GITXAAŁA ENVIRONMENTAL MONITORING

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By email (PartVIConsultation@neb-one.gc.ca)

Attention: Suchaet Bhardwaj
National Energy Board
444 Seventh Avenue SW
Calgary, Alberta, T2P 0X8

Dear Mr. Bhardwaj

Re: Proposed changes to the National Energy Board Export and Import Regulatory Framework

The Gitxaala Nation ("Gitxaala") writes to provide its comments regarding the proposed changes to three regulations under the *National Energy Board Act*, R.S.C., 1985, c. N-7: the *National Energy Board Export and Import Reporting Regulations* ("Export Regulations"*), National Energy Board Part VI (Oil and Gas) Regulations* ("Part VI Regulations"), and the *Toll Information Regulations* ("Toll Regulations") (collectively, the "Export and Import Regulatory Framework").

Gitxaala is very concerned that, as currently drafted, the proposed changes to the Export and Import Regulatory Framework:

- fail to provide sufficient guidance to the National Energy Board (the "Board") for it to reliably ensure that its export decisions respect constitutional limitations;
- open the door to inappropriate fettering of the Board's discretion; and
- potentially undermine informed, responsible decision-making by the Board.

Unless revised, the proposed changes could result in the exclusion of aboriginal rights and title from the Board's decision making process for exporting oil and gas, even though the Board's export decision are important strategic decisions that may adversely impact Gitxaala's aboriginal rights and title and that give rise to the Crown's duty to consult and accommodate.

In light of these concerns, Gitxaala urges the Board and Canada to reconsider the proposed changes to the Export and Import Regulatory Framework. In this letter, we describe our concerns and set out our recommendations for the Export and Import Regulatory Framework.

1) Overview of Gitxaala's concerns

a. Undermining the Board's Duty to Consider Constitutional Constraints

Section 35 of the *Constitution Act, 1982* and the duty to consult impose constitutional constraints on the exercise of discretionary power by statutory decision makers. In the case of tribunals that have the power to decide questions of law or jurisdiction, the Supreme Court of Canada has been clear that tribunals or bodies not only have the duty to exercise discretionary powers within constitutional constraints, but also to give remedies.[1]

In the case of the Board, s.12 of the NEB Act, the broad powers of the Board in Part VI of the NEB Act and the fact that the Board is well equipped to deal with constitutional issues from a process point of view all underscore that the Board has the ability and the duty to ensure that its decision making processes respect the constitutional limitations arising from Section 35 and the duty to consult. Recent amendments to the NEB Act have not altered this duty: while the language of s.118 of the NEB Act has been amended, there is no language in ss. 117 or 118 that suggests any intention on the part of Parliament to modify the principle that decision-makers are statutorily expected to act constitutionally.

For the purpose of this submission, this means that the Board, when considering an application under Part VI of the NEB Act, is obligated to ensure that any export decision is made in accordance with constitutional limitations, including determining that its proposed decision appropriately addresses adverse impacts to Section 35 rights and determining that the Crown has adequately discharged its consultation obligations prior to the Board making an export decision. This requires consideration of non-physical impacts to Section 35 rights from export decisions, just as decisions respecting the transfer of a timber licence[2], staking a mineral claim[3] and other strategic decisions require consideration of adverse impacts to aboriginal title and rights.[4]

Central to the Board's ability to discharge its duty to act constitutionally is obtaining (and considering) necessary and relevant information. For export decisions that may adversely impact Gitxaala's Section 35 rights, this means obtaining information respecting adverse impacts to our Section 35 rights and information respecting whether the Crown has meaningfully discharged is consultation obligations. Unfortunately, the proposed changes to the Export and Import Regulatory Framework, if approved, do not provide a sufficiently robust framework to ensure the Board considers these constitutional issues. The root of this concern is the failure of the

[1] Paul v. British Columbia (Forest Appeals Commission), 2003 SCC 55 at para. 39; Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council, 2010 SCC 43 at para. 58 ("Rio Tinto").
[2] See, Haida Nation *v.* British Columbia (Minister of Forests), 2004 SCC 73
[3] Ross River Dena Council v. Government of Yukon, 2013 YKCA 7, leave to appeal denied
[4] Rio Tinto, supra at 43-44

proposed changes to be clear *at the outset* of an export application process about the kinds of information that the Board should receive and consider under Part VI of the NEB Act.

For example, under the proposed changes to the Part VI Regulations, it is no longer clear that applicants for export licences need to provide the Board with information about environmental effects, the place of export, contractual or other arrangements respecting transportation, or other materials relevant to understanding and assessing impacts to Section 35 rights, such as details from environmental reviews.[5] Under the proposed Export Regulations, the reporting requirements also fail to specifically require the provision of such information.[6] The proposed Part VI Regulation also do a disservice to the Board by no longer requiring a hearing where Gitxaala or other potentially affected First Nations can present their constitutional concerns directly to the Board at a hearing.[7]

These proposed changes, unless remedied, are likely to be applied by proponents in a way that puts the Board at risk of making unconstitutional decisions because the regulations will be interpreted to completely exclude consideration of Section 35 rights under Part VI of the NEB Act. In our experience, proponents will provide only the information set out in the regulations, even though additional information about potential impacts to Section 35 rights and the adequacy of Crown consultation is required if the Board is to issue its export decision in a way that does not offend the Constitution or the spirit of reconciliation. The uncertainty created by the proposed deletions in the Export and Import Regulatory Framework will result in increased uncertainty, costs, delays, frustration, and ultimately, export licences and orders that are unconstitutional.

Furthermore, by reducing clarity respecting the Board's ability to require applicants to submit information about impacts to Section 35 rights and Crown consultation, the proposed changes also send a devastating message to Gitxaala. It signals to us that our Section 35 rights may not be considered in export decisions despite the potential of these decisions to adversely impacts our aboriginal title and despite clear statements from the Supreme Court of Canada that impacts to Section 35 rights, including title, are to be considered by decision-makers at strategic decision-making stages. Rather than see the Board taking Crown consultation and Section 35 rights seriously at a key strategic decision making stage, we see the Board paving the way for project momentum and the creation of expectations on the part of proponents.

b. Potential fettering of the Board's discretion

[5] Part VI Regulations, ss. 12, 14, 16, 25, 27, 29
[6] Export Regulations, ss. 4, 7
[7] Part VI Regulations , s.26

Gitxaala wishes to ensure that the Board retains the authority to include terms and conditions in export licences and orders that relate to the exercise of Section 35 rights.

It is critical that the Board not fetter its discretion over the terms and conditions that can be included in export licences and orders. Terms and conditions in export licences respecting Section 35 rights can play a critical and long-term role in ensuring that exporters respect our Section 35 rights and maintain necessary conditions for the continued exercise of our rights. There is no other statutory authority with the ability to include terms and conditions respecting impacts to Section 35 rights in export licences or orders. For example, while Transport Canada's TERMPOL process can review activities relating to the export of oil and gas, that is a non-binding process that is premised on proponents complying with the terms and conditions of relevant licences and approvals.[8] Unlike an export licence or order, a TERMPOL report is not a regulatory instrument. Environmental assessments do not consider export and transportation contracts relating to export activities nor do they have the authority to include conditions in export licences. Simply put, ensuring that the Board maintains its discretion to include a range of terms and conditions in export licences and orders is essential if the Board is to take its duty to respect constitutional limitations in its export decisions seriously.

We are very concerned that the proposed changes to the Part VI Regulations, by deleting certain subsections relating to terms and conditions of export decisions, could be interpreted by proponents and others as restricting the ability of the Board to include terms and conditions on export licences and orders relating to impacts to Section 35 rights. For example, if the proposed changes are approved, it will become unclear whether the Board can still require, as a term or condition to a licence or order, that the applicant provide evidence of various approvals or certificates, including environmental reviews.[9] It will also become unclear whether the Board could require, as a term or condition to a licence or order, that the applicant continues to meet applicable environmental requirements.[10]

We note that neither s.117 nor s.118 of the NEB Act creates any limitations on the terms and conditions that can be included in an export licence or order.

In our view, a preferable approach would be to retain the text in the sections relating to licences and orders that is slated for deletion and to add new provisions clarifying that it is open to the Board to include terms and conditions in licences and orders that are directed at ensuring the meaningful exercise of Section 35 rights.

[8] See, e.g. Gitxaala Nation v Canada (Transport, Infrastructure and Communities), 2012 FC 1336 at 20
[9] Part VI Regulations, ss. 12(f)&(h), 25(e)&(f)
[10] Part VI Regulations, ss.14(g), 27(e)

c. Undermining informed, responsible decision-making

At the heart of any responsible and fair decision-making process is a clear and predictable process for obtaining and considering relevant and credible information. Where, as is the case with export licences, a decision involves years of future activity, responsible decision-making should also include the regular reporting requirements during the life of the activity.

In our view, the proposed changes to the Export and Import Regulatory Framework could frustrate the ability of the Board to make responsible decisions by potentially restricting the types of information it can require applicants to provide and by failing to set out the obligation for the Board to obtain and consider information relevant to Section 35 rights and Crown consultation when making an export decision. Similarly, the removal of clear language requiring the Board to hold a public hearing respecting applications for a licence to export oil further undermines the Board's ability to make informed, responsible decisions by restricting the ability of potentially affected First Nations from presenting their concerns to the Board in person.[11]

Taken together, the removal of the information gathering sections in the Export and Import Regulatory Framework and the silence on the need to gather and assess information relevant to impacts on Section 35 rights may unnecessarily undermine the ability of the Board to make responsible and informed decisions.

We are concerned that the proposed deletions could be used for the erroneous conclusion that the Board should only consider the "surplus" criteria described in s.118 of the NEB Act. As set out above, it is our view that only considering the "surplus" criteria is inconsistent with the full text of the NEB Act, namely the Board's duty to respect constitutional limitations when making decisions. Such a narrow approach is also inconsistent with responsible decision-making. It also suggests that the Board is oblivious to the failures of other processes (such as the numerous environmental assessments that Gitxaala is now facing) to adequately consider and address impacts to Gitxaala's Section 35 rights regarding export decisions.

We are also concerned that the potential restrictions on the types of information the Board will consider in the context of export applications and the proposed limitations on public participation regarding oil export applications will lead to the perception that the Board is a rubber stamp body when it comes to issuing long-term export approvals. This would be unfortunate.

A preferable and more responsible approach that still allows for efficient decision-making would be to clarify in the Export and Import Regulatory Framework that information respecting

[11] Part VI Regulations, s.26(1).

potential impacts to Section 35 rights and the adequacy of Crown consultation is required for all export applications. The Export and Import Regulatory Framework could either set out that the Board can conduct its own process to establish the necessary factual record to assess impacts to Section 35 rights, or alternatively, defer decisions until such time as environmental assessments in respect of the facilities and the marine traffic are completed and rely upon those processes for the purpose of identifying and assessing the impacts of the licence. This would not create additional delays in the processing of export applications and would ensure that the Export and Import Regulatory Framework creates a framework under which the constitutional issues raised by Gitxaala are addressed by the Board.

2) **Additional comments on the proposed changes to the Export and Import Regulatory Framework**

Under all three regulations that form the proposed Export and Import Regulatory Framework, the types of information that proponents are explicitly required to furnish to the Board have been unduly narrowed and limited. Accordingly, the proposed deletions in ss. 12, 25, and 25.1 should be rejected in full.

In addition, these sections should also be revised to include clear language about the need for the Board to consider information respecting impacts to Section 35 rights and Crown consultation prior to making an export decision. Clauses requiring information regarding impacts to Section 35 rights and the adequacy of Crown consultation should be added to all sections in the Export and Import Regulatory Framework relating to the gathering and consideration of information prior to an export decision.

The Export and Import Regulatory Framework should also be revised to include an explicit requirement for the Board to consider information respecting potential adverse cumulative impacts.

Sections 14, 16, 26, 27, 28 and 29 of the Part VI Regulations should be revised to clarify that the Board's discretion to consider terms and conditions in export licences and orders relating to impacts to Section 35 rights or other conditions (such as ongoing compliance with reporting and environmental conditions) has not been fettered.

The clear language requiring a hearing to be held for oil export licences should be reinstated.

As noted above, it may be appropriate to add additional language to ensure that the gathering and assessment of information regarding impacts to Section 35 rights and Crown consultation takes place in an efficient and procedurally fair manner.

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We suggest that the Part VI Regulations, and possibly the other two regulations as well, should include an interpretation section to clarify that the Regulations should not be interpreted so as to absolve the decision maker of the obligation to take into account constitutional considerations relating to Section 35 rights. Otherwise, we are concerned that the Board will interpret the Export and Import Regulatory Framework and s.118 of the NEB Act to the exclusion of ss. 11 and 12 of the NEB Act.

Finally, reporting requirements should be more frequent than once a year.

3) Conclusion

Gitxaala is currently facing an unprecedented rush to export oil and gas through our traditional territory, over which we continue to assert aboriginal title and governance rights. It is not just the physical activities associated with exporting oil and gas that are having direct, indirect and cumulative impacts on our Section 35 rights and our way of life. We are also extremely concerned about the direct, indirect and cumulative impacts of licencing decisions on our aboriginal title, governance rights and our culture. Unfortunately, it is our recent experience that these impacts are not being properly assessed and we are not being adequately consulted about these impacts before decisions are made.

It is our view that the proposed Export and Import Regulatory Framework, as currently drafted, will exacerbate these difficulties. Unless revised, we are concerned that the proposed changes to the Export and Import Regulatory Framework will push the Board unnecessarily towards ill-informed and unconstitutional decision-making. This in turn will undermine reconciliation and hinder responsible development.

In closing, we ask the Board to explain how it will ensure that its export decisions will be made in accordance with constitutional limits and how the Board will ensure that it considers impacts to our Section 35 rights and the adequacy of Crown and proponent consultation when considering such decisions.

We are happy to discuss this further.

Yours truly,

Bruce Watkinson
Marine Program Coordinator