands and rights.
- Consistently, insufficient time was provided to review the hundreds and sometimes thousands, of pages of documents that were provided, and prepare comments on these documents with BRFN leadership, lands staff, members, and advisors input. The EAO often did not meet its own set timelines for the delivery of material (e.g., several delays in the provision of the draft Assessment Report and associated materials with little, if any, notice provided to First Nations).
- BRFN asked in writing for the EA clock to be stopped and has never received a satisfactory response.⁷
- Working Group ("WG") meetings did not constitute consultation with BRFN due to the ineffective structure of the meetings. Examples of problems with the meetings include the following: Agendas for the WG meetings were set unilaterally by the EAO; no opportunity for meaningful dialogue on unresolved issues was facilitated nor was it possible, given the number of First Nations and other WG members present; and the meetings were rushed and dominated by presentations from the proponents, which largely consisted of defending the projects, their Applications and their responses to some of the concerns that had been raised. While BRFN's technical representatives attended these meetings on our behalf, it was only to ensure BRFN's concerns were articulated to the extent

⁷ See our letter dated August 18, 2014 to the EAO and the EAO's response of August 20, 2014.

possible, and to gather further information regarding what was proposed in our territory. However, as we anticipated, no meaningful opportunities for consultation were provided at these meetings due to the concerns noted here, among others.

Environmental Assessment Failures

Detailed information on the numerous significant issues arising in the Project's EA that contribute to a wholly inadequate assessment of the Project's impacts has been set out in the correspondence provided by BRFN to date, see in particular the letters dated April 22, June 11, July 21, September 5, and September 29, 2014. Provided here are only a few examples of these issues to demonstrate how the EAO's assessment of the Project has failed.

- Insufficient or no baseline information has been provided to support an assessment of Project impacts on numerous environmental attributes or valued components ("VCs") including fish, wildlife, plants, and BRFN current uses of lands and resources for traditional purposes. Of particular note, the current decline in moose populations in our territory has not been reflected in the EA for this Project; this is a key species for BRFN treaty rights practices, and a glaring omission. Similarly missing is adequate baseline data on plants of traditional importance to BRFN. We fail to understand how any conclusions can be drawn as to Project effects when the current state of these VCs has not been properly studied or assessed. Other information required to undertake an adequate assessment of the Project's impacts is also missing, e.g., ancillary developments and BRFN TEK.
- Numerous methodological flaws call into question the assessment that has been conducted, including the following:
 - flawed scoping of BRFN rights (as described above);
 - no or inadequate baseline information available on key VCs, KIs, and other aspects of the Project (e.g., moose, culturally important plants, ancillary developments);
 - impact thresholds were unilaterally set by either the Project proponent or the EAO, with the result that they do not reflect the input of rights holders like BRFN;
 - failure to assess impacts to VCs on biologically meaningful or treaty rights appropriate scales (i.e., the assessment was based on the whole length of the project) and the failure to recognize the zones of influence of development on VCs and other values beyond the project footprint;
 - using environmental effects as proxies for Project impacts to BRFN, which ignores numerous cultural and social impacts (e.g., inability to transmit culture) which adversely affect treaty rights, and

- pushing baseline data collection and the creation of mitigation plans off to future post-EA processes, with no set criteria that must be met when undertaking this work.
- Relying on generic project-wide mitigation which does not address BRFN specific issues or BRFN rights and which therefore cannot be relied on to make conclusions about Project impacts on BRFN. Many mitigation measures are so vague as to be unenforceable which calls into question whether there will be adequate or any mitigation of Project effects, which in turn calls into question the EAO's conclusions on Project impacts. No project conditions are set out which address BRFN specific values or provide for the avoidance or mitigation of impacts to BRFN (e.g., no specific mitigation plan for moose, no cumulative effects assessment or management conditions, no BRFN specific economic issues are addressed in conditions).
- Failure to characterize Project benefits at an appropriate scale with the result that the socio-economic effects in local communities and on First Nations have not been assessed. This includes a failure to recognize and mitigate the disproportionate burden of development on First Nations, including BRFN, when relevant studies clearly demonstrate that First Nations experience a greater share of the adverse impacts of development and are less able to take advantage of Project benefits. Further, the EA failed to consider impacts of the Project on traditional and mixed economies.
- Failure to incorporate BRFN Project-specific studies as noted above, including a failure to conduct a Project-specific BRFN socio-economic impact assessment, based on the socio-economic baseline profile provided (Gibson, 2013, 2014).

Ineffective Cumulative Effects Assessment

The EAO persists in utilizing a project-based or project-specific approach to cumulative effects assessment ("CEA") that has been widely criticized in the relevant literature as being ineffective and inadequate to the task, and contrary to BRFN's requests for a VC-based assessment. It is further noted that continuing with this approach in Canada "is doing more damage than good"⁸. Effective CEA is critical to determining the significance of the Project's effects. It is also critical to assessing impacts from the Project to BRFN's treaty rights, which is required of the Crown so that its constitutional duties can be met. It is also necessary to ensure that BRFN's territory and rights are not subject to the "death by a 1000 cuts" that the law warns against.⁹ Existing levels of development in the core of BRFN's territory are already extremely high, putting the ongoing practice of our treaty rights at risk. A 2012 study concluded that, as of 2011, 66% of the land in the core of BRFN territory was disturbed, and the existing linear disturbance density of 1.58

⁸ Duinker, P.N. and Greig, L.A., "The impotence of cumulative effects assessment in Canada: ailments and ideas for employment" (2006); Forest Practices Board, "Cumulative Effects: From Assessment Towards Management: Special Report" (March 2011) at pg. 5; see also Noble, B., "Review of the Approach to Cumulative Effects Assessment in Spectra Energy's Environmental Assessment Certificate Application for the Westcoast Connector Gas Transmission Project" (May 2014).

⁹ *Halalt First Nation v. British Columbia (Environment)*, 2011 BCSC 945, at para. 628.

km/km² was so significant that traditional wildlife could cease to be viable.¹⁰ Our members consistently report that they are having difficulty exercising their rights (e.g., finding game to hunt); this is an untenable situation for our people, which is the result of Crown-authorized industrial and other development activities in our territory. This situation must be proactively addressed by the Crown; the CEA in the Project's EA fails to do so.

What is required to properly address the cumulative effects of the Project on BRFN's treaty rights is to conduct a VC-based assessment focused on BRFN's rights and based on appropriate biological and rights-based spatial scales for those VCs. The legacy of effects of past and current disturbances must also be captured in an appropriate baseline. Reasonably foreseeable development, including that induced by broader LNG development in BC, needs to be accounted for. Thresholds for the maximum acceptable change to BRFN's rights from development must also be set with BRFN. We refer you to the attached study as to what constitutes good CEA practice.¹¹ This study was prepared for BRFN by Dr. Bram Noble, a recognized expert in the field, for the Westcoast Connector Gas Transmission Project, but much of the content of this study is appropriate to the CGL Project.

There is no effective CEA proposed to be undertaken in the Project's EA (or in any of the other LNG project EAs), despite BRFN pressing for this key issue to be addressed. The result is that the potential adverse effects of the Project on BRFN have not been assessed. This is a failure in both the EA of the Project and in consultation with BRFN. This is unacceptable and not in keeping with the honour of the Crown, particularly given the level of risk to the ongoing practice of our treaty rights that already exists. We attach for your information a September 9, 2014 Briefing Note for the Premier, "Cumulative Effects on Blueberry Territory – Treaty Rights at Risk". This report contains BRFN's views as to what the Province must do to undertake effective CEA vis a vis BRFN's rights. Effectively assessing and managing the effects of the cumulative impacts of Crown-authorized development on BRFN requires the Crown's immediate attention.

As we have communicated to you previously (e.g., letter of September 5, 2014), the EAO's only proposed remedy for addressing cumulative effects for this Project – the LNG Environmental Stewardship Initiative ("ESI") – is an ill-conceived and deficient form of mitigation and/or monitoring as it is not referenced to any ecological or right-based thresholds, and is not linked to this Project through any meaningful, enforceable regulatory mechanism. Further, the ESI was not developed with BRFN's (or any other First Nations') input, and does not focus on BRFN treaty rights, with the result that there was no consultation or accommodation of our interests regarding this key line of inquiry. BRFN rejects the ESI approach as it is not sufficient to address the significant problems cumulative effects present to our rights and interests and mode of life.

¹⁰ MSES, "Effects of Industrial Disturbance on the Traditional Resources of Blueberry River first Nations" (August 2012).

¹¹ Noble, B., "Review of the Approach to Cumulative Effects Assessment in Spectra Energy's Environmental Assessment Certificate Application for the Westcoast Connector Gas Transmission Project" (May 2014).

Failure to Assess Induced Development

Very significant levels of induced development will result from the construction and operation of LNG facilities and pipelines in BC, and much of this induced development to procure the natural gas to feed these pipelines and facilities will occur in BRFN territory. This issue of induced development has been raised by First Nations (including BRFN) with the Provincial Crown in numerous venues, including LNG project EAs, for at least the last year and a half. Assessing this induced development is a necessary component of a proper CEA for the Project (and other LNG projects). For the first time, on September 22, 2014, just days and weeks before several LNG project EAs are effectively ending, the Province has responded to these concerns and has prepared an LNG Forecast Scenario (the “Scenario”). The Scenario was prepared by the Ministry of Natural Gas Development and the Oil and Gas Commission and is based on the assumption that up to five “major export facilities” would proceed.¹² The Scenario is only five pages long, representing an extremely superficial analysis of the induced development issue. BRFN rejects outright the information and conclusions set out in the Scenario. In our view, this Scenario reflects a bad faith, self-serving effort on the part of the Province to downplay the extent of the induced development that could result from the LNG development the Province is actively pursuing.

The following is a partial list of the issues BRFN has identified with the Scenario. (Note that this is not based on a technical analysis of the Scenario as we do not have the in-house technical capacity to respond to the Scenario at a technical level and, further (as pointed out below), none of the background information necessary to undertaking such an analysis has been provided by the Province.)

- There was no First Nations’ input sought in the developing of the Scenario;
- It is impossible to assess the validity of the Scenario as none of the underlying data, assumptions and methodology have been provided by the Province;
- No sources for the information contained in the Scenario are listed;
- The information and conclusions in the Scenario are contrary to BRFN’s observations on the ground in our territory;
- The information and conclusions in the Scenario (3.6% existing disturbance) run contrary to the information and conclusions set out in several independent studies undertaken in the northeast regarding existing development impacts (50-70% existing disturbance);
- No rationale is provided as to why only a 10-year time-frame has been assessed when it is anticipated that many decades of development will result from the construction and operation of an LNG export system;

¹² September 22, 2014 letter from Cory Waters to LNG Project First Nation Working Group members, enclosing “Fact Sheet – LNG Forecast Scenario”.

- The Scenario does not address linear disturbance, one of the most significant effects of this development, at all or the fragmentation, compromised ecosystem function and edge effects that result from this linear disturbance; and
- Supporting evidence for conclusions drawn in the Scenario is entirely lacking.

BRFN requests that the Provincial Crown immediately provide all of the background data, and the assumptions and methodologies utilized in the Scenario analysis, in a good faith gesture that will enable BRFN to properly assess the Scenario and the results set out therein. At this time, the Scenario has been provided far too late to play any role in the LNG EAs, and, given the obvious significant limitations in the analysis, cannot be used in any way to support the future consultation and assessment efforts of the Crown. We call on the Provincial Crown to work with us to develop the terms of reference for, and undertake, fulsome induced development analysis for the purposes of meaningfully assessing and consulting on the potential impacts of the significant adverse impacts of LNG development proposed in BC.

Conclusion

BRFN's input in this EA has not resulted in changes to the EA or the Project. BRFN's treaty rights were not properly scoped for the purposes of assessment and BRFN-specific information, while available, has not been incorporated into the Project's assessment. Key BRFN issues, including regarding cumulative effects and induced development, have not been addressed by the Crown in this EA or otherwise. Numerous methodological flaws have resulted in fundamental flaws in the assessment of the Project's effects. As a result of the above-noted, and other, reasons, BRFN rejects the EAO's conclusions with respect to the Project. It is our view that we cannot know the extent of the adverse impacts of this Project on BRFN due to a deficient assessment. Further, BRFN has not been meaningfully consulted on, or accommodated for the potential infringements that the Project represents, by the EAO or any Provincial Crown representatives on the Project. The Crown is in breach of its constitutional duties to BRFN.

BRFN requests that you, as the Ministers responsible for the EA of this Project, decline to issue an EA certificate for the Project on two grounds: a failure in consultation with BRFN on our treaty rights, and a failure to adequately assess the Project's impacts on the environment and on BRFN's rights and interests. It is your constitutional duty to assess whether the Crown's legal duties of consultation and accommodation have been discharged, before a decision on the Project is rendered. You have the obligation and the authority to deny the approval that is sought if these obligations have not been met, as is the case here. BRFN also requests that the Provincial Crown engage with us in a meaningful consultation on this Project and the other LNG projects proposed in our region, including on effective cumulative effects assessment.

BRFN is available at any time to discuss these matters and looks forward to your prompt response.

Respectfully,

Chief Marvin Yahey
Blueberry River First Nations

Encl.

cc: Michael Shepard, EAO (via email Michael.Shepard@gov.bc.ca)

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