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Our File No.: 31750-14

October 26, 2012

BY EMAIL to PartVIConsultation@neb-one.gc.ca

National Energy Board
444 – 7th Avenue SW
Calgary, AB T2P 0X8

Attention: Sheri Young, Secretary of the Board

Dear Sirs/Mesdames:

Re: Part VI Oil and Gas Consultation
Ad-GA-ActsLeg-Fed-NEBA-Amend 0101

We are counsel for the Gitxaala Nation ("**Gitxaala**"), an *Indian Act* band. We make this submission in response to the notice from the National Energy Board (the "**Board**") on September 20, 2012 seeking comments from interested parties on a number of issues relating to proposed changes to the *National Energy Board Act Part VI (Oil and Gas) Regulations*, SOR/96-244 ("***Part VI Regulations***"), which are being considered in light of recent amendments to the *National Energy Board Act* (the "***NEB Act***"). The Board has proposed seven changes to the regulatory framework and has asked for comment on them from interested parties.

The Gitxaala's Traditional Territory, over which they assert Aboriginal Rights and Title, is centered on the islands and waters off the mainland of British Columbia, stretching approximately from Prince Rupert in the north to below Kitimat in the south, and is outlined on the map enclosed with this letter. As you know, there are numerous large-scale liquefied natural gas projects (the "**LNG Projects**") in various stages of development in this region, including the LNG Canada, BG International, PETRONAS, KM LNG (Kitimat LNG) and BC LNG projects. The LNG Projects will all require Board-approved long-term export licences in order to proceed. Additionally, the Northern Gateway project, which is currently before the Board, would, if approved, export bitumen through this region.

The LNG Projects and the associated marine shipping of LNG will likely have very significant negative impacts on the environment in Gitxaala's Traditional Territory and on the Gitxaala. Given these potential impacts on the Gitxaala and neighbouring First Nations, and in light of the need to ensure that

constitutionally-protected Aboriginal Rights and Title are properly respected by the Board, the following proposed change to the *Part VI Regulations* is of great concern to the Gitxaala:

> Reduce the information required for long-term export licence applications consistent with the NEB Act.

The recent amendments to the *NEB Act* do not in any way remove or limit the *constitutional* requirement on the Board to thoroughly understand and properly weigh the impacts that a project may have on Aboriginal Rights and Title as part of the Board's decision-making process with respect to whether that project should be granted an export licence. This constitutional requirement is further addressed below under the heading "**The Board Must Respect Aboriginal Rights and Title**".

Furthermore, the new *Canadian Environmental Assessment Act 2012* ("***CEAA 2012***") – enacted at the same time as the NEB Act was amended – prohibits the Board from making its decision on an export licence application until the project for which the licence is sought has undergone any federal environmental assessment process that may be required. This statutory prohibition is explained below under the heading "**The Board May Only Issue an Export Licence Following the Environmental Assessment Process**".

With respect to the proposed reduction in the information required for long-term export licence applications, the Board has asked for comment on this specific question: "What modifications, if any, are required to the information that applicants must submit in requesting an export licence?" The Gitxaala's position is that applicants must provide the Board with such information as will allow the Board to respect the requirements introduced above and explained more fully under the headings below. Specifically, Gitxaala submits the following in respect of the Board's question:

1) Notwithstanding the legislative changes to the *NEB Act*, the Board's constitutional duties under section 35 of the *Constitution Act, 1982* have not changed. Applicants must continue to be required to submit information sufficient to allow the Board to determine whether First Nations which may be adversely impacted by the project for which the export licence is sought have been adequately consulted, and to fully understand and weigh the project's impacts on those First Nations' Aboriginal Rights and Title. To this end, applicants should submit information describing at least the following:

    a. The project for which the export licence is sought, including the physical means and the route by which the export will take place;

    b. Whether there are any First Nations who credibly assert Aboriginal Rights and Title that could possibly be adversely impacted by the project, including contact information for such First Nations;

c. Details in respect of any non-confidential consultation that has taken place with any affected First Nations with respect to the project, including:

   i. Documentation and summaries of meetings between the applicant and affected First Nations; and

   ii. First Nations' involvement in other regulatory processes;

d. The relevant Aboriginal Rights and Title asserted by potentially affected First Nations;

e. Other concerns raised by potentially affected First Nations;

f. Whether any of those impacts or concerns remain outstanding, or whether they have been accommodated, such as by modifications to the project or compensation;

g. Whether the applicant is aware of any direct consultation between the federal Crown and affected First Nations and, if so, such details as are available with respect to that consultation, including contact information for the relevant Crown officials; and

h. Whether the applicant has had any discussions with any federal government departments or agencies with respect to concerns raised by First Nations regarding the project and, if so, details of those discussions.

The Board must afford an opportunity to be heard to First Nations with Aboriginal Rights or Title that may be adversely affected by the project for which the export licence is sought. The Board may also need to request further information from an applicant, depending on the initial information provided and First Nations' concerns. In many cases properly taking Aboriginal Rights and Title into account will necessitate holding an oral hearing to allow First Nations to make submissions, tender evidence and test the evidence of the applicant.

2) Applicants should be required to provide the Board with information as to whether the project for which the export licence is sought is, or may become, a "designated project" within the meaning of the *CEAA 2012*, and if so:

   a. Whether the Canadian Environmental Assessment Agency (the "**Agency**") has decided whether or not an environmental assessment is required under *CEAA 2012*; and

   b. The status of the environmental assessment, including a copy of the decision statement if one has been issued.

The bases for these requirements are addressed more fully under the headings below.

1. The Board Must Respect Aboriginal Rights and Title

As the Board observed in respect of KM LNG Operating General Partnership's ("**KM LNG**") application for an export licence, an export licence is "necessarily connected" and "closely tied" to the physical activities by which the export is actually carried out. With the KM LNG project, those activities encompassed the pipeline, the liquefaction facility and the marine shipping, all of which would be undertaken for the sole purpose of exporting gas from Canada: GH-1-2011, pages 23-24. The *NEB Act* amendments do not change the fundamental fact.

It is plain that many projects for which an export licence is sought have the potential to adversely impact First Nations' Aboriginal Rights and Title. For instance, pipelines by which oil or gas is transported to the export point may be situated on land to which First Nations assert Aboriginal Title or Rights to hunt, or pose risks to surrounding land in the event of a spill; liquefaction, storage and/or terminal facilities – necessary for the export by ship of LNG or oil – may be planned on land to which Aboriginal Title or Rights are claimed; and the shipping of oil or LNG by sea may adversely impact First Nations' Aboriginal Title and Rights on a regular basis, and pose the risk of catastrophic impacts in the event of an accident.

Section 117 of the *NEB Act* provides the Board with discretion to grant an export licence or not, and allows it to impose terms and conditions. As a matter of constitutional and administrative law, the Board must take Aboriginal Rights and Title into account when exercising that discretion. As the Supreme Court of Canada stated in a leading case on the Board's export licencing function, "[i]t is obvious that the Board must exercise its decision-making function, including the interpretation and application of its governing legislation, in accordance with the dictates of the Constitution, including s. 35(1) of the *Constitution Act, 1982*": *Quebec (Attorney General) v. Canada (National Energy Board)*, [1994] 1 S.C.R. 159. In other words, the Board is required to ensure that its decision on an application for an export licence respects constitutionally-protected Aboriginal Rights and Title.

In the *AG Quebec* case, the Supreme Court averted to a two-step test in this regard. First, the Board must determine whether a decision to grant a particular export licence "could have the effect of interfering with the existing aboriginal rights of the [First Nation] so as to amount to a *prima facie* infringement of s. 35(1)." If so, then the Board must determine whether such potential interference is justified in all the circumstances. The Supreme Court assumed for the sake of argument in the *AG Quebec* case that such a justification analysis must amount to, at a minimum, a "rigorous, thorough, and proper cost-benefit review".

This requirement on the Board to exercise its decision-making function with "due regard for existing Aboriginal rights that are recognized and affirmed in subsection 35(1) of the Constitution" was reiterated by the Federal Court of Appeal in *Standing Buffalo Dakota First Nation v. Enbridge Pipelines*

Inc. (2009), 313 D.L.R. (4th) 217 at paragraph 40. The Court there observed that the Board required applicants to "consult with Aboriginal groups, determine their concerns and attempt to address them, failing which the NEB can impose accommodative requirements", as part of discharging its constitutional duty. In its Reasons for Decision (OH-3-2007) with respect to the decision that was appealed to the Federal Court of Appeal, the Board set out its process in more detail:

> The Board's process is designed to ensure that it has a full understanding of the concerns that Aboriginal people have in relation to a project before it renders its decision. Aboriginal people who have an interest in a project are able to participate in the regulatory process on several levels. The Board weighs and analyzes the nature of the Aboriginal concerns and the impacts a proposed project might have on those interests as part of its overall assessment of whether or not the project is in the public interest.

The Gitxaala will leave for another day the question of whether or not such a process is constitutionally sufficient to ensure that section 35 rights are respected. It is clear, however, that the Board must at least obtain adequate information – including by providing Aboriginal people with meaningful opportunities to participate – to give it a full understanding of the project's potential impacts on Aboriginal people's interests and asserted Aboriginal Rights and Title, and the extent to which those concerns have been mitigated or accommodated.

This requirement to respect Aboriginal Rights and Title arises from the interaction of the discretion given to the Board under section 117 of the *NEB Act* with the constitutional dictates of section 35 of the *Constitution Act, 1982*. The recent amendment of section 118 of the *NEB Act* does not in any way remove or diminish the Board's duty in this regard. There is nothing within the *NEB Act* that indicates a clear intention on the part of Parliament that the Board not exercise its discretion within the bounds of the Constitution. (Indeed, if there were, then the export licence provisions of the *NEB Act* would be unconstitutional.) To the contrary, the Board is a court of record (subsection 11(1)) and has full jurisdiction to hear and determine all matters for the purposes of the *NEB Act*, including matters of law and of fact (subsection 12(2)). Such matters must include whether First Nations have been adequately consulted, whether a project for which an export licence is sought may interfere with asserted Aboriginal Rights and Title, and whether such interference is justified. If the Board errs in its determination of these matters, then it is subject to judicial review in the Federal Court of Appeal, which may quash any export licence the Board issued.

In summary, it is incumbent upon the Board to require applicants for export licences to provide such information as will allow the Board to ensure that its decision on the application respects asserted Aboriginal Rights and Title. Three additional procedural points should also be noted.

First, the information that should be sought on a preliminary basis has been set out by category above, on pages 2 and 3 of this letter. The Gitxaala submit that this information should be required by the *Part VI Regulations* as a minimum condition. As has been its practice, however, the Board may require additional information from the applicant. Ultimately, it is the Board's duty to ensure its process and decision respect section 35 of the *Constitution Act, 1982*.

Second, in many cases the requirement to respect section 35 will necessitate that the Board provide meaningful opportunities to First Nations to participate in the decision-making process. Often that will mean allowing First Nations to tender evidence, test the applicant's evidence, and make written and oral submissions to the Board. Subsection 24(1) of the *NEB Act* has been amended such that public hearings in respect of export licence applications are no longer automatically required, although the Board retains the discretion to hold a public hearing on any matter if it considers it advisable to do so. Procedural fairness will generally require that a public hearing be held where an export project may adversely impact Aboriginal Rights and Title.

Third, in many cases the Board's determination of these matters will only be able to be conducted after the project has been defined in substantial detail, the scope of First Nations' asserted Aboriginal Rights and Title have been understood, and the impacts of the project on First Nations' interests, Aboriginal Rights and Title have been fully fleshed out. Often this will mean that the Board's decision will only be able to be properly made after any environmental assessment of the project has been conducted. This practical consideration is bolstered by section 7 of *CEAA 2012*, which prohibits the Board from issuing an export licence until the completion of any federal environmental assessment of the project for which the licence is sought. That requirement is addressed under the next heading.

2. The Board May Only Issue an Export Licence Following the Environmental Assessment Process

On page 3 of this letter above, we submitted that applicants should be required to provide information to the Board as to whether the project in connection with which the export licence is sought is or may become a "designated project" within the meaning of *CEAA 2012* and, if so, the status of any environmental assessment of that project.

The basis for this information requirement is section 7 of *CEAA 2012*, which states:

> **7.** A federal authority must not exercise any power or perform any duty or function conferred on it under any Act of Parliament other than this Act that would permit a designated project to be carried out in whole or in part unless
>
> > (*a*) the Agency makes a decision under paragraph 10(*b*) that no environmental assessment of the designated project is required and posts that decision on the Internet site; or

> (*b*) the decision statement with respect to the designated project that is issued under subsection 31(3) or section 54 to the proponent of the designated project indicates that the designated project is not likely to cause significant adverse environmental effects or that the significant adverse environmental effects that it is likely to cause are justified in the circumstances.

That is, section 7 prohibits a federal authority from permitting a project to proceed unless:

1) The proposed project for which the export licence is being sought is not a "designated project" within the meaning of the *CEAA 2012*; or

2) The project is a designated project, and:

    a. The Canadian Environmental Assessment Agency has determined that no environmental assessment of the designated project is required; or

    b. The environmental assessment has been carried out and the conclusion is that the designated project is not likely to cause significant adverse environmental effects or that the significant adverse environmental effects it is likely to cause are justified in the circumstances.

If there is potential for section 7 to apply to the Board's issuance of an export licence in any given case, then it is incumbent upon the Board to obtain the information necessary for it to determine whether it does apply and, if so, whether the Board continues to be prohibited from making a decision on the export licence application. We submit that the conditions that trigger the application for section 7 will often be present in relation to an export licence. In broad terms, an export licence is required for export projects to be carried out (as the Board made clear in its reasons on the KM LNG application), and those export projects will often constitute "designated projects" under CEAA 2012. More specifically, section 7 will often apply because:

1) The Board is a "federal authority" within the meaning of section 2(1) of *CEAA 2012*. It is a body established under the *National Energy Board Act*, which is an Act of Parliament, and it is ultimately accountable through a Minister of the Crown in right of Canada to Parliament for the conduct of its affairs (see section 133 of the *NEB Act* and subsection 14(4)(b) of *CEAA 2012*).

2) Many projects for which export licences are sought will be designated projects under *CEAA 2012*. Section 2 of that Act defines a "designated project" as one or more physical activities that:

    i. are carried out in Canada or on federal lands;

    ii. are designated by regulations made under paragraph 84(*a*) or designated in an order made by the Minister under subsection 14(2); and

iii. are linked to the same federal authority as specified in those regulations or that order.

A designated project also "includes any physical activity that is incidental to those physical activities."

Not all projects for which export licences are sought will be designated projects under *CEAA 2012*, but many will. Many such projects will involve physical activities that are designated in the *Regulations Designating Physical Activities*, SOR/2012-147. Those regulations include, for instance, such physical activities as the construction and operation of pipelines, and the construction or expansion of facilities for the liquefaction, storage or regasification of LNG. Further, some projects will be designated by Ministerial order.

3) If the project for which an export licence is sought is indeed a designated project, then the export licence "would permit a designated project to be carried out in whole or in part". As the Board noted in its Reasons for Decision in relation to KM LNG's project (GH-1-2011), the physical activities in that case relating to the export of LNG (the construction and operation of the pipeline; the construction of the liquefaction facility; and the marine shipping) would not be undertaken without the export licence. Since in many cases a designated project would not be carried out without the export licence, then the Board's issuance of an export licence engages section 7 of *CEAA 2012*. This conclusion is further supported by subsection 5(2) of the same statute, which requires that, "if the carrying out of the physical activity, the designated project or the project requires a federal authority to exercise a power or perform a duty or function conferred on it under any Act of Parliament other than this Act", then additional environmental effects related to that federal authority's decision be taken into account. That is, subsection 5(2) makes clear that section 7 applies to any licence by a federal authority that is <u>required</u> for a designated project to be carried out, such as the issuance of an export licence by the Board.

For these reasons, the Board must determine whether the project for which the export licence is sought is or may be a designated project under *CEAA 2012* and, if it is or may be, then it must not make any final decision on an export licence application until the environmental assessment process under that statutte has completed. Applicants for export licences should be required to submit with their application the information necessary for the Board to make this determination. The specifics of that information are set out on page 3 of this letter. The Gitxaala submit that it is appropriate that the *Part VI Regulations* set out these information requirements explicitly.

We would be pleased to provide any further submissions on these matters as the Board may request.

Yours truly,

FARRIS, VAUGHAN, WILLS & MURPHY LLP

Per: 

Tim Dickson

TAD/
Enclosure
c.c.: Chief Elmer Moody, Gitxaala Nation
Mark Ignas, Gitxaala Nation

Gitxaala Traditional Territory