



Gitga'at First Nation

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November 10, 2016

Brett Maracle
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Sent Via Email

RE: *Preliminary Feedback on the Draft Environmental Impact Statement Guidelines for the Pacific Future Energy Refinery Project*

Dear Brett Maracle,

Thank you for your letter sent on October 7, 2016. In this letter, the Canadian Environmental Assessment Agency offered Gitga'at First Nation (Gitga'at) the opportunity to comment on the Draft Environmental Impact Statement Guidelines (dEIS) for the Pacific Future Energy Refinery Project. On behalf of Gitga'at, please find enclosed our feedback on the dEIS. It is important to note that due to our limited capacity, the enclosed comments are preliminary in nature.

Please contact me by phone ^{<contact information removed>} or email (<email address removed>) if you have any questions or would like to discuss further.

Sincerely,

<Original signed by>

Environmental Assessment Coordinator, Gitga'at First Nation

cc: Ellen Torng, CEO, Gitga'at First Nation
Chris Picard, Science Director, Gitga'at First Nation

Enclosed:

Preliminary Feedback on the Draft Guidelines for the Preparation of an Environmental Impact Statement for the Pacific Future Energy Refinery Project

Preliminary Feedback on the Draft Guidelines for the Preparation of an Environmental Impact Statement for the Pacific Future Energy Refinery Project

Part 1 – Key Considerations

Section 2.3 Aboriginal engagement

This section describes that the “proponent is expected to engage with Aboriginal groups that may be affected by the project, beginning as early as possible in the project planning process”; however, to date, lack of engagement has occurred with Gitga’at First Nation (Gitga’at). It is also important to note that at this time, Gitga’at does not have the capacity to meaningfully engage.

We are also concerned about the inconsistencies in the Project Description (dated June 2016) and in the Project Description Addendum (dated September 2016) regarding potential impacts to Gitga’at. Based on the Project Description Addendum, “Potentially Affected Indigenous Groups” table (on page 3), it appears that the proponent does not view that the project (i.e., refinery) may impact Gitga’at, which we strongly disagree with.

Section 2.4 Application of the precautionary approach

The use of “technically and economically feasible mitigation measures” (as used throughout the Draft Environmental Impact Statement Guidelines [dEIS]) may not follow a precautionary approach.

Section 3.1 Designated Project

It is noted that marine transportation of prefabricated refinery modules and use of existing marine terminal infrastructure are listed as project components; however, in other sections of the dEIS, other marine shipping and infrastructure components are mentioned. Overall, it is unclear what is considered as marine works, infrastructure and transportation for this project. It is also unclear if the three options presented in the Project Description Addendum (including the two marine export options) will be assessed in the Environmental Impact Statement (EIS).

Section 3.2 Factors to be considered

Mitigation measures

What is the definition of “technically and economically feasible mitigation measures”? The dEIS should clearly define these terms and identify who makes the determination about technical and economic feasibility of mitigation measures and how that determination is made. Some mitigation measures may also impact Valued Components (VCs), and those effects should be considered as part of the EIS.

Additional Factors

The footnote (number 4) uses language that implies that the project has not been referred to a review panel; this should be updated with language that reflects the current referral.

Also, it is not clear under “incidental activities” if a marine export facility and shipping will be assessed in the EIS. The dEIS should be revised for clarity to ensure that the proponent assesses the export facility and shipping options as described in the Project Description Addendum. Also, see comments in Part 1, Section 3.1 and Part 2, Section 2.2 and 3.1.

Section 3.2.1 Changes to the Environment

The potential changes to the marine environment should also be considered.

Section 3.2.2 Valued components to be examined

The language in the last paragraph on page 6 appears to allow a lot of flexibility and ‘judgement’ with the proponent. Gitga’at requests to be informed in a timely manner of any changes, deviations, and/or exclusions prior to EIS submission.

Section 3.2.3 Spatial and Temporal boundaries

We request to be engaged in defining spatial and temporal boundaries, and request that Hartley Bay be included within socio-economic assessment boundaries.

Section 4.1 Guidance

Referring to “Agency policy and guidance” is too broad; more information should be provided.

Section 4.3 Study strategy and methodology

We ask that if Gitga’at also “disagrees with the proponent’s decision, it will require the proponent to provide the specified information”; the dEIS currently only lists the Agency and review panel.

“Where conclusions drawn from scientific, engineering and technical knowledge are inconsistent with the conclusions drawn from Aboriginal traditional knowledge, the EIS will present each perspective on the issue and a statement of the proponent’s conclusion”; Gitga’at requests to be engaged by the proponent to assist in understanding our perspective rather than interpreting written documents/reports.

“The EIS will include a description of the environment (both biophysical and human), including the components of the existing environment and environmental

processes, their interrelations as well as the variability in these components, processes and interactions over time scales appropriate to the likely effects of the project”; ensure that climate change is considered. Also ensure climate change is considered when predicting “future conditions with the project” (page 11).

In the last paragraph on page 10, definitions for “ecosystem health and integrity” and “resilience” should be provided in the dEIS.

Part 2 – Content of the Environmental Impact Statement

Section 1.3 Project Location

The “traditional territories and/or consultation areas, treaty lands, Indian Reserve lands and Metis harvesting regions and/or settlements” should be outlined by the Agency. The EIS Guidelines need to be clear that Gitga’at rights and interests are to be assessed (see comment above, Part 1, Section 2.3).

Section 2.2 Alternative means of carrying out the Project

Transportation of refined “products, including diesel, jet fuel, and gasoline” is listed in this section; however, it is not clear why these are being assessed as “alternative means of carrying out the project” because they are required for the project, i.e., there is a need to sell (and export) refined products for the project to be economically feasible. We expect that the potential impacts of all three export options as outlined in the Project Description Addendum be assessed fully in the EIS for this project.

Section 3.1 Project components

Port infrastructure and facilities, shipping, dredging, pipeline, and rail line upgrades are not “alternative means”, and are required components of the project. Therefore, it is expected that the potential impacts from these project components be fully assessed in the EIS of this project (see comment above, Part 2, Section 2.2).

Section 3.2.1 Site preparation and construction

Shipping of modules is missing.

Why is “dilbit variants” listed here? Based on the Project Description, only “NEATBIT” is proposed so please remove.

Section 5 Engagement with Indigenous Groups and Concerns Raised

Para. 1 (p. 18):

Since the two matters on which the proponent is supposed to engage Indigenous groups are only two of a number of things it should engage them on, the word “including” should be worked into the formulation. E.g.:

For purposes of developing the EIS, the proponent will engage with Indigenous groups that may be affected by the Project to obtain their views in relation to the Project, **including** their views on:

- effects of changes, and
- potential adverse impacts....

Part 1, Section 4.2.2 says that the proponent will incorporate Aboriginal traditional knowledge into the EIS and more specifically that it “will integrate Aboriginal traditional knowledge into all aspects of its assessment including both methodology ... and analysis ...”. Because of its importance, the opening paragraph should add it to the list. E.g.:

For purposes of developing the EIS, the proponent will engage with Indigenous groups that may be affected by the Project to obtain their views in relation to the Project, **including**:

- **their traditional knowledge,**
- **their views on the effects of** changes to the environment on Aboriginal peoples..., and
- **their views on** potential adverse impacts of the Project on potential....

Because of the potential confusion arising from the distinction mentioned in the third paragraph re “potential adverse impacts”, the final member of the list should be reworded to say, e.g.:

- **their views on the Project’s** potential adverse impacts or **potential infringements** on potential or established section 35 rights....

Para. 2 (pp. 18-19):

Assuming the change suggested above for paragraph 1, the second paragraph should begin with something like:

With respect to Indigenous traditional knowledge, information on how the proponent is to incorporate it into the EIS is described in Part 1, 4.2.2 (and elsewhere) of these Guidelines.

In the current first sentence in paragraph 2, the reference should be to section 6.1.10, not 6.1.9.

Assuming the third change suggested above in paragraph 1, the current second sentence in paragraph 2 should be reworded to say something like:

With respect to **the Project's** potential adverse impacts or **potential infringements** on potential or established section 35 rights....

The current second sentence of paragraph 2, combined with the first listed item, appears to imply that the proponent may, through its EIS, document the “potential” section 35 rights of the First Nations listed in 5.1 based on information “available through public records” as an alternative to what the First Nations may say. Current Canadian jurisprudence has it that it is for First Nations alone to articulate the rights they claim, their nature, scope and significance. It is not for the Agency, the review panel or least of all, the proponent. What a court or other tribunal with the power to do so would finally decide on any given claim is a different matter. The second sentence appears to confuse the rights claim, which is for the First Nation to make, with the evidence supporting it.

Footnote #8 to paragraph 2 lends itself to – and may encourage the proponent to read it as – confusing the nature and test for aboriginal title with the nature and test for aboriginal rights. Gitga’at previous experience with the Enbridge Northern Gateway Joint Review Panel process and associated Crown consultation is that the proponent, the Panel and the Crown kept trying to understand Gitga’at title in terms of lesser Aboriginal rights.

The second listed item with paragraph 2 should say something like:

- **the Project's** potential adverse impacts or **potential infringements** of each of the Project's components....

The third listed item with paragraph 2 should say something like:

- Measures identified to **avoid**, mitigate or accommodate **the Project's** potential adverse impacts **or potential infringements** of the potential....

The fourth listed item with paragraph 2 should say something like:

- **The Project's** potential adverse impacts *or potential infringements* on potential or established.... The proponent will also take into account the potential adverse impacts **or potential infringements** that may result from....

Para. 3 (p. 19):

Paragraph 3 should be revised to say, e.g.:

The information sources, methodology and findings of the assessment of paragraph 5(1)(c) effects may be used to inform the assessment of **the Project's** potential adverse impacts **or infringements** on potential.... However, there may be distinctions between the adverse impacts **or infringements** on potential or ... and the assessment of paragraph 5(1)(c) effects. ...

The third sentence of paragraph 3 tells the proponent to “carefully consider the potential distinction between these two aspects and, where there are differences, ... include the relevant information in its assessment.” Given Gitga’at’s experience with the Federal Crown’s EA/consultation process in regard to Enbridge’s Northern Gateway Project, Gitga’at has well-founded reasons to say that this sentence is insufficient guidance to the Proponent. Part of the problem is that the language of “adverse impacts” is found in the legislation (esp CEAA 2012) and the Aboriginal law jurisprudence, and isn’t used in the same sense across the board. This is part of the reason that the notion of “infringement” should be included. Unlike the notion of “adverse impact” relied on in the standard EA context, the notion of “infringement” is not necessary dependent upon a change in the environment or effects arising from changes in the environment. As this is a matter of law, the burden to attempt to clarify this should not rest on the First Nations. The proponent (and perhaps the review panel) needs more help to understand this difference than what the third sentence offers.

Although the third sentence (like elsewhere in the Draft Guidelines) tells the Proponent to document for each First Nation, it should be made clear that the Proponent should avoid general statements attributing positions universally to all the First Nations in question or vaguely to First Nations unless it is a fact that they apply to all the First Nations in questions. Otherwise, the First Nations in question should be mentioned individually.

Para. 4 (p. 20):

The first sentence of this paragraph suggests the creation of a tracking table. We would add the suggestion that where the proponent’s responses are the same for two or more First Nations, the response should be referenced to them together. Otherwise, it is likely a tracking table will be created that due to repetition of responses will be several times longer than necessary and thus that gives the impression that more was done than was in fact the case.

Section 5.1 Indigenous Groups & Engagement Activities

Para. 2 (p. 20):

The second sentence of paragraph 2 requires the Proponent to structure its Aboriginal engagement activities “to provide adequate time for Aboriginal groups to review and comment on the relevant information.” What constitutes “adequate time” must not be for the Proponent alone to decide. It must take into account what the First Nation views as adequate time, which necessarily involves consideration of its internal administrative and community processes and human and financial capacity. Too often these are ignored or overridden by imposed timeframes to the prejudice of First Nations.

Section 6.1.5 Groundwater and Surface Water

In addition to temperature changes from groundwater-surface water interactions, temperature changes can also be influenced by habitat alteration.

Also the 3rd last bullet lists “all sites to receive mine effluents or runoff”; please revise to be applicable to this project.

Section 6.1.6 Marine environment

The 3rd bullet lists the shipping routes – please define what shipping routes: the module shipping route, and the shipping routes associated with the two marine export options listed in the Project Description Addendum.

Marine plants and marine fauna (including culturally important species) should be assessed along shipping routes.

Section 6.1.7 Fish and fish habitat

This section should also include a list of culturally important species.

Section 6.1.10 Aboriginal peoples

“Access and travel routes for conducting traditional practices” and “frequency, duration or timing of traditional practices” are both listed as specific aspects of current use of lands and resources for traditional purposes; however, spatial and temporal considerations must be made in conjunction with the other because access to preferred places at preferred times is very important to Gitga’at.

The specific aspects listed for health and socio-economic conditions are very limited. The proponent and the Agency should engage with Gitga’at in identifying other required aspects.

“Key plant communities and animals that rely on wetlands” is listed; however, there are terrestrial plant communities and animals that are also of importance.

Section 6.2 Predicted Changes to the Physical Environment

This section is missing changes to the marine environment.

Section 6.2.1 Changes to the Atmospheric Environment

“The operation of the refinery and marine terminal” is listed in the 1st bullet; does the “marine terminal” refer to both export facility options listed in the Project Description Addendum?

The greenhouse gas emissions from the removal of carbon sinks due to land and wetland disturbance should be assessed.

What is meant by “emission factors for all upstream stages should be recent and pertinent to the region”? What factors? And what region?

Also, shipping emissions, noise and light impacts need to be assessed.

Section 6.3.2 Marine Environment

- The 1st bullet is missing sediment quality.
- The 2nd bullet is missing marine birds.
- The 3rd bullet is bound by “construction periods”; however, this should be the life of the project, not just construction. Also the 4th bullet should be the life of the project.

Section 6.3.3 Marine Plants

Assessment of marine plants during the life of the project is required.

Section 6.3.6 Aboriginal peoples

The list of socio-economic conditions is very limited. For example, what about changes to availability of health services, access and affordability of goods and services, or access and affordability to housing (including on reserve lands such as Hartley Bay)? The Agency and proponent must engage with First Nations to ensure this list is inclusive, and prior to the collection of baseline data and VC assessments.

Section 6.4 Mitigation

This section states “The EIS will also present an assessment of the effectiveness of the proposed technically and economically feasible mitigation measures.” A definition for “effectiveness” should be included in the EIS Guidelines.

Section 6.6.3 Cumulative effects assessment

This section states “The proponent is encouraged to consult with key stakeholders and Indigenous groups prior to finalizing the choice of VCs and the appropriate boundaries to assess cumulative effects”; rather than “encouraged” this should be “required”.

Section 8.1 Follow-up Program

This section states “The duration of the follow-up program shall be as long as required to evaluate the effectiveness of the mitigation measures.” A definition for “effectiveness” should be included in the EIS Guidelines. See comment above in Section 6.4.