



September 4, 2020

By email (david.mcgovern@canada.ca)

Impact Assessment Agency of Canada
22nd Floor, Place Bell
160 Elgin Street
Ottawa, ON K1A 0H3

Attention: David McGovern, President

Dear Mr. McGovern:

Re: Substituted Environmental Assessment for the Tilbury Phase 2 LNG Expansion Project

My name is Tejas Madhur, Manager of Policy and Intergovernmental Affairs and Government Services for Tsawwassen First Nation (“TFN” or “Tsawwassen”). I am writing regarding Associate Deputy Minister Kevin Jardine’s request for a substituted BC Environmental Assessment (“EA”) process for the Tilbury Phase 2 LNG Expansion Project (the “Project”) proposed by Fortis BC (the “Proponent”).

Part 1: Overview of TFN’s position

TFN’s position is that it is acceptable for a substituted EA process to be used for the Project on the understanding that Canada will ensure the following:

1. The new provincial assessment process will apply to the Project and the standards of consultation and assessment of Project impacts will in no way be lower than current federal standards;
2. Canada will ensure that the methodology for assessing Project impacts to Treaty rights and culture in the assessment aligns with federal guidance and Tsawwassen-specific perspectives and values;
3. Canada will ensure that impacts to Treaty rights and TFN culture are not given a less rigorous assessment and that impacts to rights and culture are not viewed as subordinate to biophysical impacts;

4. Canada will continue to engage with TFN directly through the process and will provide regular and meaningful opportunities for dialogue regarding where additional federal actions may be required in the process;
5. Substitution in no way limits the duty of Canada to fully discharge its consultation and accommodation obligations as a Treaty partner;
6. Canada will work proactively with TFN to ensure that the serious deficiencies with the current substituted BC EA process for the Wespac/Tilbury Jetty Project are avoided.

Tsawwassen asks that you confirm your support for these six principles before IAAC orders that the EA be conducted by the BC Environmental Assessment Office (the “BC EAO”) pursuant to the *Environmental Assessment Act*, S.B.C. 2018 c. 51.

Part 2: Context of this Assessment - Potential Project Impacts to Tsawwassen

The Project is proposed in an important part of Tsawwassen’s traditional territory (“**Territory**”) and in an already heavily developed area where TFN members exercise constitutionally protected Aboriginal and Treaty rights. Tsawwassen’s connection to its Territory lies at the heart of TFN culture, identity, and community well-being.

There is a profound relationship between the health of Tsawwassen members, in the broadest sense, and the health of the Fraser River, the Salish Sea, and the lands in TFN’s Territory. Development and industry that impact the natural environment in the Territory, including keystone and indicator species such as eulachon, salmon, sturgeon and Southern Resident Killer Whales stand to negatively impact TFN as a whole.

Tsawwassen continues to express its relationship to its lands and waters through its constitution, its modern laws, and its other governing documents. Through the rights entrenched through their modern Treaty, Tsawwassen people are living their stewardship goals and working to ensure their resources are healthy and protected for generations to come.

The Crown has a constitutionally required duty to consult with Tsawwassen any time it contemplates action that may adversely affect TFN’s Aboriginal and Treaty rights. The fulfillment of this duty is especially important for a project that is proposed on Tilbury Island, an area of key cultural, historical, and enduring significance to TFN.

Part 3: Additional information about TFN’s Concerns Regarding BC assessment and consultation processes that need to be proactively addressed should Canada support a substituted EA

The following issues must be addressed by Canada for a substitution decision to be reasonable:

- 1) Compliance with the *Impact Assessment Act*, S.C. 2019, c. 28, s. 1 (the “Act”): The assessment must meet or exceed the federal standards for EAs, and in particular the

requirements of the Act. While it is our understanding that there is more consistency between the Act and the new BC environmental assessment process than there was under the previous BC environmental assessment process, Canada will need to include clear direction in this regard and ensure there is regular engagement with TFN to ensure federal processes and standards are upheld. Standards relating to Indigenous participation, information gathering and evaluation criteria in the substituted EA must not be lower than the federal standard.

- 2) Federal consultation and collaboration with TFN: The EA must include the same level of federal consultation and collaboration as would occur in a federal EA and related consultation. In particular, the EA must be conducted in compliance with the following sections of the Act:
 - a. Section 6(1)(g), which states that EAs must ensure respect for the s. 35 rights of Indigenous peoples;
 - b. Section 6(1)(j), which states that EAs must take both Indigenous knowledge and community knowledge into account;
 - c. Section 6(1)(l), which requires that projects are considered in a careful and precautionary manner to avoid significant adverse environmental effects;
 - d. Section 6(1)(m), which encourages the assessment of the cumulative effects of physical activities;
 - e. Sections 7(1)(c) and (d), which prohibit proponents from impacting Indigenous people's physical and cultural heritage, current use of lands and resources for traditional purposes, and health, social, and economic conditions, unless an agreement is reached with an affected Indigenous group (s. 7(4)).

- 3) Rights Analysis: The EA must involve an Aboriginal and Treaty rights analysis that complies with Canada's Statement of Principles on the Federal Approach to Modern Treaty Implementation, Canada's Principles respecting its relationship with Indigenous Peoples and the Agency's guidance for impact to rights assessments. This analysis must consider impacts to TFN's rights, rather than to primarily or exclusively biophysical impacts. The rights analysis must uphold the common intentions of the Treaty partners with respect to the Treaty as a tool to support TFN stewardship and cultural aspirations. Given our experience with the Wespact/Tilbury Jetty Project, BC EAO either does not share Canada's view of the need for a credible, robust and indigenous-led assessment of impacts or Treaty rights or has inadequate internal capacity to consistently ensure such an assessment. A substituted assessment that allows this to continue will fall short of good impact assessment practice and breach the honour of the Crown.

- 4) Comprehensive Understanding of Biophysical Effects: the EA must take into account the full range of biophysical impacts and the EA must include requirements for the Proponent to gather sufficient evidence on these effects. In addition, the Proponent must be required to promptly address any gaps or deficiencies in collaboration and consultation with TFN. As TFN has indicated to you recently, the BC EAO has profoundly failed in this regard in the recent substituted environmental assessment for the WesPac/Tilbury Jetty project. It is incumbent on Canada to ensure that substitution does not allow this failure to be repeated here.
- 5) Cumulative Effects: the EA must properly and credibly assess the cumulative effects of existing extensive development in the Project area and recognize the heightened severity of any additional impacts. The Proponent must not rely on “scorched earth” reasoning that minimizes cumulative effects on the basis that the Project is proposed in an already highly disturbed landscape.¹ Again, it has been our experience that BC does not share Canada’s view of or commitments around the assessment of cumulative effects, highlighting the need for greater clarity and prescription in any substitution order or decision.
- 6) Baseline Conditions: The EA must be based on a comprehensive understanding of baseline conditions in the Project area and the surrounding lands and waters. These baseline conditions, particularly as they relate to Tsawwassen’s Aboriginal and Treaty rights, must be informed by TFN’s Indigenous and traditional knowledge, perspective, and worldview. This is another area that will require greater direction or prescription from Canada as our recent experience has been that the EAO does not see the gathering of baseline conditions for the exercise of rights as necessary.
- 7) Communication and cooperation with Indigenous nations: The EA must be conducted in a manner that promotes open and transparent communication and cooperation between Canada and TFN. Irrespective of substitution, Canada must guarantee that it can be responsive to TFN’s concerns and promptly address gaps and deficiencies identified by Tsawwassen that the BC EAO declines to address. Similarly, Canada must be prepared to discuss possible accommodation measures, avoid prioritizing the interests of the Proponent over TFN’s interests, and require the Proponent to conduct additional research or make changes in response to TFN’s concerns.
- 8) Timelines: the EA must set out reasonable timelines for TFN to review documents, provide materials, and offer comments.
- 9) Funding: TFN must be provided with sufficient capacity funding to allow it to participate in the consultation and assessment process. It has been our experience that BC does not provide adequate funding to support TFN participation in

¹ The “scorched earth” approach to environmental assessment is described in Murray et al., “The Insignificance of Thresholds in Environmental Impact Assessment: An Illustrative Case Study in Canada” (2018) 61:6 *Environ Manage* at 9.

consultation and assessments. We urge Canada to work directly with us around funding should a substituted assessment be ordered.

- 10) Active involvement of IAAC and federal experts: In some cases, substitution can unfortunately result in IAAC and federal departments being less actively involved in issuing information requests, gathering information and other steps in consultation and assessment processes. If Canada orders a substituted assessment, that should in no way reduce Canada's active involvement in all aspects of the process.

In closing, while we do not object to the project undergoing a substituted assessment, subject to Canada making the commitments set out in this letter, given past experiences, Tsawwassen requests that the IAAC remain involved throughout the EA process to ensure that TFN's Treaty rights are protected and to provide greater clarity and direction to BC – and guarantees to us – that core federal standards and consultation obligations will be upheld.

Yours truly,
<Original signed by>

Per:
Tejas Madhur
Manager, Policy and Intergovernmental Affairs and Government Services
Tsawwassen First Nation