



HAISLA NATION COUNCIL

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October 28, 2016

VIA EMAIL: brett.maracle@ceaa-acee.gc.ca

Canadian Environmental Assessment Agency
160 Elgin Street, 22nd Floor
Ottawa, Ontario K1A 0H3

Attention: Brett Maracle, Panel Manager

Dear Mr. Maracle:

Re: Pacific Future Energy Refinery Project – Panel Review

We are writing in response to your letter dated October 7, 2016 providing information about the comment period on draft Environmental Impact Statement Guidelines, the availability of funding to support Indigenous Groups, and the Canadian Environmental Assessment Agency's (CEAA) proposed approach to consultation with the Haisla Nation for the above-noted Project.

I. Scope of Environmental Assessment

On September 28, 2016, the proponent filed an Addendum to its Project Description, on the basis of a request for additional information from CEAA, identifying activities that are incidental to the Pacific Future Energy Refinery Project. These activities included a marine terminal component, and identified a marine export terminal in Kitimat as the preferred option. Given the Project's preference for a marine export terminal in Kitimat, it is the Haisla Nation's view that the proposed Kitimat export marine terminal should be scoped as part of the Project. Integral to the refinery and the export terminal will be the pipelines carrying the refined product from the proposed refinery to the proposed export terminal. These pipelines should also be considered part of the Project for the purposes of the environmental assessment.

When the Project Description was originally filed, it identified a potential export point on Portland Inlet, and suggested that the marine export facility would be the responsibility of third parties. With the filing of the September 28, 2016 Project Description Addendum, it is clear that the Project has identified three potential means of exporting refined product, including a potential marine export terminal at Kitimat, in Haisla Nation Territory.

Considering a refinery in the absence of project elements required to ship refined product to market would effectively amount to project splitting of the type that allows circumvention of a rigorous environmental assessment, as cautioned against in *MiningWatch Canada v Canada (Fisheries and Oceans)*, 2010 SCC 2.

In 2010, CEAA developed an Operational Policy Statement for Establishing Project Scope and Assessment type under the *Canadian Environmental Assessment Act*, the predecessor to CEAA, 2012. This guidance document states that the scope of the Project to be assessed is, **at a minimum**, the project as proposed by the proponent. However, where there are additional components which are connected to the project, the project scope should be expanded. Additional components are connected where one is automatically triggered by another, one cannot proceed without the other, or both are part of a larger whole.

In our view, the Project cannot be assessed without an assessment of the potential export terminal at Kitimat and the associated product pipelines. Without an export component, the proposed refinery is not a viable project. Without product to export, a marine export terminal is an unnecessary project. The two are interminably intertwined, such that to assess one without the other would result in project splitting.

The project which Pacific Future Energy is actually proposing is a refined product export project. The shipping of raw product to the refinery and the export of refined product are not merely incidental to the Project, they are connected components. Refining bitumen into jet fuel, diesel and gasoline automatically triggers the need to transport these products to market. Further, there is no purpose for the refinery, and it cannot, economically, proceed without the ability to transport refined products to market. Considered separately, neither the refinery nor the marine export terminal at Kitimat have independent utility.

Although the Addendum to the Project Description suggests using existing rail for the export of refined product, this alternative does not make any sense from a logistical standpoint. This would entail shipping in product by rail and then shipping it out again by rail. If shipping product in and out by rail were the intention, then the Haisla Nation presumes the refinery would be located much closer to the source of the raw product or the export point of the refined product and not conveniently close to Kitimat Arm.

An environmental assessment entails establishing appropriate assessment boundaries, including spatial and temporal boundaries. The potential effects of the project in Haisla Nation Territory change significantly with the addition of an export terminal at Kitimat. It means that the marine and land corridor transportation components would not be limited to refinery construction, but would extend to the entire operational lifespan of the

Project. This has implications for both the spatial and temporal boundaries necessary to assess environmental impacts.

To ensure that the full measures of potential project impacts on Haisla Nation current use of lands and resources for traditional purposes and on Haisla Nation Aboriginal rights, including Aboriginal title, can be properly assessed, the Haisla Nation requests the Minister to expand the Scope of the Project to include the marine export terminal at Kitimat and the refined product pipeline.

II. The Crown's Proposed Consultation Approach

1. Depth of Consultation

You have advised that, on the basis of information available to the Crown on the Haisla Nation's potential or established aboriginal rights and potential impacts of the Project, the depth of the duty to consult with the Haisla Nation is at the high end of the consultation spectrum. The Haisla Nation is of the view that the depth of consultation is at the highest end of the consultation spectrum.

In reviewing the information which you have listed in Attachment 1 to your letter, we note the following significant gaps:

- in 1978, Canada's Office of Native Claims accepted the Haisla Nation's Comprehensive Claim for negotiation, after a legal and historical validation process;
- the Addendum to the Project Description filed by the proponent on September 28, 2016 identifies an export terminal in Kitimat as the preferred option for the Project;
- the potential impacts of an export terminal at Kitimat and associated pipelines on Haisla Aboriginal rights, including Aboriginal title, are considerable and must be assessed; and
- the exact location of the proposed Kitimat terminal has not been disclosed; however, the head of Kitimat Arm is acknowledged to be an area free of any overlapping Aboriginal claims.

On the basis of these factors, the Haisla Nation takes the position that the Crown must consult with us at the deepest end of the *Haida* spectrum.

2. Proposed Crown Consultation Approach

We have reviewed the proposed Crown consultation approach provided at Attachment 2 to your letter, and have the following comments:

We acknowledge the Crown's commitment to establish a positive and productive working relationship and to determine how the Haisla Nation would be like to be consulted during the environmental assessment of the Project. One of the key concerns the Haisla Nation has with consultation in the context of environmental assessments is that the Crown's engagement in consultation is often left until after the environmental assessment has been completed, which eliminates the possibility of changes to the Project as a result of consultation. We are hopeful that the Crown will engage with the Haisla Nation throughout the environmental assessment process and will not leave it to the end of the assessment.

Our preliminary review of the table outlining how consultation is integrated into the environmental assessment process raises some concerns. For example, we note that the Minister's Decision Statement is currently identified as consisting of Notification of the Issuance of the Decision Statement. It is our understanding that where the duty to consult is deep, a decision should be accompanied by written reasons that will allow the Haisla Nation to understand how its concerns have been demonstrably integrated into the Crown's decision.

It is premature to assess the extent to which the proposed integration of Crown consultation into the environmental assessment process will be successful in discharging the Crown's obligation to consult. We will advise if we identify issues as this process proceeds.

3. Funding

CEAA has provided a funding application to the Haisla Nation and has identified that it is prepared to offer up to \$95,600 as a contribution through the Agency's Participant Funding Program to assist the Haisla Nation to participate in consultation.

With all due respect, the amount of funding offered is inadequate to address the Haisla Nation's participation in the environmental assessment of Project and in related consultation with the Crown. With the refinery, the access road, the product pipelines and proposed terminal in Haisla Nation Territory, the Haisla Nation's involvement in the environmental assessment and participation in consultation will be extensive. The funding that it has been offered to date is inadequate.

III. Draft EIS Guidelines

We have addressed our concerns regarding to the scope of the environmental assessment above. The draft EIS Guidelines provided as attachments to your letter state that CEAA requires “consideration of” the environmental effects of transporting final products. This, in the Haisla Nation’s submission, is inadequate. Please refer to our comments above outlining why the environmental assessment should be scoped to include the export of refined product, including the proposed Kitimat export terminal and associated pipelines.

We have the following additional comments on the draft EIS Guidelines:

- Part One – 4.4 Presentation and Organization: it would be helpful if each of the electronic filings could bear a descriptive title as well as any numerical reference, for ease of review;
- Part Two – 2.2 Alternative Means of Carrying out the Project: the Haisla Nation expects a full assessment of the alternative means of exporting the Project’s refined products, including the proposed Kitimat terminal;
- Part Two – 6.1.7 Fish and Fish Habitat: this section should be clarified and reworded to indicate clearly that marine fish and fish habitat must also be assessed, especially with respect to environmental effects of the proposed Kitimat export terminal;
- Part Two – 6.3.1 Fish and Fish Habitat: this section should be reworded to indicate clearly that marine fish and fish habitat must also be assessed. Alternatively, marine fish and fish habitat should be identified as components of the marine environment; and
- Part Two – 6.6.3 Cumulative Effects Assessment: the cumulative effects assessment should consider spatial scoping that looks at cumulative effects on the basis of Aboriginal Territories or resource use areas.

IV. Terms of Reference for the Review Panel

We note your commitment to provide an opportunity to review draft Terms of Reference for the Review Panel. The Haisla Nation has the following preliminary comments regarding the Terms of Reference:

- The Description of the Project should include the refined product pipelines and a proposed export terminal at Kitimat.

- The Terms of Reference should provide that the refined product pipelines and the proposed export terminal at Kitimat, currently identified as factors under s. 19(i)(j) of the *CEAA, 2012*, are actually part of the Project.

Yours truly,

HAISLA NATION COUNCIL

<Original signed by>

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