



November 7, 2016

Pacific Future Energy Project
Canadian Environmental Assessment Agency
410-701 West Georgia Street
Vancouver, British Columbia V7Y 1C6
Email: brett.maracle@ceaa.gc.ca

Re: Comments on the Draft Environmental Impact Statement Guidelines (the “**Guidelines**”) for the Pacific Future Energy Project (the “**Project**”).

We write in response to your letter (and attachments) dated October 7, 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 (Pacific Future Energy Corporation, 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*.

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 Coast¹ and that the depth of the duty to

¹The First Nations listed in the Guidelines as the most affected by the Project are: Kitselas First Nation; Haisla Nation; Kitsumkalum Indian Band; Metlakatla First Nation; Lax Kw'alaams Band; Gitxaala Nation; and Gitga'at Nation, at p. 21.

consult is “at the low end of the consultation spectrum”.² The Addendum to the Project Description lists options for the export of products from the refinery, including marine terminals; the Proponent views these options as “Incidental to the project”. We strongly disagree with this position. We understand that the proponent informed CEAA that it has been approached by a third party that intends to submit a Project Description for an export pipeline and marine terminal that would connect to the refinery. We also understand that while this would be a separate project proposed by a separate proponent, CEAA felt it appropriate to consider the options identified in the Addendum as alternative means of getting product to market. We are of the view that these options must inform the scope of the EA, including the scope of consultation and accommodation.

The Project will set in motion the export of refined products and by-products through Haida Territory that will make accommodation of Haida Title and Rights impractical or impossible at a later stage of getting the products to international markets³. As the Federal Court of Appeal noted in respect of the Enbridge Northern Gateway Project, the “Project is large and has been in the works for many years”, that “the largeness of the Project means that its effects are also large”. Separating the refinery from the export of refined products and by-products does not uphold the honour of the Crown nor the fiduciary duties to the Haida Nation in respect of both the Haida territorial sea, aboriginal rights within and to species inhabiting the Haida territorial sea.

The likelihood that any tanker route would enter or be adjacent to Haida Territorial waters means that potential adverse impacts of tanker traffic on the Haida Nation is much more serious than the proponent’s mischaracterization as “incidental” activities. All of the components and options identified in the addendum must be addressed by the Guidelines and the EIS. This means that with respect to the Haida Nation, the Proponent must be “*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.*”⁴ The Haida Nation is therefore entitled to much more than being “. . . 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.”⁵

The Haida Nation must be considered as one of the First Nation that will be “most affected”, thereby engaging in a corresponding level of consultation and

² Attachment 1: Summary of Information Available to the Crown on the Haida Nation’s Potential or Established Aboriginal rights and Potential Impacts of the Project.

³ *Reece v. Canada (Minister of Environment, Western Economic Development)*, 2007 FC 550

⁴ DEISG, CEAA at page 21; emphasis added.

⁵ DEISG, CEAA at page 21; emphasis added.

accommodation. To hold otherwise is a mischaracterization of the real risk the Haida Nation will bear from tankers traversing the tempestuous territorial ocean carrying refined fuel from the Project's refinery. As demonstrated recently in Heiltsuk territory, if a spill occurs in the OWA surrounding Haida Gwaii, any response plan will be ineffective at cleaning up or preventing oil or refined fuel from reaching the coastline. The impacts could be permanent, and long-lasting beyond our lifetimes. The risks to the Proponent and the third party that intends to submit a Project Description for an export pipeline and marine terminal and shipping route are low; they are manageable and acceptable business risks. However, for all the people who rely upon the oceans, the combined Projects put at risk our life source, culture, communities, families and our future. Attachment 1 includes the factors CEAA considered to assess the depth of consultation assessment for the Haida Nation. CEAA indicates that "Negotiations were discontinued in 1995 and the Haida Nation has been pursuing a title claim through the courts since 2002". This assessment is incorrect. The Haida Nation has diligently pursued, and continues to pursue, negotiations with both the federal and provincial governments through since 1993. However, negotiations have been stalled as a result of Canada being unable, or unwilling, to provide a mandate for reconciliation negotiations. Canada, BC and the Haida Nation have not discontinued negotiations in the manner contemplated under the 2009 Framework Agreement. It is not honourable for the federal government to say that negotiations have been discontinued when it stalls the commencement of negotiations. The Supreme Court of Canada's admonitions about the relationship between litigation, negotiations, and proposed developments is instructive:

The Crown, acting honourably, cannot cavalierly run roughshod over Aboriginal interests where claims affecting these interests are being seriously pursued in the process of treaty negotiation and proof. It must respect these potential, but yet unproven, interests. To unilaterally exploit a claimed resource during the process of proving and resolving the Aboriginal claim to that resource, may be to deprive the Aboriginal claimants of some or all of the benefit of the resource. That is not honourable.⁶

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..."⁷ 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

⁶ *Haida Nation v. Haida Nation v. British Columbia (Minister of Forests)*, [2004] 3 S.C.R. 511, 2004 SCC 73 ("*Haida Nation v. BC*"), at para. 27.

⁷ *Tsilhqot'in Nation v. British Columbia*, [2014] 2 SCR 257 at para 91.

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 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 a spill in their territorial waters.⁸ In addition, unless the Métis, the Haida Nation has a clearly delineated territory.

The Crown's Summary of Information Available to the Crown on the Haida Nation's Potential or Established Aboriginal rights and Potential Impacts of the Project Potential adverse environmental effects of the Project includes a brief listing of potential adverse environmental effects. This list is woefully incomplete and inadequate; for instance, it does not include impacts on resident marine species, the unique environment of Haida Gwaii and the habitat it provides to thousands of marine species including species at risk, and impacts upon Haida Title to the marine territory. In addition, one of the effects that must be examined in relation to the Haida Nation is the effect upon governance and collaborative management to achieve reconciliation⁹ arising from a unilateral EA process occurring outside of the collaborative governance structures and processes, which is contained in the next section.

We request a copy of the Crown's detailed assessment of the depth of consultation and accommodation, as it is and as it changes over time in relation to this Project.

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 impacts 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"

⁸ DEISG, CEAA at page 22.

⁹ *Haida Nation v BC*, para. 45; *Gitxaala Nation et al. v. HMTQ, AGC et al* 2016 FCA 187, para. 232.

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.

The Project has the potential to affect 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, that were 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. If the processes and higher standards for Crown conduct contained in the Agreements were not engaged in respect of the Project, it would be a fundamental breach of the Crown's three-fold duty to the Haida Nation of consultation, accommodation and reconciliation. This is particularly the case for the many cooperatively managed protected areas directly adjacent to the oil tanker route, including 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 SGaan Kinghlas Bowie Seamount Marine Protected Area (co-designated by Fisheries and Oceans Canada, "DFO"). The Guidelines must recognize and account for the fact that this Project proposes significant threats to these sensitive 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 and the EIS must contain requirements that the proponent and the Crown work within these existing collaborative governance structures.

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), the marine territory and resources must be embedded in the Guidelines, EIS and any EA for the Project. In addition, all components and options listed in the proponent's addendum must be part of the scope of the Project and contained in the Guidelines and therefore considered in the Project's EIS. This is the only way it will be possible to assess the

adverse impacts resulting from a spill and 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 EIS.

With due respect,

<Original signed by>

Péter Lantin
President of the Haida Nation