

From: [Leticia Hill](#)
To: [Kitimat Clean Refinery / Raffinerie de Kitimat Clean \(CEAA/ACEE\)](#)
Cc: [Reception Skidegate](#)
Subject: CHN LT CEAA - Kitimat Clean Refinery Project
Date: August 12, 2016 3:42:25 PM
Attachments: [CHN LT CEAA - Kitimat Clean Refinery Project.pdf](#)

Good afternoon,

Please find attached correspondence from the President of the Haida Nation.

Thank you,

Leticia Hill
Council of the Haida Nation
P: 250.559.4468 | F: 250.559.8951

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August 12, 2016



Kitimat Clean Refinery Project
Canadian Environmental Assessment Agency
410-701 West Georgia Street
Vancouver, British Columbia V7Y 1C6
Email: KitimatCleanRefinery-RaffineriedeKitimatClean@ceaa-acee.gc.ca

Re: Comments on the Draft Environmental Impact Statement Guidelines (the “**Guidelines**”) for the Kitimat Clean Refinery Project (the “**Project**”).

We write in response to your letter dated July 13, 2016 with our comments and concerns regarding the Guidelines for the Project.

PART I: INTRODUCTION

We understand that the Canadian Environmental Assessment Agency (“**CEAA**”) has decided that a federal environmental assessment (“**EA**”) is required for the Project, and that the purpose of the Guidelines is to identify for the proponent the minimum information requirements for the preparation of an Environmental Impact Statement (“**EIS**”) for the Project to be assessed pursuant to the *Canadian Environmental Assessment Act, 2012*.¹

PART II: HAIDA NATION MUST BE INCLUDED WITH THOSE MOST AFFECTED BY THE PROJECT

CEAA is of the view that the Haida Nation will be affected by the Project, but to a lesser degree than other First Nations along BC’s Coast². We strongly disagree with this position, as the proposed oil tanker route is within the Haida Nation’s territorial waters. The Project proposes an oil tanker route from the pilot pickup/departure point at Triple Island which would continue through Dixon Entrance to the open ocean. The same

¹ According to Hatch Ltd., Kitimat Clean Ltd. (the “Proponent”), intends to “build the largest integrated gas-to-liquids refinery in the world”. <https://www.hatch.com/Projects/Energy/Kitimat-Clean>.

² The First Nations listed in the Guidelines as the most affected by the Project are: Kitselas First Nation; Haisla Nation; Metlakatla First Nation; Lax Kw’alaams Band; Kitsumkalum First Nation; Gitxaala Nation; and Gitga’at Nation, at p. 21.

route will be used for in-bound oil tankers, but in reverse. Attached as Schedule "A", is a map of the territory of the Haida Nation in relation to Canada's interests. The marine portion of the Haida Territory, the open water area ("OWA") and eastern and northern shores of Haida Gwaii will be greatly affected by the proposed Project.

CEAA proposes that for the First Nations expected to be the most affected by the project, the Proponent is "*expected to strive towards developing a productive and constructive relationship based on on-going dialogue . . . to support information gathering and the effects assessment*", and will ". . . *strive to use primary data sources and hold face-to-face meetings to discuss concerns. The proponent will facilitate these meetings by making key EA summary documents (baseline studies, EIS, key findings, plain language summaries) accessible in advance.*"³ By contrast, groups affected to a lesser degree, will be ". . . *notified about key steps in the EIS development process and of opportunities to provide comments on key EA documents and/or information to be provided regarding their community.*"⁴

The Haida Nation must be included with the First Nation groups identified by CEAA as "most affected" to engage the sufficient level of consultation and accommodation with the Haida Nation. To state that the Haida Nation will be affected to a lesser degree is a mischaracterization of the real risk the Haida Nation would have to bear by having oil tankers traversing our tempestuous territorial ocean. If a spill occurs in the OWA surrounding Haida Gwaii, any oil response plan will be ineffective at cleaning up or preventing oil from reaching the coastline. The impacts could be permanent, and long-lasting beyond our lifetimes. The risks to the Proponent, the oil companies and shippers are low: they are manageable and acceptable business risks. However, for all the people who rely upon the oceans, the proposed Project would put at risk our life source, our communities, our families and our future.

The Crown's duty of consultation and accommodation to the Haida Nation resides at the higher end of the spectrum as articulated by the *Tsilhqot'in* case. In that case, the Supreme Court ruled "Where a claim is particularly strong... Care must be taken to preserve the aboriginal interest pending final resolution of the claim..."⁵ The Haida Nation is in the unique position of not only having a Supreme Court affirmation of strong *prima facie* Title and Rights but also are parties to the agreements with both the federal and provincial governments that recognize concurrent jurisdictions and the exercise of those jurisdictions in pursuit of reconciliation through collaborative decision-making. Two decades of successful collaborative management has built upon voluminous primary and baseline data generated jointly by the Haida and the federal government that is critical to the identification of valued components and the assessment of the Project impacts. Clearly, the unique circumstances of the Haida Nation require far more

³ DEISG, CEAA at page 21; emphasis added.

⁴ DEISG, CEAA at page 21; emphasis added.

⁵ *Tsilhqot'in Nation v. British Columbia*, [2014] 2 SCR 257 at para 91.

than mere consultation and notice; fostering reconciliation, meaningful dialogue and accommodation is required.

Therefore, it is unacceptable to group the Haida Nation in the same category as the Métis Nation of British Columbia, as the Métis Nation will not bear the risk of an oil spill in their territorial waters.⁶

One of the effects that must be examined in relation to the Haida Nation is the effect upon governance and collaborative management to achieve reconciliation⁷ which is contained in the next section.

PART III: DEVELOPING A LEGALLY SUFFICIENT CONSULTATION PROCESS

The Haida Nation is an ancient culture, borne from one of the richest land and marine areas on the planet. Because of this origin and because of our long-standing relationship with Haida Gwaii, we inherit responsibilities to take care of the land, the surrounding waters and the people who call it home. These responsibilities have resulted in collaborative management of Haida Gwaii that directly impact the development of an EA and a legally sufficient consultation process for the Project.

We begin with some context to the scope of consultation and accommodation required. The Supreme Court of Canada has held in a number of decisions that consultation and accommodation must be responsive to, and engage in meaningful dialogue about the Haida Nation's concerns, and must be proportionate to the strength of Haida Title and Rights. In *Haida Nation v. BC*, the Supreme Court of Canada assessed the strength of Haida Title and Rights and stated they were "supported by a good *prima facie* case" and that significant accommodation may be required to preserve the aboriginal interest pending final resolution of the Haida Title case.

The Supreme Court of Canada has repeatedly emphasized the importance of reconciliation. The framework for strategic and operational decisions in relation to Haida Gwaii terrestrial and marine resources is contained in a number of reconciliation agreements between the federal and provincial Crown and the Haida Nation that includes shorelines, marine spaces and species that are at risk of being adversely affected by the Project. Namely, the 1993 Gwaii Haanas Agreement, the 2005 Gwaii Haanas Marine Agreement, the 2007 MOU for the SGaan Kinghlas (Bowie Seamount) area, the 2007 Strategic Land Use Plan Agreement and 2009 Kunst'aa Guu Kunst'aayah Reconciliation Protocol (the "Agreements"). All of the Agreements contain commitments to protect these rare and sensitive areas for future generations, with the expectation, from both the Haida Nation and the Crown, that Haida Gwaii will be collaboratively managed to a higher standard with a lower threshold of risk.

⁶ DEISG, CEAA at page 22.

⁷ *Haida Nation v BC*, para. 45; *Gitxaala Nation et al. v. HMTQ, AGC et al* 2016 FCA 187, para. 232.

The Project affects our commitment to manage and restore marine ecosystems and marine species. Therefore, the Agreements provide both substantive and procedural content to the Crown's duties, which was affirmed by the Federal Court in *Moresby Explorers Ltd. v. Canada (Attorney General)* and *Council of the Haida Nation et al v Canada (Fisheries and Oceans)*, 2015 FC 290. It would be a fundamental breach of the Crown's three-fold duty of consultation, accommodation and reconciliation to the Haida Nation if the processes and higher standards for Crown conduct contained in the Agreements were not engaged in respect of the Project. This is particularly the case for the many cooperatively managed protected areas that are located throughout Haida territory that are directly adjacent to the oil tanker route. This includes areas under the Agreements above, namely, the CHN-BC protected areas and Protection Management Zones (co-designated by BC), Gwaii Haanas National Marine Conservation Area Reserve and Haida Heritage Site (co-designated by Parks Canada), and S^Gaan Kinghlas Bowie Seamount Marine Protected Area (co-designated by Fisheries and Oceans Canada, "DFO").

As indicated above, we have co-management agreements with the Province of BC, Parks Canada and DFO in respect to many sensitive areas that are vulnerable to shipping traffic and spills. All areas are co-designated by the Haida Nation as Haida Heritage Sites. The Guidelines must recognize and account for the fact that this Project proposes significant threats to these areas, and that failure to utilize the co-management bodies will compromise rather than encourage Canada's duty to foster Canada's mandated reconciliation with the Haida Nation. Therefore, the Guidelines must contain requirements that the proponent and the Crown work within these existing collaborative governance structures.

PART IV: MISSING COMPONENTS OF THE GUIDELINES

A) An Environmental Assessment ("EA") of the OWA Must Be Conducted

Haida Territory is the only First Nation territory entirely contained within the OWA of the Project. The Project's proposed oil tanker route goes through, or is immediately adjacent to, the marine portion of Haida Territory. Haida Gwaii is a biologically culturally important area in the OWA, providing critical habitat for many marine species including pelagic fish such as herring and eulachon, marine birds, marine mammals, groundfish, invertebrates and species at risk.

An EA of the OWA is required in view of the likelihood of significant and potentially long term or irreversible adverse effects on the ecosystems of Haida Gwaii resulting from an oil spill and heavy oil tanker traffic in the marine environment around Haida Gwaii.

B) Invasive Species

The Guidelines also fail to address the impacts on Haida Gwaii resources resulting from risks posed by the introduction of aquatic invasive species through oil tanker hull fouling and the dumping of ballast water. International shipping is the largest vector for the

introduction of aquatic invasive species and is a major cause of animal extinctions and reductions in biodiversity.

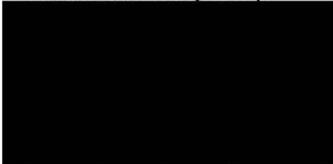
C) Places of Refuge

In light of Haida traditional and local knowledge about substantial risks involved in navigating heavy oil tankers in treacherous and unpredictable waters and weather conditions, this issue must be addressed in the Guidelines. As with all other matters, this matter must be addressed within collaborative governance structures in direct consultation with the Haida Nation before any decision is made regarding ports of refuge for the Project.

PART IV: CONCLUSION

A requirement for the Project to conduct a focused, thorough, comprehensive and cumulative EA of the potential impacts of the Project on Haida Aboriginal Title and Rights (including the governance rights exercised under the Agreements), marine resources and the OWA must be embedded in the Guidelines and any EA for the Project. This is the only way it will be possible to assess the adverse impacts resulting from an oil spill and oil tanker traffic in the waters surrounding Haida Gwaii. The issues we have identified above are missing and need to be included in the Guidelines, in order for significant effects and impacts to Haida interests, rights and resources to be adequately assessed and documented in the Project's Environmental Impact Statement.

With due respect,



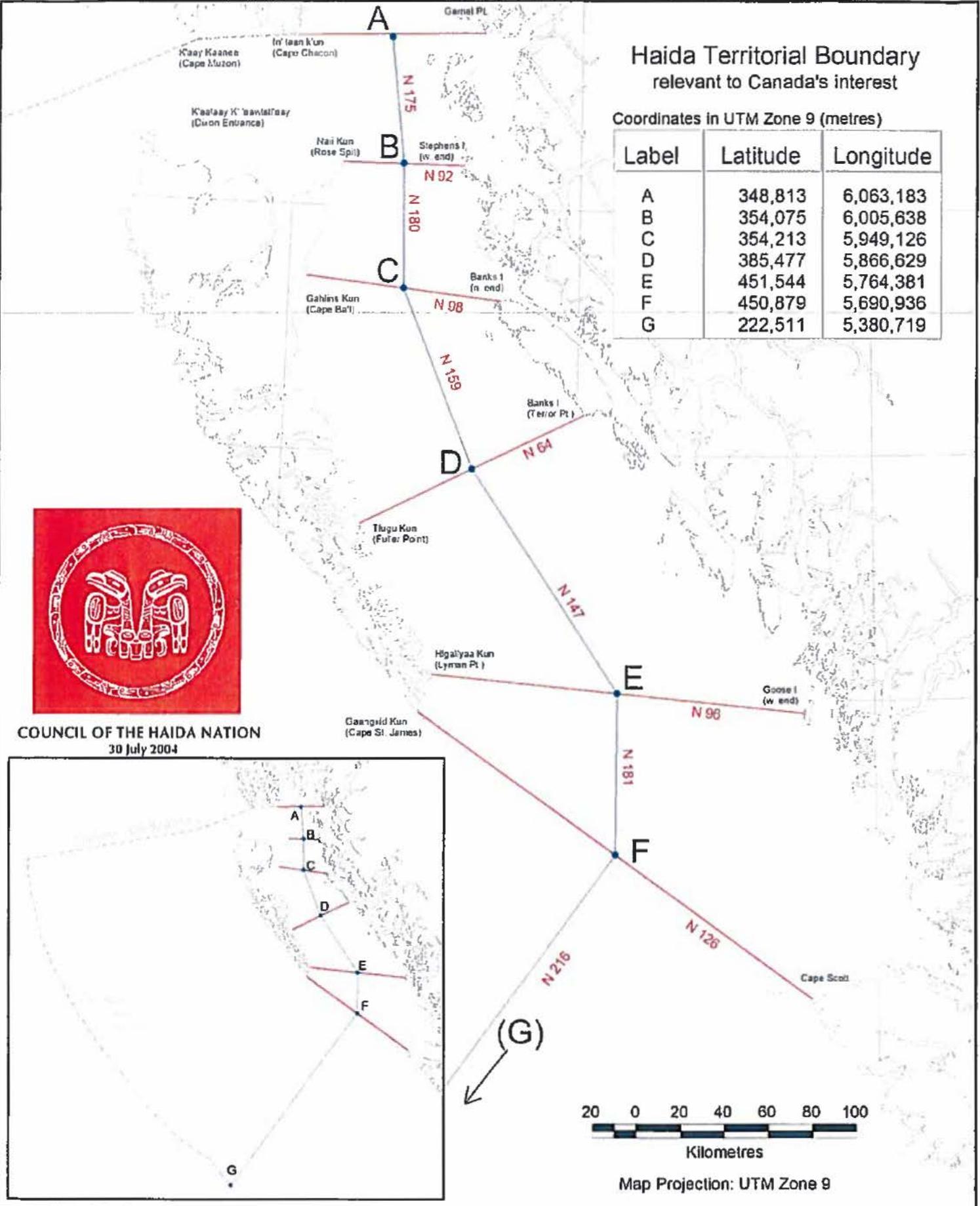
Peter Lantin, *kil laat'sгаа*
President of the Haida Nation

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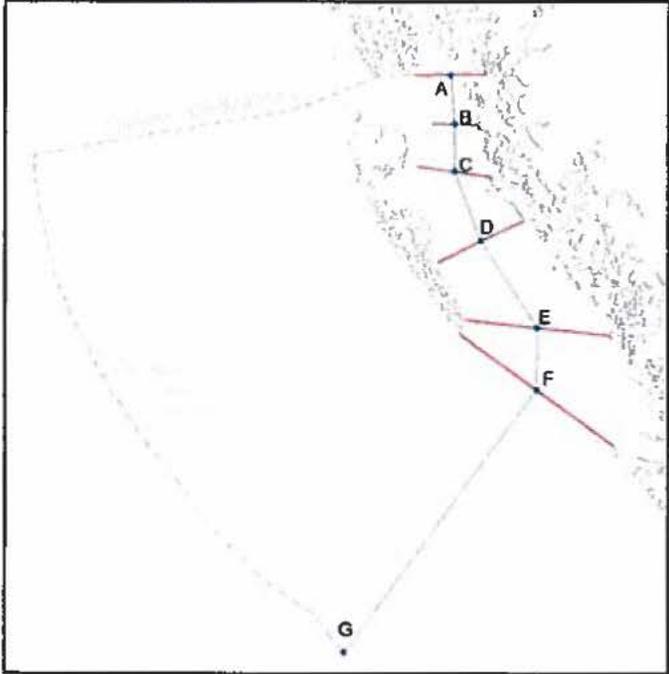
Haida Territorial Boundary relevant to Canada's interest

Coordinates in UTM Zone 9 (metres)

Label	Latitude	Longitude
A	348,813	6,063,183
B	354,075	6,005,638
C	354,213	5,949,126
D	385,477	5,866,629
E	451,544	5,764,381
F	450,879	5,690,936
G	222,511	5,380,719



COUNCIL OF THE HAIDA NATION
30 July 2004



Map Projection: UTM Zone 9