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October 6, 2021

By Email to: ENV.minister@gov.bc.ca and EMPR.Minister@gov.bc.ca

Honourable George Heyman
Minister of Environment and Climate Change
Strategy
PO Box 9047 Stn Pov Govt
Victoria, BC V8W 9E2

Honourable Bruce Ralston
Minister of Energy, Mines & Low Carbon
Innovation
PO Box 9060 Stn Prov Govt
Victoria, BC V8W 9E2

Dear Minister Heyman and Minister Ralston:

RE: Vopak Pacific Canada Application for Environmental Assessment Certificate

I write on behalf of Gitga'at First Nation ("Gitga'at") with respect to the Environmental Assessment Office's ("EAO") decision to refer Vopak Development Canada Inc.'s ("Vopak") Application for an Environmental Assessment Certificate (the "Application") to construct and operate Vopak Pacific Canada (the "Project") to the Ministry of Environment and Climate Change Strategy and the Ministry of Energy, Mines and Low Carbon Innovation. We understand that the Project will involve the construction of a new bulk liquids tank storage facility in Prince Rupert, British Columbia that will store Liquefied Petroleum Gas (LPG), Clean Petroleum Products (CPP), and methanol on behalf of Vopak's customers.

In Gitga'at's view, neither Vopak's Application nor Crown consultation to date has been sufficiently complete to warrant a decision being made to issue a certificate for the Project. The Crown has retained all the power in this regulatory process. Indigenous experience to date has shown that when the Crown and Indigenous groups cannot agree the Crown proceeds as it intends. Ultimately, however, by doing so on a persistent and consistent basis, the government fails to uphold the honour of the Crown and fails to protect our constitutionally enshrined rights.¹

In correspondence to the EAO on August 25, 2021, and September 17, 2021, Gitga'at requested that the EAO wait to refer the Project to the Province until Gitga'at completed a full review of the EAO's report approving the Application (the "EAO Report") and until the EAO and Gitga'at could address their differences regarding the conclusions. The EAO informed Gitga'at on September 20, 2021 that it did not intend to wait for Gitga'at's full review before referring the Project but proposed that Gitga'at provide you with a submission directly.

This letter outlines Gitga'at's major concerns about the regulatory process and proposed Project, which we urge you to take seriously and respond to meaningfully prior to any decision being made. Further details are provided in the enclosed submission.

Neither the Province nor Vopak have engaged Gitga'at yet in meaningful discussions about what accommodation measures could be put in place to secure Gitga'at's consent. The Crown therefore

¹ *Yahey v British Columbia*, 2021 BCSC 1287, para. 1785 [Yahey].

cannot honourably maintain that the regulatory process has met either party's responsibility to obtain our free, prior and informed consent.

Gitga'at is seriously concerned about the EAO's approach to assessing impacts on our rights. In nearly every category of impact considered, the EAO has unilaterally down-graded Vopak's assessed magnitude of the impact on Gitga'at, without providing *any* reasonable rationale or explanation for doing so. The EAO assessment is entirely unjustified. Any reliance on Vopak's mitigation measures provides us with no comfort, given that no concrete measures or demonstrable evidence about the effectiveness of these measures has been provided.

The proposed mitigation measures identified by the EAO in Part C of its Report fall into one of four categories: 1) monitoring, 2) engagement with multilateral committees, 3) developing plans, and 4) establishing an Indigenous liaison and cross-cultural training. Monitoring is not a mitigation measure: a process to observe and record adverse effects is not the same as responding to adverse effects. Likewise, multi-lateral engagement committees assumes a 'one-size fits all' approach which is a poor substitute for genuine engagement and responses to Gitga'at's specific issues. Relying on the future development of plans to mitigate impacts is not reasonable and does not meet the Crown's obligation to understand and mitigate impacts prior to approval. Commitments to revise project designs and develop plans to respond to the anticipated impacts of this Project on our rights some time in the future does not honourably discharge the duty to consult. It requires Gitga'at to assume all of the risk. Finally, developing relationships through Indigenous liaisons, which constitutes the type of measures most frequently proposed, is not mitigation and is not responsive to legitimate concerns.

Vopak's refusal to share the Quantitative Risk Assessment and other technical material regarding the impacts of this Project has prevented Gitga'at from meaningfully assessing the positions taken by Vopak and the EAO regarding the magnitude of impacts on our rights. This lack of transparency disregards Gitga'at's right to free, prior and informed consent and again asks that Gitga'at bear all the risk.

Gitga'at has raised genuine concerns about the specific vulnerabilities our community members experience in contending with this Project's socio-economic, housing, food security and health impacts. There have been no good faith efforts by either Vopak or the EAO to grapple with or respond to these concerns or suggest measures to alleviate them.

For all the reasons provided in this submission, the Ministers should not approve this Application until Vopak and EAO have meaningfully consulted with Gitga'at with respect to the Project's impacts and ensured mutually acceptable accommodations. Gitga'at welcomes the opportunity to work with the Provincial government and Vopak to find genuine and mutually agreeable solutions to our concerns and to the Project effects on our Rights and interests that remain unresolved. We ask that the Ministers' representatives reach out to our Senior Manager, Chris Picard, by telephone at (250) 615-8296 or by email at chrispicard@gitgaat.ca to arrange a meeting to discuss these issues.

Sincerely,



Simone Reece, Director, Gitga'at Oceans and Lands Department

cc: Gitga'at Leadership Council
Scott Bailey, EAO

Fern Stockman, EAO
Gareth Stuart, EAO
Jack Smith, Prince Rupert Port Authority
Taylor Groenewoud, ECCC
Amy Dopson, VPC
Peter Keeshan, VPC
Kevin Inouye, Transport Canada

Encl. Gitga'at's Concerns regarding the Vopak Pacific Canada Project and Environmental Assessment Process

Gitga'at's Concerns regarding the Vopak Pacific Canada Project and Environmental Assessment Process

I. LEGAL FRAMEWORK FOR CONSULTATION

The EAO and Ministers' review of the Application and Project must be grounded in the current law on consultation.

The duty to consult, as a constitutional imperative, "gives rise to a special public interest that supersedes other concerns commonly considered by tribunals".² The duty is not fulfilled by simply providing a process for exchanging and discussing information.³ There must be a substantive dimension to the duty.⁴ The goal of consultation is to reach mutual understanding on the core issues of concern to Indigenous groups and requires a demonstrably serious consideration of accommodation.⁵

No mutual understanding has been reached in this regulatory process. The Crown's duty to consult obliges it to consult with the intention of substantially addressing Indigenous concerns.⁶ There needs to be genuine and specific responses that demonstrate serious consideration of Gitga'at concerns. Instead, nearly every single proposed mitigation measure in response to legitimate concerns raised by Gitga'at is a vague commitment to develop a plan or monitor an impact in the future.

The Province's *Declaration on the Rights of Indigenous Peoples Act* (DRIPA) and draft action plan thereunder commits BC to taking meaningful action toward implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) in areas of Indigenous self-determination, title and rights, racism and socio-economic well-being. The Province and the EAO have acknowledged that obtaining free, prior and informed consent is an integral aspect of UNDRIP.

UNDRIP also applies to Vopak as an entity doing business that impacts Indigenous lands and resources. The Truth and Reconciliation Committee's (TRC) call to action #92 calls on the corporate sector to adopt and apply UNDRIP standards to their operations and activities involving Indigenous lands and resources. This includes obtaining free, prior and informed consent prior to proceeding with economic development projects.

The United Nations' *Guiding Principles on Business and Human Rights* (the "UNGPs") state that corporations ought to respect human rights, which means "that they should avoid infringing on the human rights of others and should address adverse human rights impacts with which they are involved."⁷ The principles include seeking to prevent or mitigate adverse human rights impacts that are directly linked to their operations, products or services by their business relationships, even if they have not contributed to those impacts."⁸

² *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153, para. 507 [*Tsleil-Waututh Nation*]; *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, para. 40 [*Clyde River*].

³ *Tsleil-Waututh Nation*, para. 500; *Clyde River*, para 49.

⁴ *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73, para. 46 [*Haida Nation*].

⁵ *Clyde River*, para. 49; *Tsleil-Waututh Nation*, paras. 500 and 549.

⁶ *Tsleil-Waututh Nation*, para. 496; *Haida Nation*, para. 42.

⁷ Office of the United Nations High Commissioner for Human Rights (OHCHR). (2011, April). *Guiding Principles on Business and Human Rights*. pg. 13-14; online: https://www.ohchr.org/Documents/Publications/GuidingPrinciplesBusinessHR_EN.pdf.

⁸ *Ibid*, s. 13(b).

Vopak has made no meaningful effort to seek Gitga'at's consent to this Project. This is evident in the superficial nature of its responses in the issues tracking table and its vague and undeveloped mitigation measures.

If the Province is serious about free, prior and informed consent and about achieving its goal of recognizing and engaging with Indigenous governments as self-governing nations with their own jurisdictions and laws, and its goal of recognizing our right to access and use our lands and resources and exercise our s. 35 rights therein, its current model of assessment and consultation cannot continue.

Approving the Project as it is set out in the Application and the EAO Report would be inconsistent with the law and principles set out above. We set out our specific concerns below.

II. THE EAO REPORT FALLS SHORT OF CROWN CONSULTATION OBLIGATIONS

Vopak has failed to disclose their Quantitative Risk Assessment for the Project, failing to uphold the principle of free, prior and informed consent

Vopak has not disclosed their Quantitative Risk Assessment ("QRA") report used to inform the Accidents and Malfunctions chapter (Section 6). Although Vopak subsequently shared PowerPoint slides summarizing the presentation of the QRA, Gitga'at was never provided with the full QRA report.

A QRA is an essential report required to comprehensively identify potential risks and impacts to local populations. In the case of this Project, the QRA is summarized in the Accidents and Malfunctions, however the full report is not provided. The full QRA is generally included and disclosed to meet international standards of health risk management and commitments to ensure local populations are fully informed on project-related risks. A QRA encompasses some of the most critical topics that need to be canvassed in order to understand potential impacts of the Project and to respond with appropriate mitigation measures.

As it stands, the Application and EAO Report fail to articulate the specific potential risks to local populations that would be described in a QRA. For example, a QRA would provide key figures related to potential fires, explosions and the dispersion of chemicals as they relate to the surrounding environment (including populated areas). Table 6.3-1 of the Application identifies interactions related to fire and explosions that were considered, and Section 6.3.2.9.3 highlights "*During all phases of the Project, a fire or explosion resulting in human casualty or injury of employees or contractors working onsite could affect the well-being of residents of the local community*" but it is not clear to what extent. Furthermore, it has been noted on the British Columbia EPIC site that Gitga'at are not alone in being concerned about the QRA and requesting its disclosure.

A QRA is essential for enabling Gitga'at leadership to make sound decisions with respect to the Project. Gitga'at requires disclosure of the full QRA report to understand many issues such as the methodology applied in the QRA, whether proposed mitigation measures are reasonable and the environmental, health and safety hazards of various products being spilled, among other concerns. In withholding this key information, Vopak fails to respect the principle of free, prior and informed consent recognized by the Canada-endorsed UNDRIP and the TRC.

Vopak has breached corporate commitments under UNGP and with DRIPA requirements. If a private sector project directly affects the traditional territory of Indigenous People, free, prior and informed

consent must be obtained. This requires full disclosure of risks and impacts, which Vopak has not provided. Vopak has failed to live up to its commitment to align its environmental, health and safety management systems with international best practices and benchmarks such as the World Bank Group's Environmental, Health and Safety (EHS) Guidelines, which encourage transparency. Both the law and international standards require that Vopak be transparent with Gitga'at about health and safety risks associated with this Project.

The Minister should protect Gitga'at's right to free, prior and informed consent. As part of this obligation, the Minister should at minimum, require that the EAO enlist an ***independent*** expert reviewer to examine and provide oversight of the socio-economic and health and well-being components and the full QRA of the application.

The EAO Report fails to address cumulative effects

The Crown is required to consider existing limitations, including cumulative impacts and historical context, on Indigenous rights when consulting on a project's potential impacts.⁹ The Crown needs to consider whether cumulative impacts on Indigenous rights have sufficiently infringed such that it is no longer possible to meaningfully exercise those rights.

This environmental assessment has failed to properly consider cumulative effects and has not accounted for the significant impacts on the current use of lands and resources by Indigenous groups including Gitga'at, as required by law.

Gitga'at submitted a Traditional Use and Occupancy Study (TUOS) for this Project, which had a Study Area centered in Southern Chatham Sound around the Project area. Gitga'at members identified the Study Area as a key harvesting area. Gitga'at has strong ancestral and continuing ties and a long history connected to Prince Rupert Harbour and the surrounding Chatham Sound. These ties are reflected in place names and over 654 identified use, occupancy and spiritual sites.

Gitga'at's TUOS pointed out that Gitga'at's seasonal round of resource procurement has been drastically altered over time as a result of industrial and urban development. Certain marine resources, like abalone and sea cucumber, are no longer available for harvest due to industrial over-harvesting. Many other key marine resources no longer occur in the abundance known by the grandparents of Gitga'ata harvesters.

Gitga'at members have been pushed out of the areas of most concentrated use and cultural importance to the margins of the areas traditionally used. These large-scale cumulative impacts represent a meaningful diminution of Gitga'at's way of life and an unjustifiable infringement of Gitga'at rights.¹⁰ These cumulative impacts provide the backdrop against which this Project must be assessed.

Vopak assessed the residual cumulative effects on Gitga'at's harvesting rights in the study area to be of "moderate" magnitude and acknowledged that the Project is anticipated to deter harvesting activities and consumption of harvested resources for the entire life of the Project.¹¹ Gitga'at identified important

⁹ *Chippewas of the Thames First Nation v. Enbridge Pipelines Inc.*, 2017 SCC 41, para. 42 [*Chippewas of the Thames*]; *Tsleil-Waututh Nation*, para. 505.

¹⁰ *Yahey*, paras. 3, 552.

¹¹ Application, pp. 8-2-20-21 and 8.2-83.

harvest areas within the Project footprint for species including seaweed, clams and salmon for which Vopak anticipates permanent, high-magnitude effects to occur, including permanent loss and disturbance.¹²

Vopak acknowledges that Gitga'at members utilize travel routes that intersect the Project shipping route and that travel to access harvesting, spiritual and cultural sites may be affected by Project marine activities at the proposed facility and jetty.¹³ Vopak acknowledges that restricted passage, increased safety risks and changes to navigation may result from Project activities. Vopak further acknowledges that the Project will extend the timeline of cumulative effects on Aboriginal interests and states.

Vopak's response to these acknowledgments is that its proposed mitigation measures will keep changes neutral or reverse existing conditions. Vopak provides no support for this claim. None of the project-specific mitigation measures proposed by Vopak are substantive or even developed yet. Under each category, Vopak's summary of proposed mitigation measures are limited to following the law and proposals to develop designs, plans and monitoring at some unknown point in the future. Vopak also does not provide any analysis or indication that it has considered other active and proposed projects in the region. Gitga'at cannot meaningfully respond to any of the so-called mitigation plans because they do not yet exist. The Crown cannot reasonably rely on such measures to support its duty to consult and accommodate.

Vopak and the EAO also seek to rely on government initiatives like the Ocean Network Canada Partnership, the Marine Environment Water Quality Program and the Green Marine Program to address cumulative impacts. Vopak does not explain in any detail what its participation in these programs will consist of or how they will address any of the specific impacts on Gitga'at rights.

Gitga'at is further concerned with cumulative effects as they relate to:

- **The health and well-being of Gitga'at members.** This is particularly focused on housing and the costs of living. Current experienced housing and cost of living conditions in Prince Rupert are seriously negatively impacting Gitga'at members.
- **Increased marine traffic.** The Project will add an estimated 171 vessels yearly to the traffic at the Port of Prince Rupert. Each of these vessels will transect Chatham Sound twice, inbound and outbound, thereby doubling the carrier crossings through Chatham Sound to 342 per year. Each of these 342 Vopak vessel crossings will also require use of a pilot boat and tugs, which adds additional trips between Prince Rupert Harbour and the Triple Island Pilot Station. They will also occupy numerous anchorages, precluding Gitga'at's fishing activities and potentially damaging fish habitat. Vopak and the EAO have not addressed the hazard compatibility of vessels carrying dangerous goods of different types and interactions if these goods are spilled or catch fire.

The Application and the EAO Report also fail to address the risks posed by navigation at the berth. This is especially important when taking into account the proposed expansion to the neighboring Ridley Terminals dock. This expansion is located just north of the proposed Vopak dock, and, when completed, will shorten the distance between Ridley Coal and the Vopak Dock. The higher density of marine traffic in this area could significantly increase the risk of accidents

¹² Application, p. 8.2-21.

¹³ Application, p. 8.2-30.

and potential severity of accidents. In addition, Gitga'at members regularly use this route as a thoroughfare between fishing sites. Losing this important travel route to the Project further alienates Gitga'at from its traditional fishing territory and eliminates a safe means of travel for Gitga'at fishers.

The increase in marine traffic will have numerous cumulative effects on Gitga'ats Rights and Interests, including but not limited to: the ability of Gitga'at members to safely access and use harvesting areas in the Chatham Sound region; safety on the water due to vessel wakes; safety on shore from vessel wakes when harvesting seaweed, mussels, abalone, sea cucumber, chitons; safety of fishing gear that is set for halibut, groundfish, prawn, shrimp, crabs; continued access to preferred locations and times for fishing and seafood gathering; damage to harvesting areas, especially bivalve beaches and seaweed rocks due to wakes; increase of marine users. Vopak and the EAO have failed to identify appropriate and effective mitigation measures to address these concerns.

- **The lack of accommodation or direct mitigation** for the multitude of impacts resulting from continued PRPA development.
- **Marine safety.** Gitga'at recently conducted a household survey of its community members. Our data indicates that community members are experiencing marine safety incidents within the Project area, already on a regular basis. This issue is not being addressed in the Application or EAO Report.
- **Air quality concerns.** The Project's impacts to air quality is both a standalone concern and a significant cumulative effects issue.

The British Columbia Supreme Court stated very clearly in *Yahey* that the Crown cannot rely on present policy initiatives that could change or be abandoned at any time and which do not as yet sufficiently protect Indigenous rights. It is not an answer, when an Indigenous nation raises concerns, to maintain the status quo indefinitely and indicate processes are in development to take care of these matters.¹⁴ There is a clear need for timely, definitive, enforceable legal commitments.¹⁵

The court in *Yahey* found that one of the fundamental problems with regional initiatives relied on during consultation by the Province is the lack of a definitive timely deadline to undertake these changes and a means to ensure these changes are actually implemented with some force and effect. The Province's cumulative effects processes lack objectives and thresholds and contribute further to "the problem of persistent delay".¹⁶

The Province needs to end its "practice of deferring real engagement" and referring Indigenous nations to processes that are "fledgling and inoperative rather than dealing substantively with their concerns about further development being continuously authorized".¹⁷

¹⁴ *Yahey*, para. 1806.

¹⁵ *Yahey*, para. 1417.

¹⁶ *Yahey*, para. 1630.

¹⁷ *Yahey*, para. 1783.

EAO’s assessment of the magnitude of effects is opaque and flawed

The EAO Report provides no information about how the EAO arrived at its conclusions concerning their determinations of the significance of each potential effect to Gitga’at’s interests. There is no way to discern why the EAO concluded that there would be no potential residual effects on the human health of Gitga’at members, for example, or why EAO has determined that the Project would result in only a small but detectable change to the ability of Gitga’at to harvest resources for commercial distribution. The EAO provides no framework or helpful details to explain this critical part of the assessment.

Further, as demonstrated in the chart below, the magnitude of the Project's effects to Gitga'at's interests assessed in the EA were down-graded, or considered less severe, in the EAO Part C-Gitga'at Chapter report as compared to Vopak's Application-Gitga'at Chapter. In every instance except Access and Travel, the EAO report downgrades the anticipated magnitude of the effect. The EAO does not provide any rationale or explanation for the downgrade.

Gitga’at Interest	Effect Magnitude – Vopak’s Application	Reference	Effect Magnitude – EAO Report	Reference*
Harvesting Rights	Moderate to High	Table 8.2-5; page 8.2-21	Low to Moderate (marine) Low (terrestrial)	Pages 10 and 12
Sense of Place and Sense of Attachment	Moderate to High	Table 8.2-7; page 8.2-28	Moderate	Page 15
Travel and Access	Low to Moderate	Table 8.2-9; page 8.2-35	Low to Moderate	Page 18
Indigenous Governance	Moderate to High	Table 8.2-11; page 8.2-42	Low	Page 21
Cultural Identity	Moderate to High	Table 8.2-13; page 8.2-48	Low	Page 23
Indigenous Health	Moderate	Table 8.2-15; page 8.2-57	Low to Moderate	Page 26
Socioeconomic Conditions	Moderate	Table 8.2-17; page 67	Low	Page 29

**From the most recent version Gitga’at received from the EAO.*

These divergences from Vopak’s assessment would only be appropriate if there were material changes in the Project design that lessened the effect, or if meaningful mitigation measures were put in place to ameliorate effects. Gitga’at is unaware of any material changes to the Project that would reduce effects to Gitga'at interests. In fact, Vopak has only added components to the Project, such as condensate and methanol, which would increase, not decrease, effect magnitude. The EAO has downgraded the significance of effects without any justification. Further, the EAO refused to discuss these concerns before referring the Project to the Province.

The flaws in the EAO’s approach and findings are reminiscent of what occurred during the Trans Mountain Pipeline regulatory review, per the findings of the Federal Court of Appeal when it overturned the certificate approval:

...missing from both the Crown Consultation Report and the individual appendices is any substantive and meaningful response to these concerns [of the Indigenous applicants]. Nor does a review of the correspondence exchanged in Phase III disclose sufficient meaningful response to, or dialogue about, the various concerns raised by the Indigenous applicants. Indeed, a review of the record of the consultation process discloses that Canada displayed a closed-mindedness when concerns were expressed about the Board's report and was reluctant to depart from the findings and recommendations of the Board. With rare exceptions Canada did not dialogue meaningfully with the Indigenous applicants about their concerns about the Board's review. Instead, Canada's representatives were focused on transmitting concerns of the Indigenous applicants to the decision-makers, and nothing more. Canada was obliged to do more than passively hear and receive the real concerns of the Indigenous applicants.¹⁸

EAO's approach here is even worse than the approach taken by Canada's consultation team during the Trans Mountain process because in the present circumstances EAO has unilaterally *downplayed* Vopak's findings to the prejudice of Indigenous groups without *any* justification. The EAO has provided insufficient information regarding its approach to assessing the significance of impacts. EAO's downgrade of the magnitude of the project effects in the Application as compared to the Application is entirely unjustified.

Vopak's proposed mitigation and response measures are grossly inadequate

Vopak does not propose any concrete measures that would successfully mitigate or respond to risks and adverse impacts to Gitga'at's rights and interests. Vopak has further failed to provide any demonstrable evidence or case-studies to support Vopak's expectation that their proposed mitigation or response measures will be effective. The proposed mitigations, as drafted, will do little to prevent adverse impacts to Gitga'at and other Indigenous peoples.

Mitigation measures are measures built into the design and operations of a project so that if an accident or malfunction occurs, mitigation measures lessen their impact. Response measures should address all other risks and impacts not alleviated by mitigation measures. To properly address the potential risks and impacts of the Project, Vopak's response and mitigation strategy must: : (a) highlight potential effects that th Project may have on people and the environment, (b) determine the significance of such effects, and (c) provide a clear plan for mitigation that incorporates stakeholder feedback and concerns. Identified impacts, even where minor, require specific mitigation plans. If an effect can be measured, it should be mitigated. Further, a proper mitigation strategy must include mitigation measures for cumulative impacts.

Vopak has not provided an adequate mitigation and response strategy for Project risks and impacts. Mitigation measures are either absent or difficult to identify in the Application. The Application references general comments from various stakeholders but targeted responses, rationale, and detailed mitigation procedures are rarely provided by Vopak. In some instances, Vopak proposes alternative mitigation measures; however, these measures lack detail and do not address the specific comments/concerns put forward by Gitga'at in its correspondence.

Information pertaining to proposed mitigation and response measures should be specific. In addition, Vopak must provide a rationale and justification for not addressing certain stakeholder comments or

¹⁸ *Tsleil-Waututh Nation*, para. 603.

concerns, and a plan for employing alternative management measures to mitigate Project-induced risks. With respect to alternative management measures, disclosure and consultation efforts need to be detailed and incorporated into Project documentation in order to highlight the potential risks to impacted communities, and monitoring activities that need to be included.

Recommended mitigation and response measures should be further informed by community health and safety international risk management standards¹⁹ and updated health risk management guidance for private sector projects²⁰ as well as international guidance on future population health goals for the Pacific region.²¹ When none of the above can occur, compensation is the only remaining option.

Part C of the EAO Report cites four documents containing mitigation measures: 1) mitigation measures identified for each Gitga'at interest in Vopak's Application, 2) Vopak's summary of mitigation measures, 3) Table of Conditions and 4) the Section 67 Draft Determination Rationale. The proposed mitigation measures identified in these documents primarily fall into one of four categories: 1) monitoring, 2) engagement with multilateral committees, 3) developing management plans, and 4) establishing an Indigenous liaison and cross-cultural training.

Vopak proposes to monitor numerous environmental parameters; however, they make no commitments around threshold levels that would trigger management measures nor the management measures themselves. Further, Vopak alludes to something they call an Aboriginal Interests monitoring program. This is loose commitment that gives Gitga'at no comfort since it does not make any reference to what would be monitored nor why or what would be done if adverse effects are revealed. Monitoring is not a mitigation measure. While monitoring programs are useful to evaluating whether mitigation measures are effective, they are not mitigation measures themselves. Simply having a process to observe and record adverse effects is not the same as responding to adverse effects.

Vopak proposes to establish and engage with a Community Services and Infrastructure Committee (CSIC) as a mitigation measure for addressing Gitga'at community well-being. Their proposed membership in the CSIC includes First Nations, municipalities, health authorities, emergency services, employment and training managers, proponents, and government agencies. Such multilateral engagement fails to recognize Gitga'at's unique features, issues and interests and the Project's effects on them. It assumes that a 'one-size fits all' approach is appropriate rather than genuinely engaging with and responding to Gitga'at's specific issues. Consultation requires Nation-specific engagement and responses.

Vopak proposes to rely on developing myriad management plans to mitigate the numerous Project and cumulative effects to Gitga'at's rights and interests. This includes a series of environmental plans such as an Operation Environmental Management Plan, Construction Environmental Management Plan, Air Quality and Dust Control Management Plan, among others. Vopak has further identified an "Indigenous Interests Management Plan" presumably to serve as a "catch-all" for the outstanding concerns of

¹⁹ International Finance Corporation, 2012. Performance Standards for Environmental and Social Sustainability. Available online at: https://www.ifc.org/wps/wcm/connect/Topics_Ext_Content/IFC_External_Corporate_Site/Sustainability-At-IFC/Policies-Standards/Performance-Standards.

²⁰ Barron, T. and Shandro, J. 2020.

²¹ WHO, 2019. For the Future: Towards the Healthiest and Safest Region. A vision for WHO work with Member States and Partners in the Western Pacific. Available online at: <https://iris.wpro.who.int/bitstream/handle/10665.1/14476/WPR-2020-RDO-001-eng.pdf>.

Gitga'at and other First Nations. With respect to mitigating impacts on health, EAO notes that Vopak would be required as part of the federal Section 67 Determination to develop and implement its Community Services and Infrastructure Committee and Health and Medical Services Plan.

Management plans are not appropriate mitigation measures. As discussed above, relying on plans to mitigate impacts is not reasonable because: (a) they fail to recognize Gitga'at's unique interests and project effects on them, (b) the content of these plans remains unknown because the plans do not yet exist, and (c) the results of the proposed planning processes are unknown. It is impossible to predict whether these plans will yield results that genuinely mitigate effects to Gitga'at's interests. It is possible they will make no difference whatsoever.

Vopak repeatedly relies on the establishment of an Indigenous Liaison position and cross-cultural awareness training as mitigation measures. Vopak also proposes a rail dialogue forum (at the Terms of Reference stage only) as a mitigation measure. However, it is unclear how these initiatives will actually function to mitigate risks and impacts. Maintaining positive relationships is not mitigation and yet these measures make up a large part of identified mitigations recommended for impacts to Indigenous groups.

Establishing a liaison position does not guarantee meaningful engagement with Gitga'at or that this engagement will in any way address adverse impacts. Cross-cultural awareness training is not an acceptable mitigation measure. Even if there were a way to guarantee that Vopak's proposed cross-cultural training was meaningful and impactful, there is no evidence that this training would have any bearing on risks and impacts. Finally, proposing to run a rail dialogue forum is simply a commitment to a discussion, not a concrete response to an adverse effect. Again, processes are not mitigation measures.

Furthermore, to mitigate the increased alienation of Gitga'at members from important spiritual and cultural sites, Vopak proposes to "design the Project to minimize the footprint area and reduce the visual effects" and to "develop and implement site-specific management plans" prior to commencing activities. These are not mitigation measures, they are deferrals of the development of actual mitigation measures. There is no meaningful way for Gitga'at to assess so-called mitigation measures that have not yet been developed. This is not a valuable use of our limited resources and is not responsive to the significant efforts we have made to help Vopak and the Crown understand the real and measurable disruption this Project will cause to our way of life.

To illustrate the above further, consider Table 8.2-8 of the Application, which summarized its proposed mitigation measures for access and travel. In this list, Vopak includes as "mitigation" its commitments to abide by existing mandatory federal procedures, such as using piloting of carriers and abiding by transit speed regulations. Following existing legally mandatory minimums does not constitute mitigation.

Furthermore, the Application acknowledges that residual adverse effects to Gitga'at's interests are expected to persist after consideration of Vopak's mitigation measures. Therefore, it is illogical for either Vopak or the EAO to conclude that proposed mitigation measures would eliminate the residual effects to Gitga'at's interests.

The only mitigation measure that has the potential to deliver tangible results is Vopak's proposal to provide financial support for social housing, noted in Vopak's summary of mitigation measures (reference number CI-C-1 Effect of Project Construction on Rental Housing). Housing costs and costs of living more generally is an important concern for Gitga'at, stemming from Project and cumulative

effects. However, Vopak's social housing commitment is vague and does not confirm that impacts to affordable housing will be meaningfully addressed.

Instead of adopting a meaningful framework for establishing effective mitigation measures, Vopak has opted for a cursory and hollow approach. Vopak does not identify any tangible or concrete measure designed to reduce adverse effects. It does not contemplate mitigation measures for cumulative effects. The Application does not identify a commitment to any measurable outcome, objectives or targets associated with each interest affected by the Project. Further, no phase of Vopak's Project development appears to be linked to successful implementation of the mitigation measures.

This approach to mitigation is inconsistent with the law. Vopak's proposed mitigation measures essentially amount to 'kicking the can down the road'. This approach allows Vopak to deal with risks and impacts after it has received regulatory approval for the Project and no longer has an incentive to meaningfully address the Project's effects. This mitigation strategy has been rejected by the courts. As with Vopak's and the EAO's treatment of cumulative effects, this approach to mitigation measures contributes further to "the problem of persistent delay".²² This is yet again another effort to defer real engagement with Gitga'at that deals substantively with their concerns and instead refer Gitga'at to processes.²³ This approach is inconsistent with the law. The Minister should not approve the Project until Vopak commits to concrete mitigation measures that meaningfully address the risks and impacts to Gitga'at's rights and interests.

The EAO Report fails to properly measure the potential health effects of the Project

The EAO Report does not properly measure the Project's potential health effects to disaggregate Indigenous populations. The conclusions in the EAO Report are based on insufficient baseline data. Current, community-specific baseline information and proper community health profiling is critical to both impacted communities and the Project team for identifying, managing and mitigating risks to Indigenous and non-Indigenous people related to the Project. If the proponent does not understand the baseline, it cannot understand its risks.

Vopak should further align the health chapter of the Application with best practice global frameworks and guidelines on impact assessments such as: BC First Nations HIA Guidelines (Shandro & Jokinen, 2018)²⁴, and the Asian Development Bank's *Health Impact Assessment – A Good Practice Sourcebook* (ADB, 2018)²⁵ with a focus on guidance related to the integration of health in EIA.

As it stands, the Application and the EAO Report provide little information about the diversity and importance of Indigenous communities, resulting in inaccurate conclusions. Gitga'at community members comprise a portion of Prince Rupert's diverse population and hold specific vulnerabilities relating to project induced/related socio-economic and health impacts.

Gitga'at's socio-economic data is current and our findings differ from Vopak and EAO's conclusions. For example, our team has collected up-to-date socio-economic data concerning Gitga'at members that

²² *Yahey*, para. 1630.

²³ *Yahey*, para. 1783.

²⁴ Available online: <http://www.hianetworkasiapac.com/wp-content/uploads/HIA-framework-for-BC-First-Nations.pdf>.

²⁵ Available online: <https://www.adb.org/documents/health-impact-assessment-sourcebook>.

provides evidence of serious safety impacts already affecting community members in the Project area's marine environment. Contrary to the EAO Report and Vopak's Application, our data supports the need for additional mitigations as the Gitga'at are already facing serious impacts to health from development in the area.

We recommend that the Minister require Vopak to appropriately characterize how affected populations specifically interact with the Project based on current data. By involving Gitga'at community members in the region, or supporting a regional baseline for Prince Rupert's vulnerable community members, Vopak may be able to identify and manage the associated impacts that are unique/specific to Gitga'at.

In addition, Vopak must consider the aggregated health of the Vopak workforce and local communities. Individual health behaviors, particularly during the COVID-19 pandemic, can have major public health ramifications. For example, health actions taken by the Vopak workforce can directly influence important public health issues via the spread of infectious diseases (e.g., STIs), increasing the local crime rate, increasing the demand for illicit drugs (and overdose), and increasing the local demand for sex trade services.

For example, an understanding of current community health related data can identify to the Project team important communicable diseases that should be considered in effects assessments. This is necessary to drive critical mitigations to safeguard workers, to acquire the appropriate health services supports for workers and to also ensure appropriate site induction trainings are being provided to the project team. Simultaneously, behaviour change campaigns and other mitigations around codes of conduct can be implemented to benefit/safeguard community members and promote positive health trajectories.

Baseline data should be further informed by the impacts of the COVID-19 pandemic. The COVID-19 pandemic dramatically changed community conditions for Gitga'at. Current community health conditions in Prince Rupert and the surrounding region (including Hartley Bay) have been burdened by the emergence of the COVID-19 pandemic and for many, this time is characterized by increases in mental health impacts, such as fear, stress, anxiety and feelings of isolation. This is exacerbated by public restrictions and consistently changing health orders given by BC's Provincial Health Officer to reduce transmission of the virus. This public health crisis continues to evolve so Vopak should anticipate further shifts in community conditions and include in their Application specific plans to respond accordingly.

The EAO Report reports that Vopak:

acknowledged the Application was drafted prior to the global pandemic, and committed to continuing to engage with local and Indigenous communities to implement best practices and develop safety measures that are effective and adaptive.

However, the EAO Report provides no evidence that Vopak adapted to the pandemic with updated analyses of risks and corresponding responses. The EAO Report fails to integrate available information on COVID-19 or detail the current impacts this pandemic has had on Gitga'at members. As a result, the EAO Report fails to present the real risks posed by the Project as a consequence of this pandemic or provide appropriate mitigation measures.

In addition, EAO and Vopak should consider and adequately mitigate the following risks and impacts of the Project:

- The Project will impact housing. The influx of a Vopak workforce (and subcontractors) to the region will put greater pressure on the availability and cost of safe and affordable housing in the Northwest of BC. Gitga'at members who live in Prince Rupert may be unequally impacted by strains placed on housing markets. This would exacerbate ongoing inequalities Indigenous people face in finding affordable housing. Vopak has proposed to address this concern with a work camp, a proposal to engage with stakeholders and a loose commitment to financially support social housing (no specific amount or timelines have been indicated). However, without clear, detailed concrete commitments to address this serious adverse effect, Vopak has failed to accommodate Gitga'at with respect to this issue.
- The Project could impact health services. The influx of a Vopak workforce (and subcontractors) to the region will put greater pressure on health and social services in Prince Rupert.
- The Project may compound existing barriers that prevent Gitga'at members from living their culture. For example, increased traffic on marine travel routes, or even perceptions of congestion, could reduce enjoyment and participation in traditional activities.
- The impacts of colonization on Gitga'at members. Any operation that further displaces Indigenous populations from their land or proceeds without free, prior and informed consent will not only exacerbate current health inequities but result in additional impacts to Indigenous health and well-being, including cultural identity.
- The Project could impact self-governance and cohesion. Governance systems are diverse across First Nations and therefore, project impacts may unequally affect members of the community. Development in the region can create rifts between communities that work together on other fronts, as well as enhance existing tensions regarding territorial boundaries and resources.
- The Project could contribute to climate change. Climate change risks and impacts are serious and significant in nature. There is a global call for all of society, including private sector projects to ensure positive contributions to climate healthy and resiliency initiatives.

For years, Gitga'at has repeatedly expressed its concerns to the Province and federal government regarding the impacts of major industrial developments, such as Vopak's Project, having significant adverse impacts to socioeconomic conditions and community wellness. For example, Gitga'at emphasized these issues through the submission of reports, presentations and letters to the Crown in the PNW-LNG Environmental Assessment in 2015/2016. Both Vopak and the Ministry of Environment and Climate Change Strategy were made well aware of Gitga'at's concerns from the outset of the Vopak EA. In fact, during the assessment process, Vopak used and cited information from the April 30, 2014 and October 30, 2014 socioeconomic and reports by Compass Resource Management that Gitga'at provided to PNW.

Despite this, and as the EAO Report demonstrates, Vopak has proposed nothing in the way of tangible mitigation measures or any form of accommodation to address concerns for socioeconomic conditions and community wellness.

Vopak has not properly assessed the risks related to air quality, navigation and rail safety

The scope of assessment for air quality in the Application and the EAO Report is inadequate to understand health impacts to Gitga'at members residing in Prince Rupert. Gitga'at raised this concern during the regulatory process in the comment periods. In assessing air quality, the EAO has allowed Vopak to exclude Prince Rupert from the study area. The impacts of the Project to air quality in the Prince Rupert region and to the health of Gitga'at members are therefore still unknown. This is unacceptable and is a further marker of inadequate consultation in Vopak's EA process. In addition, the Application indicates that some Project storage tanks will have floating tops. Although these tanks will have vapour controls, these controls can fail, posing serious risks to the health. Ongoing, transparent air quality measurements are needed on-site and off-site.

Vopak has further failed to address the impacts of underwater noise resulting from the Project. The Project's effects of underwater noise on marine fish and marine mammals are a significant concern for Gitga'at. At full capacity, with 171 ships operating per year and 40 hours of loading time per ship anticipated at the terminal, the Project will generate underwater noise for 80% of the time ($171 * 40 \text{ h} = 6840 \text{ hours}/8760 \text{ hours in year}$). This concern is only heightened when considering the close proximity to Ridley Terminals and the Prince Rupert Grain Terminal to the proposed Vopak dock discussed above. Vopak and EAO propose to mitigate Vopak's effects by developing a Marine Underwater Noise and Vibration Plan. However, this plan does not yet exist and actual mitigation measures to address underwater noise have not been established. Marine fish (e.g., all salmon species, herring, oolichon) and marine mammals are vital to the Gitga'at and Gitga'at culture. An effects determination cannot be supported without a proper assessment of underwater noise.

Further, the Application and EAO Report do not adequately address impacts to rail safety. Rail safety and traffic are already a significant concern for Gitga'at with current rail traffic moving alongside the lower Skeena River adjacent to Gitga'at territory. The Project will significantly increase rail traffic of dangerous goods. The Application and EAO Report fail to adequately address this concern.

Vopak has not properly assessed the risks and potential impacts of exporting its materials from an emergency response perspective

Vopak has not adequately addressed the potential adverse impacts of the Project to the marine environment. In its *Potential Accidents and Malfunctions Memorandum* dated January 15, 2021, Vopak provides "additional detail regarding potential accidents and malfunctions in the marine environment" to supplement its Application.²⁶ Vopak acknowledges that CPPS "have potential for long-term contamination, including long-term intertidal contamination and potential for subtidal impacts".²⁷

The potential for significant harm to birds that could result from bio-accumulation of CPPs is entirely missing from the analysis and none of the acknowledged harms are supported by scientific evidence regarding the acute/sublethal toxicity of each product. The memo concludes the long-term consequences of CPP spills on loss of prey resources, habitat loss and habitat quality decline "are difficult to quantify but could have serious consequences at the species or population levels" (page 6).

²⁶ Available online:

https://www.projects.eao.gov.bc.ca/api/public/document/601852d6609cfd0020335b26/download/20210115_656431_MEM_A_M.pdf.

²⁷ *Ibid*, page 3.

Similarly, the memo accepts that “[a]ny loss of CPP may have the potential to impact marine use for commercial fisheries” but fails to elaborate on what these impacts might be, such as: contamination, uncertainty regarding safe consumption, loss of productivity.

Vopak has further failed to provide for an emergency response plan for the materials it intends to transport. Vopak submitted another memo to the EAO on June 22nd, 2021, outlining a rationale for including a broader definition of Clean Petroleum Product (CPP) to allow them flexibility to store a broad range of products in the future. A follow-up August 11th memo from Vopak provides additional information on CPPs with assumptions referenced below. Vopak’s stated assumption in their August 11th memo is that:

“...all CPPs within the same class perform similarly in the environment should a spill occur.”

The term “perform” pertains only on its fate and behaviour by CPP classification. That is, if a CPP spilled into the marine environment from a storage tank, during terminal transfers or from a vessel malfunction the general classes will have similar chemical fates and behaviors as follows:

- Ultra-light: These oils and products are often clear, have a strong odour, are highly volatile and flammable, are highly water soluble and are highly degradable.
- Light Oils: These oils are light in color, moderately volatile and moderately water soluble.

As for environmental consequences, Vopak’s August 11th memo then states:

“...ultra-light oils and light oils are similar in composition and have similar chemical properties, resulting in similar environmental fate and transport in the marine environment, as well as toxicity to marine aquatic organisms.”

Its concluding statement was:

“Vopak acknowledges that the CPPs in Table 1 are chemically different from one another but from an environmental fate and spill response perspective, they are similar, and as such, emergency planning and response would be similar for CPPs within the same classification.”

The CEAA 2012 Section 67 Determination Rationale (September 30th, 2021) submission concludes that a spill containing bunker oil would be the only incident of concern from an environmental impact standpoint:

... the principal concern would be potential effects on marine fauna, including marine mammals, in the event of an accidental spill of bunker oil from a vessel collision. No significant adverse residual effects on the biophysical environment were anticipated by Vopak to result from the Project-related accidents and malfunctions scenarios.

A January letter from Vopak to the federal government undertaking the Environmental Effects Evaluation re-stated this conclusion that persistent oil - diesel and bunker - *are the only products of concern*, and that British Columbia is well-prepared to manage such a spill through its Transport-Canada certified Response Organization, the Western Canada Marine Response Corporation.

Vopak's conclusion about responses to and consequences of a CPP spill should be based on a product's classification - either an ultra-light or light oil. The conclusion that similar response measures and environmental impacts can be anticipated for all products within the same classification because they all have common "fate and behavior" parameters (e.g., volatility, flammability, water solubility, degradability) is fundamentally flawed.

Emergency planning, response, and consequences would not be similar for CPPs grouped within the same classification. Response strategies and tactics, exposure measurements, acute and chronic (sub-lethal) impacts, and ecological recovery can be different for each specific CPP product spilled into marine waters. A CPP can differ in response and impacts based on the rates and magnitudes of the "fate and behavior" parameters affected by the receiving marine environment - including if one should ignite and burn. Vopak cannot assume that any CPP, or another volatile chemical such as methanol, will disappear quickly through evaporation and dilution to such a degree there won't be shorter acute and long-term chronic (sublethal) impacts and exposures to marine life or contaminate seafood. Some products linger longer on the surface, burn at different rates, create different smoke emissions, and require fire-foam for vapour suppression. These differences demand tailored emergency response plans.

This failure to consider CPPs leaves a significant gap in the understanding and assessment of potential impacts and is entirely contrary to the precautionary principle. The precautionary principle obliges government to act cautiously in the face of scientific uncertainty:

The precautionary principle recognizes, that as a matter of sound public policy the lack of complete scientific certainty should not be used as a basis for avoiding or postponing measures to protect the environment, as there are inherent limits in being able to predict environmental harm. Moving from the realm of public policy to the law, the precautionary principle is at a minimum, an established aspect of statutory interpretation, and arguably, has crystallized into a norm of customary international law and substantive domestic law [...].²⁸

The Federal Court of Appeal has held that:

The precautionary principle states that a project should not be undertaken if it may have serious adverse environmental consequences, even if it is not possible to prove with any degree of certainty that these consequences will in fact materialize.²⁹

The precautionary principle is embedded in the previous (repealed) *Canadian Environmental Assessment Act* (CEAA) and the new (Bill C-69) *Impact Assessment Act* (IAA) The IAA's mandate (2) states:

The Government of Canada, the Minister, the Agency and federal authorities, in the administration of this Act, must exercise their powers in a manner that fosters sustainability, respects the government's commitments with respect to the rights of the Indigenous peoples of Canada and applies the precautionary principle.

This principle has been incorporated into the Crown's approach to marine governance. The precautionary approach is defined under the federal *Oceans Act*, S.C. 1996, c. 31, as "erring on the side

²⁸ *Morton v Canada (Fisheries and Oceans)*, 2015 FC 575, at para. 43; see also *114957 Canada Ltée (Spraytech, Société d'arrosage) v. Hudson (Town)*, 2001 SCC 40.

²⁹ *Canadian Parks and Wilderness Society v Canada (Minister of Canadian Heritage)*, 2003 FCA 197, para 24.

of caution". The *Oceans Act* employs the precautionary approach for the evaluation of acceptable levels of certainty regarding acute, chronic and cumulative impacts to the marine environment that includes shipping risk and spill response.

In 2015, a federal appointed Expert Panel on Tanker Safety found that there is no preparedness on the part of proponents or the Crown to respond to potential Hazardous and Noxious Substances ("HNS") incidents at sea.³⁰ The 2015 Tanker Safety Expert Panel's Report concerned initial assessments, forecasting spill trajectories and chemical pathways, real-time and post-incident monitoring. The panel outlined several operational readiness measures to address HNS risks and impacts. Although there is recent recognition to prepare for a major HNS incident, these measures have not been acted on.

Against this already precarious context, Vopak's flawed classification-based approach to emergency response presents serious risks and could have disastrous adverse impacts to Gitga'at and other Indigenous communities. Vopak has not properly assessed the risks and potential impacts of exporting its materials from an emergency response perspective. Asking Gitga'at to accept the risks of HNS incidents resulting from Project vessels when there is little preparedness on the part of Vopak or the Crown to respond to such emergencies and no accommodations to address these risks is unreasonable.

Until the potential, long-term risks of all possible types of CPP and other spills resulting from the Project are fully acknowledged, understood and justified, and an adequate response, mitigation and compensation plan developed, this Project must not be approved. Vopak's process of delaying critical risk planning to the future following approval constitutes an unacceptable shirking of responsibility.

Vopak failed to meaningfully engage with Gitga'at

Vopak and the EAO have heard many of Gitga'at's concerns during this assessment process, but have not engaged with Gitga'at to find mutually agreeable solutions. This approach to consultation reflects an antiquated, pre-DRIPA understanding of consultation that amounts to filling a quota of meetings, emails and telephone calls without concern for Gitga'at's capacity or actual impacts to Gitga'at's rights and interests. It is an approach centred entirely upon process, not meaningful accommodation.

Vopak also undermined Gitga'at's trust by committing missteps during the assessment process. In September 2020, Vopak shared the initial Part C Draft of the Application with the working group. Gitga'at requested that Vopak allow them to view a copy of the draft Part C ahead of publication out of concern over potential disclosure of confidential information regarding Gitga'at use and occupancy. Vopak ignored Gitga'at's request and published sensitive information on the working group website. Vopak subsequently excluded the draft Gitga'at chapter from their publication on the work group website in response to complaints from Gitga'at. However, the information had already been disclosed and Gitga'at's trust violated.

These oversights only added to the Gitga'at's work in the assessment process, further stretching Gitga'at's already limited capacity and creating a lack of trust between parties.

³⁰ Government of Canada, Tanker Safety Expert Panel, "A Review of Canada's Ship-Source Spill Preparedness and Response: Setting the Course for the Future, Phase II – Requirements for the Arctic and for Hazardous and Noxious Substances Nationally," (2015), available online: <https://tc.canada.ca/en/marine-transportation/marine-safety/tanker-safety-expert-panel>.

III. CONCLUSION

For all the reasons provided herein, it is premature for the Ministers to approve this Application. We urge you to send this process back to the EAO and direct the EAO to take our concerns seriously and take the time needed to ensure all parties are adequately informed about the impacts and that the Crown can consult meaningfully on how to address those impacts. If this Project is to process, it must be designed in such a way to be in the public interest and to maintain the honour of the Crown in its dealings with Indigenous peoples. As it stands, the Project Application and Indigenous consultation to date falls well short of that mark.