

Aboriginal Consultation Framework for the Northern Gateway Pipeline Project

This document sets out a framework for how the federal government will rely on the Joint Review Panel process to the extent possible to assist in fulfilling its legal duty to consult Aboriginal groups for the proposed Northern Gateway Pipeline project.

The Federal Government Approach to Aboriginal Consultation

The Joint Review Panel (JRP) process will play a key role in the federal government's consultation with Aboriginal groups. The JRP will consider the potential adverse impacts that federal government actions regarding the Northern Gateway Pipeline project may have on potential or established Aboriginal and treaty rights.

The federal government is committed to taking a whole-of-government approach to consulting with Aboriginal groups regarding the Northern Gateway Pipeline project. Through this approach federal departments and agencies will fulfill their obligations for consulting Aboriginal groups in a coordinated manner that is integrated with the environmental assessment and regulatory review processes for the project.

The JRP process will be the primary mechanism for Aboriginal groups to learn about the project and present their views to the federal government about:

- their traditional knowledge with respect to the environmental effects of the project;
- the effects any change in the environment resulting from the project may have on their current use of lands and resources for traditional purposes; and
- The nature and scope of their potential or established Aboriginal and treaty rights, the impacts the Crown conduct in respect of the project may have on those rights, and appropriate measures to avoid or mitigate such impacts.

The Joint Review Panel Process

The federal government is required by law to ensure the review of the proposed project under both the *Canadian Environmental Assessment Act (CEAA)* and the *National Energy Board Act (NEBA)*.

The JRP process provides the most thorough type of review available under these Acts. It requires that the proponent describe in detail the nature of its proposed project and provide a detailed statement of the anticipated project's environmental effects. The environmental assessment of the proposed project is

conducted by a panel of experts, appointed by the Minister of the Environment and by the NEB. The JRP process provides all interested parties with an opportunity to understand the nature of the project and its impact on the environment, and provides opportunities for individuals and groups to provide their own views and perspectives on these issues. The JRP process also provides all interested parties the opportunity to hear the views and perspectives of the other parties participating in the process.

The joint review panel process has proven over time to be an effective means for the review of the environmental impacts of proposed projects and the consideration of broad societal concerns, including those of Aboriginal groups

The federal government believes that many of the issues that will be considered by the JRP in satisfying its mandate (as set out in the JRP agreement) may be directly and indirectly related to potential or established Aboriginal and treaty rights. For example, the project may have the potential to adversely affect a fish-bearing stream or lake and have the potential for consequential impacts on a related right to fish in an Aboriginal group's claimed territory. The JRP process provides an effective and reasonable means of ensuring that Aboriginal groups have access to the JRP and can bring to the JRP's attention the best available information with respect to the project and its potential impacts.

The federal government will rely on the JRP process, to the extent possible, to fulfill its duty to consult with Aboriginal groups. In the event that project-related issues requiring consultation fall outside the mandate of the JRP, the federal government will consult directly with the potentially affected Aboriginal groups on these matters at any time.

Federal Environmental Assessment and Related Regulatory Responsibilities

Crown Consultation Co-ordination:

The federal government will provide oversight of the consultation approach in order to ensure that the federal government fulfills its consultation obligations. The Canadian Environmental Assessment Agency (Agency) is responsible for coordinating Aboriginal consultation with Aboriginal groups during the federal environmental assessment of the Northern Gateway Pipeline project. The Agency has appointed a Crown Consultation Coordinator who will ensure that consultation activities described in this document are carried out, and Aboriginal groups are well informed.

Throughout the JRP process the Crown Consultation Coordinator will:

- ensure Aboriginal groups are provided with information, where necessary, on *CEAA*, *NEB* and the JRP processes and mandates, and the mandates of other federal departments and their involvement in the project review;
- answer any questions from Aboriginal groups about the integration of the consultation and JRP processes;
- discuss the importance of being involved in the JRP process and how Aboriginal groups can participate in it. This includes the importance of providing environmental assessment related information, including the traditional use of lands and resources for traditional purposes and information related to the nature and scope of potential or established Aboriginal and treaty rights that may potentially be affected by the project and the impacts that the project may have on these rights;
- encourage Aboriginal groups to introduce all project specific issues that are within the mandate of the JRP to the JRP process;
- monitor or participate in all public information sessions conducted by the JRP or its secretariat;
- monitor Aboriginal engagement activities conducted by the proponent to supplement the Crown record;
- liaise with the proponent to gain information on their Aboriginal engagement activities;
- attend oral hearings at key sessions depending on the schedule of intervenors and/or topics to hear and understand rights issues raised by Aboriginal groups in order to prepare for Phase IV consultations;
- discuss how Aboriginal groups may participate in consultation on the JRP environmental assessment report;
- coordinate, in collaboration with federal departments, the consultation on the environmental assessment report;
- initiate discussions on the participation of Aboriginal groups in any remaining consultation that may be required during the regulatory phase after the filing of the JRP environmental assessment report;
- describe funding available to assist Aboriginal groups to prepare for and participate in the JRP process and consultation activities as well as assist Aboriginal groups with the application for funding process; and
- prepare a report to the federal Cabinet, in consultation with federal departments, on the adequacy of consultation. This report on adequacy of consultation will be considered at the same time as federal departments seek federal Cabinet approval for the government response to the JRP environmental assessment report.

Federal Departments (Responsible Authorities)

Under section 5 of the *CEAA*, an environmental assessment is required for this project because the *NEB* may issue a certificate under section 52 of the *NEBA*; Transport Canada may grant leave under subsection 108(4) of the *NEBA*

and may issue a permit under paragraph 5(2) and 5(3) of the *Navigable Waters Protection Act*; Fisheries and Oceans Canada may issue an authorization under subsection 35(2) of the *Fisheries Act*; Indian and Northern Affairs Canada may provide an authorization under subsection 28(2) of the *Indian Act*; Canadian Transportation Agency may issue a permit under the *Transportation Safety Act*; and Environment Canada may issue a permit under the *Canadian Environmental Protection Act*. These federal departments cannot make these regulatory decisions until the environmental assessment has been completed.

Federal departments will be active participants in the JRP process to ensure the environmental assessment and the consultation record, is as accurate and complete as possible. Any issues or concerns related to aboriginal consultation will be brought to the attention of the Crown Consultation Coordinator.

Federal departments will refer any requests made by Aboriginal on project-related issues to the Crown Consultation Coordinator.

Other federal departments (federal authorities) may be asked to provide specialist or expert information or knowledge with respect to the project to the JRP.

Aboriginal Consultation Activities in the JRP Process

There are five distinct phases which offer opportunities for consultation between the federal government and Aboriginal groups during the JRP process:

- Phase I: Initial engagement and consultation on the draft JRP agreement
- Phase II: JRP process leading to oral hearings
- Phase III: Oral hearing and preparation of the JRP reports
- Phase IV: Consultation on the JRP Environmental Assessment Report
- Phase V: Regulatory permitting

Each phase of the JRP process is undertaken to achieve a specific objective, is comprised of different activities and may involve different parties. However, the overall goal is to ensure that the requirements for environmental assessment and regulatory review under the *CEAA* and the *NEBA* are met. It also seeks to address the Crown's obligation to consult with Aboriginal groups about potential adverse impacts Crown conduct related to the project may have on potential or established Aboriginal and treaty rights. The federal government strongly encourages Aboriginal groups to participate in all phases of the JRP process to express their views about the project to federal decision makers. Information about the JRP process will be available to all interested parties as the review proceeds.

Phase I: Initial engagement and consultation on the draft JRP Agreement

Beginning in the fall of 2008, Agency officials began contacting Aboriginal groups identified as being potentially impacted by the proposed Northern Gateway Pipeline project. The objective was to describe the manner in which consultations with Aboriginal groups will be integrated into the environmental assessment process and provide details about the JRP process itself. This approach to consultation was previously outlined in the document "Approach to Crown Consultation for the Northern Gateway Pipeline Project" issued 9 February 2009 and is in accordance with the "Aboriginal Consultation and Accommodation: Interim Guidelines for Federal Officials to Fulfill the Legal Duty to Consult"¹.

This preliminary phase will conclude when the JRP agreement is approved by the Minister of the Environment and the Chair of the NEB.

JRP Agreement

The current final draft JRP agreement has been developed following consultation with Aboriginal groups. Each proposal put forward by Aboriginal groups was carefully considered and the final draft JRP agreement balances the interests and needs of all interested and potentially affected parties.

The mandate of the JRP with respect to Aboriginal rights and treaty is set out in sections 6.5, 8.1 and 8.2 of the JRP agreement. The JRP will be directed through the JRP agreement to collect information related to the nature and scope of potential or established Aboriginal and treaty rights that may be affected by the project and the impacts that the project may have on these rights. In this way, the JRP process will provide a detailed record of Aboriginal groups' concerns about potential adverse impacts that the project may have on their potential or established Aboriginal and treaty rights. The JRP may recommend appropriate measures to avoid or mitigate potential adverse impacts on such rights and interests.

Phase II: JRP process leading to oral hearings

The JRP process is an open and transparent venue for Aboriginal groups to bring concerns, comments and/or evidence forward to the federal decision makers. During Phases II and III, Aboriginal groups are strongly encouraged to provide the JRP with information related to the nature and scope of potential or established Aboriginal and treaty rights and the potential adverse impacts that the project may have on these rights. Aboriginal groups are invited to propose appropriate measures to avoid or mitigate such impacts on potential or established Aboriginal and treaty rights.

¹ INAC/Department of Justice; February, 2008, <http://www.ainc-inac.gc.ca/ai/mr/ls/acp/intgui-eng.asp>

The JRP will also require the proponent to provide evidence regarding the concerns of Aboriginal groups and how these concerns have been taken into consideration in the project design and planning.

During Phase II, Aboriginal groups should prepare their information for submission to the JRP. There are three ways for Aboriginal groups to provide their information and participate in the hearing process:

- **Filing a letter of comment:** this is a written statement of the Aboriginal group's views on the project and any relevant information that will explain or support their comments.
- **Providing an oral statement:** this is similar to a letter of comment except that the statement is delivered orally at a prescribed time during the oral hearings (Phase III). A party wishing to provide an oral statement must advise the JRP of their intention to do so in advance.
- **Intervention:** Intervenors have the ability to do the following: file written evidence, ask questions regarding the evidence of others, be questioned on their evidence, participate in cross examination and make a final argument at the oral hearings (Phase III).

More information on these methods for involvement is available in the NEB's document 'The Public Hearing Process – Your Guide to Understanding the NEB Hearing Process'.²

Details of the panel process will be set by the JRP through a Hearing Order which sets out the procedures that will be followed for the joint review of the project. The Hearing Order will include:

- A description of the methods by which Aboriginal groups can participate in the review of the project;
- The draft list of issues (i.e. the project-related issues) that will be considered in the joint review;
- How and when intervenors can issue information requests to the proponent or other parties in order to clarify evidence or obtain further information regarding the project;
- The distribution of, and access to, all evidence, correspondence and other documents which will be used in the JRP process and which will form the public registry;
- The timetable of events for the JRP process, including the deadlines for filing evidence and information requests as well as the date when the oral hearings will commence; and
- How motions or questions of procedure or substance can be raised with the JRP.

² NEB document, <http://www.neb-one.gc.ca/clf-nsi/rthnb/nvlvngthpbic/pblchrng/pblchrngpmphlt-eng.html>

The secretariat to the JRP will conduct information sessions with Aboriginal groups to assist them in understanding the JRP process and the ways in which Aboriginal groups can participate. The location and timing of the sessions will be determined by the JRP in response to demand from interested parties.

The JRP will conduct sessions with Aboriginal groups for the purpose of seeking comments on:

- the draft list of issues (included in the Hearing Order);
- whether the proponent be required to file any additional information in view of the proposed changes to the list of issues, the NEB Filing Manual and the Agency's document entitled "Scope of the Factors - Northern Gateway Pipeline Project, August, 2009"; and
- the location of the oral hearings.

The Crown Consultation Coordinator will be available to discuss and meet directly with Aboriginal groups during Phases II and III on the following subjects:

- Matters that fall outside of the JRP's mandate, although these are expected to be the exception given the broad mandate of the JRP;
- Provision of information on available funding and preparation of applications; and
- Continued assistance in understanding the integration of the consultation and JRP processes and how to participate.

Phase III - Oral Hearings and Preparation of JRP Environmental Assessment Report

Prior to the scheduled start of the oral hearings (as will be set out in the Hearing Order), the JRP will announce the location and timing of the oral hearings. When determining the location and timing of the oral hearings, the JRP will take into consideration the location of Aboriginal groups most impacted by the project and any special needs of Aboriginal groups. Although it is anticipated that the time available will be significantly longer, Aboriginal groups will have a minimum of 90 days prior to the commencement of the oral hearings to review the proponent's application. The oral hearings will be accessible via the Internet so Aboriginal groups not attending the oral hearings can listen to the proceedings. Transcripts of the oral hearings will be prepared and be available through the public registry on the Agency's website (www.ceaa-acee.gc.ca).

The Crown Consultation Coordinator will be available to continue to discuss and meet directly with Aboriginal groups during Phase III on all of the subjects in Phase II and to provide further information, including information about available capacity and participation funding, related to Phase IV - consultation on the environmental assessment report.

At the conclusion of the oral hearings, expected in early 2011, the JRP will prepare its environmental assessment report. The JRP will include in its report information provided by Aboriginal groups regarding the manner in which the project may affect potential or established Aboriginal and treaty rights. In the case of potential Aboriginal rights, the JRP will also include the information provided by the Aboriginal groups regarding the Aboriginal groups' strength of claim respecting Aboriginal rights. The JRP may include in its environmental assessment report recommendations for appropriate measures to avoid or mitigate potential adverse impacts on potential or established Aboriginal and treaty rights and interests.

The JRP will not be mandated, however, to make final determinations about the strength of an Aboriginal group's claim respecting Aboriginal rights. The federal government will make this final determination, and will ensure that it meets its legal duty to consult and, where appropriate, accommodate.

Phase IV – Consultation on the JRP Environmental Assessment Report

After the JRP has issued its environmental assessment report, the Crown Consultation Coordinator, in collaboration with federal departments, and on behalf of the federal government, will consult with Aboriginal groups, to which it has a legal duty to consult, about the report and its recommendations. This consultation will seek to establish whether all concerns about potential project impacts on potential or established Aboriginal and treaty rights have been characterized accurately. It will also consult on the manner and extent to which any recommended mitigation measures might serve to accommodate these concerns, and whether there remain any outstanding issues.

The JRP's environmental assessment report and the record established through the JRP process will be the primary source of information to support the federal government's assessment of the project's potential impacts on potential or established Aboriginal and treaty rights. It is therefore essential that Aboriginal groups provide all relevant information to the JRP in Phases II and III. New or additional information about the nature and scope of potential or established Aboriginal and treaty rights that may be affected by the project or about the impacts of the project on these rights may not be considered during consultation on the JRP's environmental assessment report.

This consultation will form the basis for a report to the federal Cabinet by the Crown Consultation Coordinator, in consultation with federal departments, on the adequacy of consultation with Aboriginal groups. This report on adequacy of consultation will be considered at the same time as federal departments seek federal Cabinet approval for the government response to the JRP environmental assessment report. It is important to note that the federal departments, not including the NEB, must take a course of action that is in conformance with the federal Cabinet approval of the government response. The federal Cabinet could

decide that further consultation with Aboriginal groups is required. The approved government response will be sent to all Aboriginal groups and made public.

The JRP will then issue its “Reasons for Decision” pursuant to the NEB Act. The JRP will determine whether or not the project is in the public interest. If the JRP decides it is, federal Cabinet approval also will be required for the NEB to issue a Certificate of Public Convenience and Necessity.

Following the separate federal Cabinet approvals for the government response to the JRP environmental assessment report and the NEB Certificate, federal departments and the NEB may proceed to take decisions on regulatory permitting.

Phase V – Regulatory Permitting

In deliberating decisions on regulatory permitting, federal departments may need to further consult with Aboriginal groups on specific regulatory issues. The decision to undertake additional consultation will take into consideration:

- The consultation record;
- Mitigation, compensation, accommodation measures to address outstanding concerns not addressed through the environmental assessment;
- The report to the federal Cabinet by the Crown Consultation Coordinator on the adequacy of consultation;
- The government response to the JRP environmental assessment report; and
- Any direction that may be provided by federal Cabinet.

Responsibility for Aboriginal consultation throughout this phase, which could include specific details on project construction, operation and eventual decommissioning, will be transferred from the Crown Consultation Coordinator to another federal authority. Federal departments or their representatives will continue to be available to discuss regulatory matters directly with Aboriginal groups.

Participant Funding Program – Funding for Aboriginal groups

The Aboriginal Funding Envelope under the Participant Funding Program supports Aboriginal groups engaged in Aboriginal consultation activities and public participation activities on projects that are undergoing a federal environmental assessment under the *CEAA*. The program is administered by the Agency and can cover eligible expenses, such as travel costs and fees for experts, to support participation in the environmental assessment process.

In this case, funding under the Aboriginal Funding Envelope was made available for Phase I. This funding was intended only for consultation related to the draft JRP agreement and process.

On July 24, 2009 notification was sent to Aboriginal groups of the availability of funding for participation in the following:

- all aspects of the JRP process (Phase II and III); and
- consultations on matters outside the JRP mandate (Phase II and III).

This funding will be awarded following the finalization of the JRP agreement and appointment of JRP members. The deadline to receive applications is two weeks after the release of the final JRP agreement.

Funding for Aboriginal participation in consultation on the JRP environmental assessment report (Phase IV) will be made available at a later date.

Provincial Environmental Assessment and Permitting Considerations

At this time no provincial environmental assessment is required for the project by Alberta or British Columbia since the project, as proposed, crosses the provincial boundary between them. By crossing a provincial boundary, the project becomes a federally regulated project under the *NEBA*. However, Alberta and British Columbia will participate in the JRP process and do have permitting responsibilities that must be fulfilled to allow the project to proceed.

**AGREEMENT BETWEEN THE NATIONAL ENERGY BOARD AND THE
MINISTER OF THE ENVIRONMENT CONCERNING THE JOINT REVIEW OF
THE NORTHERN GATEWAY PIPELINE PROJECT**

1.0 PREAMBLE

WHEREAS the National Energy Board (the Board) has regulatory responsibilities for interprovincial and international natural gas, oil and commodity pipelines pursuant to the *National Energy Board Act* (the NEB Act) and for environmental assessment pursuant to the NEB Act and the *Canadian Environmental Assessment Act* (the Act);

WHEREAS the Minister of the Environment has statutory responsibilities pursuant to the Act and the Canadian Environmental Assessment Agency (the Agency) has administrative responsibilities under the Act;

WHEREAS the Northern Gateway Pipelines Limited Partnership (the Proponent) is proposing to construct and operate pipelines and a marine terminal as further described in the Appendix to this Agreement;

WHEREAS an application for a Certificate of Public Convenience and Necessity is expected to be filed with the Board pursuant to Part III of the NEB Act by or on behalf of Northern Gateway Pipelines Limited Partnership in respect of the Northern Gateway Pipeline Project (the project);

WHEREAS the Board, pursuant to the NEB Act, must hold a public hearing to consider the application for the project and conduct an environmental assessment of the project;

WHEREAS certain components of the project are within the jurisdiction of the Board and the Act applies to all aspects of the project;

WHEREAS the Board, Fisheries and Oceans Canada, Transport Canada and Indian and Northern Affairs Canada are responsible authorities for the project under the Act and the Canadian Transportation Agency, Environment Canada and Natural Resources Canada may be responsible authorities for the project under the Act;

WHEREAS the Board and the responsible authorities recommended that the Minister of the Environment refers the project to a review panel pursuant to section 25 of the Act;

WHEREAS the Minister of the Environment has determined that a Joint Review Panel (the Panel) should be established pursuant to paragraph 40(2)(a) of the Act to consider the project;

WHEREAS the Board, the Agency, and the responsible authorities recognize that a TERMPOL review process, which will be coordinated by Transport Canada, will occur separately from this Joint Review Panel process;

WHEREAS the Parties to this Agreement wish to avoid unnecessary duplication that could arise from carrying out the environmental assessment requirements separately while maintaining a high-quality environmental assessment process under the Act and the NEB Act;

AND WHEREAS the Government of Canada will rely upon the consultation effort of the proponent, and the Joint Review Panel process, to the extent possible, to assist in meeting the duty to consult;

NOW THEREFORE, in accordance with this Agreement and the Terms of Reference attached as an appendix to this Agreement, the Minister of the Environment and the Chairman of the Board hereby establish a Joint Review Panel to conduct the environmental assessment of the project.

2.0 DEFINITIONS

In this Agreement:

“Aboriginal group” means a collectivity of Indian, Inuit or Métis people that holds or may hold Aboriginal or treaty rights under section 35 of the Constitution Act, 1982;

“Agency” means the Canadian Environmental Assessment Agency;

“Agreement” means this Agreement including the Appendix;

“Board” means the National Energy Board;

“Board rules” means the *National Energy Board Rules of Practice and Procedure, 1995*, as amended, and made pursuant to section 8 of the NEB Act;

“Board’s public hearing process” means the public hearings process followed by the Board under the NEB Act to assess a proposed project and the environmental effects of a project;

“The Act” means the *Canadian Environmental Assessment Act*;

“Environment” means, as set out in the Act, the components of the Earth, and includes

- a) land, water and air, including all layers of the atmosphere,
- b) all organic and inorganic matter and living organisms, and
- c) the interacting natural systems that include components referred to in paragraphs a) and b);

“Environmental assessment” includes, as set out in the Act in respect of a project, an assessment of the environmental effects of the project that is conducted in accordance

with the Act and its regulations and an assessment of the environmental effects of the project for the purposes of the NEB Act and its regulations;

“Environmental effect” means, as set out in the Act in respect of a project,

- a) any change that the project may cause in the environment, including any change it may cause to a listed wildlife species, its critical habitat or the residences of individuals of that species, as those terms are defined in subsection 2(1) of the *Species at Risk Act*,
- b) any effect of any change referred to in paragraph a) on
 - (i) health and socio-economic conditions,
 - (ii) physical and cultural heritage,
 - (iii) the current use of lands and resources for traditional purposes by Aboriginal persons, or
 - (iv) any structure, site or thing that is of historical, archaeological, paleontological or architectural significance, or
- c) any change to the project that may be caused by the environment, whether any such change or effect occurs within or outside Canada;

“Federal authority” has the same meaning as set out in section 2 of the Act;

“Follow-up program” means, as set out in the Act, a program for

- a) verifying the accuracy of the environmental assessment of a project, and
- b) determining the effectiveness of any measures taken to mitigate the adverse environmental effects of the project;

“Government participant” means a federal authority or provincial department that has an environmental assessment or regulatory responsibility and that files a declaration with the Joint Review Panel stating that it wishes to participate in the hearing as a government participant;

“Joint review” means the assessment of the environmental effects of the project to be conducted pursuant to the Act and the consideration of the application under the NEB Act;

“Panel” means the Joint Review Panel established pursuant to Section 3 of this Agreement;

“Parties” mean the signatories to this Agreement;

“Participant” means anyone who participates in the joint review process for the project through one of the means set out in Part IV of this Agreement;

“Pipeline” has the same meaning as set out in section 2 of the NEB Act;

“**Project**” means the project as described in the Terms of Reference found in the Appendix to this Agreement and titled “Part I - Scope of the Project”, and may also be referred to as the Northern Gateway Pipeline Project;

“**Proponent**” means Northern Gateway Pipelines Limited Partnership who proposes the project;

“**Report**” means the report set out in Section 9 of this Agreement;

“**Responsible authority**” has the same meaning as set out in section 2 of the Act; and

“**TERMPOL review process**” refers to the voluntary technical review process of Marine Terminal Systems and Transshipment Sites. The technical review process focuses on a dedicated design ship’s selected route in waters under Canadian jurisdiction to its berth at a proposed marine terminal or transshipment site and, specifically, to the process of cargo handling between vessels, or off-loading from ship to shore or vice-versa.

3.0 ESTABLISHMENT OF THE PANEL

This Agreement:

- a) establishes an administrative framework within which the Parties can cooperatively exercise their respective powers and duties as established by the Act and the NEB Act;
- b) is a public document that is to be read with and interpreted in a manner consistent with the statutes referenced in a) and the regulations made pursuant to those statutes; and
- c) does not create any new legal powers or duties, nor does it alter in any way the powers and duties established by the statutes referenced in a) and the regulations made pursuant to those statutes.

4.0 GENERAL

4.1 Purpose – The primary purpose of this Agreement is to coordinate the environmental assessment required under the Act and the NEB Act by providing for a review of the Environmental Effects likely to result from the project and the appropriate mitigation measures as part of the Board’s public hearing process for the project. Nothing in this Agreement should be construed as limiting the ability of the Panel to have regard to all considerations that appear to it to be relevant pursuant to section 52 of the NEB Act.

4.2 Public Registry

- 4.2.1 A public registry will be maintained during the course of the review in a manner that provides for convenient public access. The registry will meet the purposes of compliance with sections 55, 55.1 and 55.4 of the Act and the Board's requirement to maintain a record of the Board's public hearing process for the project.
- 4.2.2 The public registry will include hearing transcripts and all submissions, correspondence, exhibits and other information received by the Panel, as well as all public information produced by the Panel relating to the review of the project.
- 4.2.3 All information produced or received by the Panel will be made available to the public and to Aboriginal peoples, unless specific procedural rulings or legislative provisions prevent the disclosure of the information.

4.3 Participant Funding Program – The Agency will administer a participant funding program that includes an Aboriginal funding envelope and a regular funding envelope. The Aboriginal Funding Envelope contributes limited funding specifically to Aboriginal groups to participate in and be consulted throughout the joint review process. The Regular Funding Envelope contributes limited funding to members of the public, not-for-profit organizations and Aboriginal people to participate in the joint review process.

5.0 CONSTITUTION OF THE PANEL

- 5.1 The Panel will consist of three members and be composed of no less than two permanent members of the Board.
- 5.2 Two members of the Panel, including the Panel Chair, will be appointed by the Board. The Minister of the Environment will approve the appointment of the Panel Chair and select the third panel member who will satisfy the eligibility requirements for a temporary member of the Board.
- 5.3 The Chair of the Board will make a request to the Minister of Natural Resources to recommend to the Governor in Council the appointment of the third panel member as a temporary member of the Board.
- 5.4 The members of the Panel are to be unbiased and free from any conflict of interest in relation to the project and are to have knowledge or experience relevant to the anticipated environmental effects of the project.

6.0 CONDUCT OF THE ENVIRONMENTAL ASSESSMENT BY THE PANEL

- 6.1 The Panel will meet the requirements of the Act and the NEB Act in the joint review of the project.

- 6.2 The Panel will conduct its review in accordance with the Board Rules and in accordance with Part IV of the Terms of Reference attached as an appendix to this Agreement. The Panel will have the powers set out in the NEB Act and section 35 of the Act.
- 6.3 The Panel will review the project in a careful and precautionary manner.
- 6.4 The Panel will conduct its review in a manner which will facilitate the participation of the public and Aboriginal peoples, and enable them to convey their views on the project to the Panel by various means, such as oral statements, letters of comment or participation as intervenors as outlined in Part IV of this Agreement.
- 6.5 In order that the Panel may be fully informed about the potential impacts of the project on Aboriginal rights and interests, the Panel will require the proponent to provide evidence regarding the concerns of Aboriginal groups, and will also carefully consider all evidence provided in this regard by Aboriginal peoples, other participants, federal authorities and provincial departments.

7.0 SECRETARIAT TO THE PANEL

- 7.1 Administrative, technical and procedural support required by the Panel shall be provided by a secretariat, which shall be the joint responsibility of the Board and the Agency.
- 7.2 The Secretariat will report to the Panel and will be structured so as to allow the Panel to conduct its review in an efficient and cost-effective manner.
- 7.3 The Agency will ensure that all other activities performed by Agency staff while assigned to the Secretariat are conducted in a way so as to avoid a conflict of interest with this joint review. Likewise, the Board will ensure that all other activities performed by the Board staff while assigned to the Secretariat are conducted in a way so as to avoid a conflict of interest with this joint review.

8.0 ABORIGINAL CONSULTATION

- 8.1 In addition to Subsection 6.5, the Panel will receive information from Aboriginal peoples related to the nature and scope of potential or established Aboriginal and treaty rights that may be affected by the project and the impacts or infringements that the project may have on potential or established Aboriginal and treaty rights. The Panel may include in its report recommendations for appropriate measures to avoid or mitigate potential adverse impacts or infringements on Aboriginal and treaty rights and interests.

- 8.2 The Panel shall reference in its report:
- a) the information provided by Aboriginal peoples regarding the manner in which the Project may affect potential or established Aboriginal and treaty rights; and
 - b) in the case of potential Aboriginal rights, the information provided by the Aboriginal groups regarding the Aboriginal groups' strength of claim respecting Aboriginal rights.

9.0 REPORTING AND DECISION MAKING

- 9.1 The Panel will prepare a report setting out its rationale, conclusions and recommendations relating to the environmental assessment of the project, including any mitigation measures and follow-up programs and a summary of any comments received from the public and Aboriginal peoples, as well as information referred to in Section 8.
- 9.2 Once completed, the report will be submitted to the Minister of the Environment who will make it available to the public and Aboriginal peoples.
- 9.3 Following the Governor in Council approval of the government response to the report, the Panel will issue its Reasons for Decision pursuant to the NEB Act.

10.0 SPECIALIST ADVISORS TO THE PANEL

- 10.1 The Panel may request federal authorities and provincial departments having specialist information or knowledge with respect to the project to make this information or knowledge available.
- 10.2 The Panel may retain the services of independent non-government experts to provide evidence on certain subjects within the Panel's Terms of Reference.
- 10.3 The names of the experts retained pursuant to Subsection 10.2 and any documents obtained or prepared by such experts and that are submitted to the Panel will be placed on the public registry. For greater certainty, this shall exclude any information subject to solicitor-client privilege where the expert is a lawyer.
- 10.4 Any federal authorities or provincial departments from which specialist or expert information or knowledge has been requested, and any independent non-government experts retained pursuant to Subsection 10.2 may be required to appear at the oral hearing and testify in regard to the documents they have submitted to the Panel.
- 10.5 Nothing in this Agreement will restrict the participation by way of submission to the Panel by other federal or provincial departments or bodies.

11.0 AMENDMENTS, INTERPRETATION AND TERMINATION

- 11.1 Amendments to this Agreement may be made upon written notice by a Party to the other Party and upon the mutual consent of the Chair of the Board and the Minister of the Environment.
- 11.2 To the extent practicable, the Parties will seek to resolve differences of opinion in the interpretation and application of this Agreement at a working level, through good faith reasonable efforts.
- 11.3 Any Party may terminate this Agreement upon one month's written notice to the other Party.
- 11.4 Subject to section 27 of the Act, a Party's eligibility to withdraw from or terminate this Agreement will end at the commencement of the oral hearings.
- 11.5 The attached Appendix forms an integral part of this Agreement.

WHEREAS the Parties hereto have put their signatures this _____ day of _____ 2009.

Original Signed by:

The Honourable Jim Prentice
Minister of the Environment

Gaétan Caron
Chair, National Energy Board

APPENDIX

Terms of Reference

The definitions in the Agreement between the National Energy Board and the Minister of the Environment concerning the joint review of the Northern Gateway Pipeline Project will apply to this Appendix.

The Panel will conduct a review of the Environmental Effects of the project and the appropriate mitigation measures based on the project description and consideration of the project application under the NEB Act.

The Panel will include in its review of the project, consideration of the factors identified in this Appendix and the scope of the factors.

Part I – Scope of the Project

The project includes the construction, operation, decommissioning and abandonment of the following components:

- An oil pipeline commencing near Fort Saskatchewan, Alberta and terminating at a new marine terminal located in Kitimat, British Columbia;
- A condensate pipeline commencing at a new marine terminal in Kitimat, British Columbia and terminating near Fort Saskatchewan, Alberta;
- The right-of-way for the two pipelines as well as any temporary workspace required for the construction;
- Associated pump stations, a pressure letdown station (oil) and a pressure initiation station (condensate);
- Tunnels through North Hope Peak and Mount Nimbus to facilitate crossing of the Coast Mountains by the pipelines;
- A tank terminal, including hydrocarbon tanks, pump facilities and other land facilities, adjacent to the marine terminal;
- All-weather road access and electrical power requirements for the pump stations, the tank terminal and the new marine terminal in Kitimat, British Columbia;
- Block valves located at pump stations, selected watercourse crossings and other locations along the route;
- Pigging facilities at either end of the pipeline system and in selected intermediate locations;
- Cathodic protection system for the pipelines and tanks, including anode beds at selected locations along the pipeline route;

- Two marine loading and unloading berths (one each for oil and condensate) including:
 - loading and unloading platforms;
 - breasting dolphins;
 - mooring dolphins;
 - gangway tower;
 - walkway bridges between platform and breasting dolphins;
 - utility boat floating dock;
 - oil contingency deployment system with storage platforms;
 - fire fighting systems;
 - offshore anchorages in Kitimat Arm or elsewhere; and
 - pipeline interconnects between the berths and the tankage.
- Marine transportation of oil and condensate within:
 - the Confined Channel Assessment Area, as defined by the proponent, which includes the marine and shoreline area of Kitimat Arm, Douglas Channel to Camano Sound, and Principe Channel to Browning Entrance;
 - Hecate Strait; and
 - the proposed shipping routes to be used for the project that are within the 12 nautical mile limit of the Territorial Sea of Canada.
- All related works and activities including:
 - all temporary electrical power supply lines, such as those supplying energy for camps and worksites;
 - temporary work camps;
 - temporary access roads;
 - bridges and watercourse crossings (new or modified);
 - management and treatment of wastewaters and waste management;
 - water withdrawals;
 - borrow pits and quarries;
 - management of excavation material, including stockpiles (e.g. overburden);
 - log handling and storage facilities
 - construction worksites, storage areas and staging areas;
 - handling and storage of petroleum products and hazardous materials;
 - handling, storage and use of explosives; and
- Any other components described by the proponent in its Preliminary Information Package, filed with the National Energy Board on November 1, 2005

Any additional modifications or decommissioning and abandonment activities would be subject to future examination under the NEB Act and consequently, under the Act, as appropriate. Therefore, at this time, the Proponent will be required to examine these activities in a broad context only.

Part II - Factors to be Considered During the Joint Review

The joint review will include a consideration of the following factors listed in paragraphs 16(1) (a) to (d) and subsection 16(2) of the Act:

- The environmental effects of the project, including the environmental effects of malfunctions or accidents that may occur in connection with the project and any cumulative environmental effects that are likely to result from the project in combination with other projects or activities that have been or will be carried out;
- The significance of the effects referred to above;
- Comments from the public and Aboriginal peoples that are received during the review;
- Measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the project;
- The purpose of the project;
- Alternative means of carrying out the project, that are technically and economically feasible and the environmental effects of any such alternative means;
- The need for, and the requirements of, any follow-up program in respect of the project; and
- The capacity of renewable resources that is likely to be significantly affected by the project to meet the needs of the present and those of the future.

In accordance with paragraph 16(1)(e) of the Act, the assessment by the Panel will also include a consideration of the following additional matters:

- Need for the project;
- Alternatives to the project;
- Community knowledge and Aboriginal traditional knowledge received during the review;
- Measures to enhance any beneficial environmental effects; and
- Environmental protection, environmental monitoring, and contingency and emergency response plans.

Part III - Scope of Factors

The Panel in conducting its consideration of the factors outlined in Part II will have regard to the following:

- The National Energy Board's Filing Manual dated 2004 as amended from time to time; and
- The document issued by the Canadian Environmental Assessment Agency, in response to comments received on the draft Joint Review Panel Agreement, entitled "Scope of the Factors - Northern Gateway Pipeline Project, August, 2009".

Part IV – Review Process

The main steps of the joint review process will be as follows:

- After the application has been filed with the Board by the Proponent, the Panel will review it to determine if there is sufficient information in the application to initiate the joint review process. If it is determined by the Panel that there is sufficient information, it will proceed to issue a Hearing Order. If there is not sufficient information, the proponent will be notified and the process will not proceed until the required information has been filed with the Panel.
- The Panel will issue a Hearing Order which sets out the procedures that will be followed for the joint review of the project including:
 - a description of the methods by which the public and Aboriginal peoples can participate in the review of the project;
 - the draft list of issues (i.e. the project-related issues) that will be considered in the joint review;
 - how and when intervenors can issue information requests to the Proponent or other parties in order to clarify evidence or obtain further information regarding the project;
 - the distribution of and access to all evidence, correspondence and other documents which will be used in the joint review and which will form the public registry;
 - the timetable of events for the joint review, including the deadlines for filing evidence and information requests as well as the date when the oral hearings will commence; and
 - how motions or questions of procedure or substance can be raised with the Panel.
- The Secretariat to the Panel will conduct information sessions with the public and Aboriginal peoples to assist them in understanding the joint review process and

the ways in which they can participate. The location and timing of the sessions will be determined by the Panel.

- The Panel will conduct sessions with the public and Aboriginal groups for the purpose of seeking comments on:
 - the draft list of issues (included in the Hearing Order);
 - whether the proponent ought to be required to file any additional information which was not included in its application in view of the proposed changes to the list of issues, the NEB Filing Manual and the Agency's document entitled "Scope of the Factors - Northern Gateway Pipeline Project, August 2009"; and
 - the location of the oral hearings.
- The public and Aboriginal peoples may choose the manner in which they wish to participate in the review of the project. These options include:
 - **filing a letter of comment:** This is a written statement of the writer's views on the project and any relevant information that will explain or support their comments;
 - **providing an oral statement:** This is similar to a letter of comment except that the statement is delivered orally at a prescribed time during the oral hearings. A party wishing to provide an oral statement must advise the Panel of their intention to do so in advance; and
 - **intervention:** Intervenors may choose the extent to which they wish to participate in the hearing, but have the ability to do the following: file written evidence, ask questions regarding the evidence of others, be questioned on their evidence, participate in cross-examination and make a final argument at the oral hearings. There will be a minimum of 90 days between the deadline for requesting intervenor status and the commencement of the oral hearings.
- Government participant status will be afforded to federal authorities and provincial departments with an environmental assessment or regulatory responsibility and who file a declaration to this effect. The requirements of a government participant will be outlined in the Hearing Order.
- Prior to the scheduled start of the oral hearings as set out in the Hearing Order, the Panel will announce the location and timing of the oral hearing. When determining the location and timing of the oral hearings, the Panel will take into consideration the location of those most impacted by the Project and any special needs of participants.
- The public and Aboriginal peoples will have a minimum of 90 days prior to the commencement of the oral hearings to review the proponent's application.

- The oral hearings will be accessible via the Internet so the public and Aboriginal peoples not attending the oral hearing can listen to the proceedings. Transcripts of the oral hearings will be prepared and be available through the public registry.
- The Panel will deliver its report to the Minister of the Environment following the close of the oral hearings. The report will take into account and reflect the views of all Panel members.

Scope of the Factors – Northern Gateway Pipeline Project

Guidance for the
assessment of the environmental effects of the

Northern Gateway Pipeline Project

as proposed by Northern Gateway Pipelines Limited Partnership

Issued by the Canadian Environmental Assessment Agency

August 2009

TABLE OF CONTENTS

1.	INTRODUCTION	1
2.	PRINCIPLES TO CONSIDER.....	1
2.1	COMMUNITY KNOWLEDGE AND ABORIGINAL TRADITIONAL KNOWLEDGE.....	2
2.2	SUSTAINABLE DEVELOPMENT	2
2.3	PRECAUTIONARY APPROACH	2
3.	CONSIDERATION OF ALTERNATIVES.....	2
3.1	ALTERNATIVE MEANS	3
4.	PROJECT DESCRIPTION	3
4.1	DESCRIPTION OF MARINE COMPONENTS	4
4.2	PROJECT BENEFITS	4
5.	STUDY AREA BOUNDARIES AND KEY ISSUES.....	5
5.1	IDENTIFICATION OF KEY ISSUES	5
5.2	STUDY AREA BOUNDARIES.....	5
5.2.1	<i>Marine Spatial Boundaries.....</i>	<i>6</i>
5.2.2	<i>Marine Temporal Boundaries</i>	<i>6</i>
6.	BASELINE INFORMATION	6
6.1	PHYSICAL ENVIRONMENT	7
6.2	MARINE ENVIRONMENT.....	7
6.3	HUMAN ENVIRONMENT	8
6.4	ABORIGINAL RIGHTS AND INTERESTS.....	9
7.	IMPACT ASSESSMENT	10
7.1	EFFECTS ON THE PHYSICAL ENVIRONMENT	10
7.2	EFFECTS ON THE MARINE ENVIRONMENT.....	11
7.3	EFFECTS ON HUMAN ENVIRONMENT	11
7.4	EFFECTS ON ABORIGINAL RIGHTS AND INTERESTS	12
7.5	POTENTIAL ACCIDENTS AND MALFUNCTIONS.....	13
7.6	EFFECTS OF THE ENVIRONMENT ON THE PROJECT	14
7.7	MITIGATION MEASURES	14
7.8	DETERMINATION OF THE SIGNIFICANCE OF RESIDUAL EFFECTS.....	15
7.9	CUMULATIVE ENVIRONMENTAL EFFECTS.....	16
7.10	CAPACITY OF RENEWABLE RESOURCES	16

8. FOLLOW-UP AND MONITORING17
9. REFERENCES.....18

1. Introduction

As stated in Part III of the Terms of Reference of the Joint Review Panel Agreement (the Agreement) for the Northern Gateway Pipeline Project (the Project), the Joint Review Panel (the Panel), in conducting its consideration of the factors outlined in Part II of the Terms of Reference, will have regard to the following:

- The National Energy Board's (the Board) Filing Manual dated 2004 as amended from time to time; and
- The document issued to the Panel and Northern Gateway Pipelines Limited Partnership (the proponent) by the Canadian Environmental Assessment Agency (the Agency), in response to comments received on the draft Agreement, entitled "Scope of the Factors - Northern Gateway Pipeline Project, August 2009".

The Board's Filing Manual is available on the public registry (document # ISSN 1718-472X). In seeking approval for the proposed project, the proponent must submit an application and subsequent filings to the Panel that are complete and that enable the Panel to make an informed decision which balances, among other things, economic, environmental and social interests. While it is ultimately the responsibility of the proponent to make its case before the Panel, the Filing Manual has been developed by the Board to provide direction regarding the information that would typically be expected to be addressed in a filing. The goal is to provide the proponent with a clear definition of the Board's expectations for complete filings.

As the Filing Manual does not explicitly address the marine components associated with the Project, the Agency has prepared this scope of the factors document. The primary purpose of this document is to provide additional guidance to the proponent on the assessment of environmental effects associated with the marine project components. Further, sections of this document provide additional guidance to the proponent regarding other factors to be considered by the Panel and unless otherwise noted, are applicable to all components of the Project, as described in Part I of the Terms of the Reference.

It should also be noted that the marine components of the Project fall within the overall scope of project, as outlined in Part I of the Terms of Reference in the Agreement. Therefore, the guidance provided in Guide A.2 of the Filing Manual is equally applicable, as appropriate, to the marine components as to the rest of the Project. For clarity, as defined in Part I of the Terms of Reference, the marine components of the Project include marine transportation of oil and condensate, two marine loading and unloading berths, a tank terminal adjacent to the marine terminal, and any associated ancillary works and/or activities.

In assessing the potential environmental effects of all project components, the proponent shall consult with federal government departments and agencies for applicable guidance material and specific information requirements that may assist it in its assessment. Early and ongoing engagement will help to facilitate an efficient and effective process.

2. Principles to Consider

The following principles shall be incorporated into the application by the proponent for all components of the Project.

2.1 Community Knowledge and Aboriginal Traditional Knowledge

Community knowledge and Aboriginal traditional knowledge have an important contribution to make to an environmental assessment. In combination with other information sources, it may be valuable in achieving a better understanding of potential impacts of projects. Community knowledge and Aboriginal traditional knowledge refers to the broad base of knowledge held by Aboriginal peoples, individuals and by communities that may be based on teachings, personal observation and experience, or passed on from one generation to another through oral and/or written traditions.

It is recognized that approaches to community knowledge and Aboriginal traditional knowledge, customs and protocols may differ among communities and persons with respect to the use, management and protection of this knowledge. The Panel will consider the views of communities, Aboriginal peoples, and traditional and local knowledge holders during the review process. Therefore, the proponent must incorporate into the application the community knowledge and Aboriginal traditional knowledge to which it has access or that it may reasonably be expected to acquire through appropriate due diligence, in keeping with appropriate ethical standards and without breaching obligations of confidentiality.

2.2 Sustainable Development

A purpose of the *Canadian Environmental Assessment Act* (the Act) is to encourage responsible authorities to take actions that promote sustainable development and thereby achieve or maintain a healthy environment and a healthy economy. Sustainable development seeks to meet the needs of present generations without compromising the ability of future generations to meet their own needs. The objective of sustainable development is to achieve a balance between preserving environmental integrity, ensuring social equity and improving economic efficiency. The proponent shall strive to integrate and balance this objective within its application, and clearly outline how it has been incorporated.

2.3 Precautionary Approach

Another purpose of the Act is to ensure that projects are considered in a careful and precautionary manner before authorities take action in connection with them, and to ensure that such projects do not cause significant adverse environmental effects. While there is no universally agreed upon definition of the “precautionary approach” or the “precautionary principle”, Principle 15 of the 1992 *Rio Declaration on Environment and Development* states that “where there are threats of serious or irreversible damage, lack of full scientific certainty shall not be used as a reason for postponing cost-effective measures to prevent environmental degradation”. The proponent shall clearly demonstrate how it has applied such an approach and in what circumstances. In doing so, the proponent shall consider the guiding principles set out in the Government of Canada’s *Framework for the Application of Precaution in Science-based Decision Making About Risk* (2003).

3. Consideration of Alternatives

The application must include an analysis of alternative means of carrying out the Project that are technically and economically feasible, and the environmental effects of any alternatives means. For further guidance, the proponent is referred to the Agency’s

guidance document "Addressing 'Need for', 'Purpose of', 'Alternatives to' and 'Alternative Means' under the *Canadian Environmental Assessment Act*" (1998). When assessing project alternatives, the proponent is encouraged to take into account the relations and interactions among various components of the ecosystem, including affected Aboriginal and other communities. Further, the proponent is encouraged to demonstrate how the preferred alternative contributes to sustainable development.

3.1 Alternative Means

The proponent will describe the alternative means of carrying out the terrestrial components of the Project. In addition, the proponent will also identify and describe alternative means of carrying out the marine components of the project that are technically and economically feasible, including:

- other potential sites for the marine facilities and related components;
- marine terminal and tank terminal design;
- other shipping routes considered (refer to Section 3.2 of Transport Canada's publication, "TERMPOL Review Process 2001¹");
- type of vessels to be used; and
- dredging and disposal methods for dredged material, where applicable.

The analysis will include:

- a description of the alternative means considered, how or why they are not technically and economically feasible, and the rationale for rejecting any alternatives that are excluded from further assessment;
- the identification of the environmental effects of the technically and economically feasible alternatives; and
- the criteria and rationale for selecting the preferred alternative means.

4. Project Description

As appropriate, the proponent will present descriptions, locations, plans, figures and/or drawings for each of the project components, including the marine components, as outlined below.

¹ This document makes reference to the Transport Canada voluntary Technical Review Process of Marine Terminal Systems and Transshipment Sites (TERMPOL Review Process 2001). For clarity, the TERMPOL review process will occur separately from the joint review process and therefore, any information that could be useful toward the environmental assessment shall be submitted by the proponent to the Panel as a component of its application, separate from any submission for the TERMPOL review process information.

4.1 Description of Marine Components

The proponent will provide a detailed description of the physical works and activities associated with the marine facilities and related components of the Project, including marine traffic. The proponent will include descriptions of the construction, operation and maintenance, and where relevant, closure, decommissioning and restoration of permanent and temporary structures associated with these components of the proposed project.

In preparing this description, the proponent shall refer to Part 3 of TERMPOL Surveys and Studies of Transport Canada's publication "TERMPOL Review Process 2001" and in particular, Sections 3.5, 3.9 and 3.10.

Specific to the determination of potential effects of the marine terminal on navigation, the proponent will provide the following information:

- Designed general arrangement drawings (to scale) of the marine terminal, including plan and profile views;
- Legal description of the adjoining upland property, including latitude and longitude;
- Proposed methodology and timing of construction of the marine terminal; and
- Proposed methodology and approximate timing of decommissioning of the marine terminal.

The proponent will also provide a description of any relevant ancillary works and/or activities related to the marine components of the Project, such as

- all temporary electrical power supply lines, for example those supplying energy for camps and worksites;
- temporary work camps;
- temporary access roads;
- bridges and watercourse crossings (new or modified);
- management and treatment of wastewaters and waste management;
- water withdrawals;
- borrow pits and quarries;
- management of excavation material, including stockpiles (e.g. overburden);
- log handling and storage facilities;
- construction worksites, storage areas and staging areas;
- handling and storage of petroleum products and hazardous materials; and
- handling, storage and use of explosives.

The proponent will also provide a description of any dredging activity and any ocean disposal requirements, where relevant.

4.2 Project Benefits

As outlined in Part II of the Agreement, the Panel will include a consideration of "measures to enhance any beneficial environmental effects" in its review of the Project. As such, the application shall discuss the benefits of all project components, including:

- employment and training opportunities for the construction and operation stage, including seasonal employment over the life of the Project to maintain the pipeline right of way;

- land lease or purchase fees to the province;
- payments to the regional tax base;
- local investment, including the use of local goods and services; and
- social and economic benefits to the public and Aboriginal peoples.

Where appropriate, information on the benefits of the proposed project should not be aggregated, but presented for each potentially affected municipality, regional district and/or Aboriginal community.

5. Study Area Boundaries and Key Issues

5.1 Identification of Key Issues

As stated in Section A.2.5 of the Filing Manual, the proponent must describe the methods used to predict the potential effects of the Project on the biophysical and socio-economic setting, and the effects of the environment on the Project.

If the valued ecosystem component (VEC) or valued socio-cultural component (VSC) approach is used, the VECs or VSCs (referred to as valued components) for which effects are predicted must be included and justified. In identifying the valued components, the proponent shall consider those identified to be of concern during any workshops or meetings held by the proponent, or that the proponent considers likely to be affected by the Project. In justifying the methods used to select the valued components, the proponent shall note that the value of a component not only relates to its role in the ecosystem, but also to the value placed on it by humans.

If using the valued components methodology, for the marine components of the Project, the following valued components shall be considered by the proponent:

- Fish and fish habitat, including wild salmon;
- Species at risk and species of special status;
- Water quality;
- Marine mammals and marine habitat;
- Land and resource use by Aboriginal peoples; and
- Tourism, and commercial and public recreational use, including navigation.

This list of valued components shall be modified as appropriate by the proponent, following consultations with the public, Aboriginal peoples, federal and provincial government departments and relevant stakeholders.

If another method is used to predict potential effects of the marine components of the Project, the proponent must identify and justify the biophysical or socio-economic elements for which effects are predicted.

5.2 Study Area Boundaries

For all components of the Project, the proponent will define the appropriate boundaries used for its assessment for each biophysical or socio-economic element assessed. The proponent will also provide a justification and rationale for all of the boundaries chosen.

The proponent shall provide a description of the boundaries of the Project in a regional context showing existing and planned future land use, current infrastructure, and proposed improvements to this infrastructure.

The proponent will focus the assessment of the marine components of the Project on the relevant issues and concerns, and will define the appropriate boundaries used for its assessment for each biophysical or socio-economic element assessed.

5.2.1 Marine Spatial Boundaries

The spatial boundaries for the marine transportation of oil and condensate are defined in Part I of the Terms of Reference, as appended to the Agreement. In determining the spatial boundaries to be used in assessing the potential adverse environmental effects of the remaining marine components, the proponent shall consider, but not be limited to, the following criteria:

- The physical extent of the project components, including any offsite facilities or activities. The physical extent shall include all areas affected by the Project, including those impacts in or on the water, on the shoreline, coast, and bank(s);
- The extent of aquatic and terrestrial ecosystems potentially affected by the Project, including potential accidents and malfunctions;
- The extent of potential effects arising from noise and atmospheric emissions;
- The extent to which the local communities may be affected by this project component;
- The extent to which traditional land use and Aboriginal rights, including title or treaty rights, could potentially be affected by the project component; and
- Lands used for residential, commercial, industrial, recreational and aesthetic purposes.

For the assessment of the potential effects related to an accidental release of oil or condensate, the spatial boundaries for the marine transportation components, as defined in Part I of the Terms of Reference appended to the Agreement, will be expanded to take into account the areas that could be affected by a potential accident or malfunction.

5.2.2 Marine Temporal Boundaries

The temporal boundaries of the marine components of the Project shall cover the construction, operation, maintenance, and where relevant, closure, decommissioning and restoration of the sites affected by the Project. Temporal boundaries shall also consider seasonal and annual variations related to environmental components for all phases of the Project, where appropriate. To determine the temporal boundary of assessment, the proponent shall take into account the following elements:

- Duration of the operational period;
- Design life of engineered structures; and
- Frequency and duration of natural events and human-induced environmental changes.

6. Baseline Information

As stated in the Filing Manual (Chapter 4, Section A.2.4), the goal of the baseline information is to provide a complete description of the biophysical and socio-economic setting, including the current state of the environment within the study area. Again, this is equally applicable for both the terrestrial and marine components of the Project. A complete description of the environmental and socio-economic setting and the current state of the environment within the study area can be compared against the project

description to identify the potential effects that might be caused by the proposed project. Therefore, the description of the environment should focus on the relevant issues. The proponent is not required to provide extensive descriptions of features of the environment or socio-economic elements that are not relevant factors or issues related to the Project. However, the proponent must provide a sufficient description of the local setting to allow the Panel, other regulators, the public, and others to clearly understand the rationale for environmental assessment decisions. The proponent is encouraged to consult with government departments and agencies regarding the study design and methodology, and the availability of applicable guidance material.

If the baseline data have been extrapolated or otherwise manipulated to depict environmental conditions in the study areas, modelling methods and equations should be described, and should include calculations of margins of error and other relevant statistical information, such as confidence intervals and possible sources of error.

With respect to all components of the Project (i.e. terrestrial and marine), without limiting itself to this list, the proponent will provide the baseline information outlined in the following Subsections 6.1 to 6.3, as appropriate. If such information is not provided, the proponent will provide a rationale as to why it has not done so.

6.1 Physical Environment

- Possible natural hazards potential.
- The prevailing climate conditions, including the identification of available data sources (e.g. Meteorological Service of Canada, recording stations).
- The predominant wind conditions, including direction, velocity, seasonal variations, and severe outflow conditions.
- Surface water and groundwater quality and quantity.
- Sediment regime (e.g. erosion zones, sediment transport, accumulation zones), particularly in dredging and filling areas, and potential open water sediment-disposal sites.
- Noise environment (near the marine infrastructures and at sensitive points).

6.2 Marine Environment

Note: For the purposes of the environmental assessment, “marine environment” refers to all life stages of marine fish and the habitats necessary to support marine life. Marine fish includes finfish, shellfish, crustaceans and marine mammals (as defined by the Fisheries Act). The definition of fish habitat includes the benthic environment, pelagic environment and marine water quality.

- A description of marine environments, including the type of water body (e.g. estuary, coastal, marine), and any special management areas in or near the study area.
- An overview of oceanography, including a description of the physical characteristics of the Kitimat Arm of the Douglas Channel (e.g. length, width, depth and slope of sea floor), tidal range, offshore currents, the time of year and weather conditions that influence the characteristics of flow.
- The identification, description and mapping of marine habitats, including habitat type, location and range, habitat suitability, diversity, abundance, and sensitive aquatic habitat.
- The identification and relative predominance of aquatic vegetation.

- A description of marine habitat use and species presence, including population status, life cycle, sensitive periods, habitat requirements for each life stage, abundance (local and regional), distribution and use of habitat type, and for anadromous species, the seasonal range, migration patterns, and sensitivity to disturbance.
- A description of any existing fisheries (i.e. commercial, subsistence, sport fishing) in the area.
- A description of any marine birds, including a description of suitable habitat such as wetlands.
- In the area near the proposed marine infrastructure:
 - ✓ a description of the subtidal and intertidal habitat and communities, including a detailed underwater mapping of the subtidal benthic habitat;
 - ✓ a description of the deeper subtidal and benthic invertebrate community, including species abundance, richness and diversity;
 - ✓ a description of the shoreline with classification of substrate type, vegetation and watercourse outfall;
 - ✓ a description of near shore and long shore processes;
 - ✓ a description characterizing sediments in relation to parameters identified in the Canadian Sediment Quality Guidelines, the *Canadian Environmental Protection Act*, 1999, and its *Disposal at Sea Regulations*, including areas to be dredged or used for dredge spoil disposal; and
 - ✓ a description of underwater noise levels in the vicinity of the marine facilities.
- A description of underwater noise levels at sensitive sites.
- The identification and description of any federally and/or provincially listed species at risk in the study area, including distribution and population status, the identification of their habitat and critical habitats, critical timing windows, known factors limiting their distribution and population, sensitivity to disturbance, and whether any species recovery plans are available.
- Any known issues with respect to the health of harvested species (e.g. parasites, disease) and known baseline contaminant concentrations in harvested species.
- Species subject to exclusive or preferential rights granted by land claims.
- A listing and distribution or abundance of existing invasive, non-native species.
- The location and description of protected areas in the region.

6.3 Human Environment

- A description of fishing activities, including:
 - ✓ Aboriginal and non-Aboriginal activities, as well as seasonality of these activities;
 - ✓ types, number, size and capacity of fishing vessels used in the area, their docking or marina locations and existing interactions with shipping (locations, frequency, effects), and gear types;

- ✓ commercial license statistics;
 - ✓ fishing regulations and fish processing facilities, and their economic importance to communities;
 - ✓ fish catch by species and value for communities; and
 - ✓ map fishing areas in the study area and describe their relative importance in a broader regional context.
- A description of commercial vessel traffic, including tourism, from existing port or terminal data, including frequency, goods, quantities, shippers, origin and destination, and the importance to the local and regional economy.
 - A description of routes and channels from and to the ocean that commercial shipping uses, main hazard areas for other users in relation to shipping, and frequency and magnitude of shipping incidents.
 - Visual and aesthetic characteristics of commercial vessel traffic.
 - Tourism and commercial recreation activities practiced in the study area, including ecotourism, recreational fishing activities, guiding, and outdoor activities (e.g. sea-kayaking, sailing, whale watching, beach combing, bird watching, and scuba diving).
 - A description of businesses, clubs and associations involved in marine recreation activities.
 - An inventory, description, including maps, and evaluation of any archaeological and historical resources likely to be affected by the marine components.

6.4 Aboriginal Rights and Interests

Further to the general guidance provided in Chapter 3 of the Filing Manual regarding consultation and Table A-5 Filing Requirements for Socio-Economic Elements, the proponent will identify the lands, waters and resources of specific social, economic, archaeological, cultural or heritage value to Aboriginal groups, including Métis, that assert Aboriginal rights, including title and treaty rights or in relation to which Aboriginal rights, including title and treaty rights have been established and that may be affected by project components.

The proponent must identify traditional activities, including activities for food collection, social, ceremonial and other cultural purposes, in relation to such lands, waters and resources. The focus of this discussion shall be on the current use of lands, waters and resources for traditional purposes, and the sites and features of the landscape associated with such uses. The proponent shall provide information that would include a description of dependence on country foods and harvesting for other purposes, including harvesting of plants for medicinal purposes. The proponent will identify any effects on Aboriginal rights and interests, including treaty rights and current land uses for traditional purposes, and outline the proposed methods to manage and mitigate any such effects to an acceptable level. The proponent will include a discussion of the archaeological findings in the study area that are of particular interest to Aboriginal peoples. In particular, the proponent will describe the findings of any preliminary archaeological field reconnaissance work completed as a component of a traditional use study.

Aboriginal peoples that may be affected by the Project, including the marine components, will be identified. Potentially affected Aboriginal peoples include those where any component of the proposed project will be located within their traditional territory.

The geographic limits of the analysis undertaken to address considerations of Aboriginal peoples will be provided, supported with maps as required. The study area will take into consideration the traditional territories of each Aboriginal group, relative to the proposed footprint of the marine project components.

A summary of the completed, ongoing and proposed consultation with Aboriginal peoples will be provided. The proponent will provide a detailed description of the consultations, indicating the concerns raised, how those concerns were addressed, and any outstanding concerns.

7. Impact Assessment

The proponent shall clearly state the methodology used in its assessment of the environmental effects of the Project. In this description, the proponent shall consider environmental effects, such as direct and indirect, reversible and irreversible, short- and long-term and cumulative environmental effects of all project components. In predicting and assessing the Project's effects, the proponent will clearly state the elements and functions of the environment that may be affected, specifying the location, extent and duration of these effects and their overall impact. This assessment shall focus primarily on the biophysical and socio-economic elements identified for the Project.

Where necessary, the proponent will consult with federal government departments and agencies to obtain further specific guidance on the filing requirements relating to the identification and analysis of effects, as outlined in Tables A-4 and A-5 of the Filing Manual.

In assessing the environmental effects of all components of the Projects (i.e. terrestrial and marine), the proponent will, when relevant, present as accurately as possible the anticipated effects on the elements described in Section 6 and in the following Subsections 7.1 to 7.3.

7.1 Effects on the Physical Environment

- Identify the sources, quantities and frequency of project-related emissions of greenhouse gas that could result from the construction and operation of the marine project components and from accidents or malfunctions.
- Identify the various ways that reductions in greenhouse gas emissions could be realized, including a discussion on the technical and economic feasibility of options.
- Describe any relevant federal or provincial actions and/or initiatives, including policies or accords that currently exist to identify, track, report or manage greenhouse gas emissions.
- Describe the means by which greenhouse gas emissions would be managed and any proposed verification, monitoring and/or reporting of greenhouse gas emissions.
- If, as a result of the Project, there will be an increase in ship activity over current activity levels, provide an estimate of emissions of common air contaminants and any expected air toxics using activity information and pedigree emission factors. If proposed emission levels are notably higher than current emission levels, provide a quantitative estimation of ambient air quality concentrations (i.e. through dispersion modelling).
- Assess the fugitive emissions from the storage tanks at the tank terminal.

7.2 Effects on the Marine Environment

- The potential effects on the marine environment, including the effects of increase vessel traffic on shoreline erosion due to wave actions from vessel wakes.
- The anticipated changes in the composition and characteristics of the populations of marine mammals and various fish species, including shellfish and forage fish, following modifications to the aquatic environment, including:
 - ✓ disruption of sensitive life stages or habitat;
 - ✓ disruption of feeding activities;
 - ✓ distribution and abundance;
 - ✓ contaminant levels in harvested species; and
 - ✓ marine mammal health and condition.
- Any potential impacts on riparian areas that could affect aquatic biological resources and productivity taking into account any anticipated modifications to fish habitat.
- The identification of any potential harmful alteration, disruption or destruction of fish habitat, including the calculations of any potential habitat loss (temporary or permanent) in terms of surface areas (e.g. spawning grounds, fry-rearing areas, feeding).
- Any potential changes in the food web in relation to baseline.
- Any modifications to the marine habitats for fish, invertebrates and marine mammals with regard to their productivity, life cycles, migration, or local movements.
- The potential effects of the terminal operations and marine traffic on marine mammal individuals or populations, including:
 - ✓ risk of collision with other vessels;
 - ✓ disruption of activities (e.g. feeding, calving, movement, migration, etc.) and alteration of habitat;
 - ✓ effect of noise on the behaviour and habits of marine mammals;
 - ✓ effect of increased turbidity on the feeding activities of marine mammals and other marine species;
 - ✓ effect of ballast discharge and the potential for the introduction of invasive species; and
 - ✓ quantity and effect of discarded waste and litter.
- Any modifications and use of the environment and habitats by aquatic species listed by the *Species at Risk Act*.

7.3 Effects on Human Environment

- Any potential effects on human health associated with potential contamination of country foods.
- Potential effects of intensified shipping and port activities on regional shipping networks, and commercial and recreational boating during construction and operation (e.g. maneuvering area, assistance required from tugboats, additional

navigational aids), refer to Transport Canada's publication, "TERMPOL Review Process 2001", including Section 3.2.

- Potential effects on harvesting of marine species as well as shellfish, including a consideration of:
 - ✓ changes in harvester travel patterns resulting from increase vessel traffic;
 - ✓ disturbance of harvest patterns and harvest level, or loss or alteration of high-value harvest areas;
 - ✓ changes in the abundance and distribution of harvested resources;
 - ✓ changes to harvesting costs;
 - ✓ changes to harvest effort as perceived by harvester; and
 - ✓ changes in the quality of harvested species, including contamination, that would adversely affect their consumption or sale.
- Effects on noise level at site boundaries and sensitive sites.
- Any potential effects on the physical and cultural heritage, and on archaeological resources.
- Any potential effects on the visual environment and the effects that changes to the aesthetic quality will have on businesses which rely on the aesthetic and recreational interest of the area.
- Any effects of the Project on the recreational interest and potential of the area, including the steps that will be taken to maintain the recreational interest of the zones affected by the various components of the Project. This assessment will include the perspective of pertinent parties (e.g. outfitters, fishing guide operators, sightseeing tour operators).
- Any potential effects on unique sites or special features, such as environmentally sensitive areas, reserves or protected areas.
- Any potential effects of the Project on other land uses.

7.4 Effects on Aboriginal Rights and Interests

Based on information provided by Aboriginal peoples, or, if Aboriginal peoples do not provide this information, on available information from other sources, the proponent will identify:

- any potential cultural, social and/or economic effects to Aboriginal peoples that may arise as a result of the Project, including accidents and malfunctions;
- any potential effects on current uses of land and resources by Aboriginal peoples for traditional purposes;
- any effects on hunting, fishing, trapping, cultural and other traditional uses of the land (e.g. fishing and harvesting salmon, halibut, seaweed and other marine species, collection of medicinal plants, use of sacred sites), as well as related effects on lifestyle, culture and quality of life of Aboriginal peoples;
- measures to avoid, mitigate, or accommodate effects on traditional uses;
- any effects of the project on heritage and archaeological resources in the project area that are of importance or concern to Aboriginal peoples; and
- a discussion of any factors that may inhibit or foster the flow of economic and other benefits to Aboriginal peoples.

7.5 Potential Accidents and Malfunctions

The proponent will describe and evaluate the potential effects of project-related accidents and malfunctions on the environment, including impacts on social, economic or cultural elements of the environment and human health to people in close proximity of spilled contaminants.

Particular attention should be focused on sensitive components of the environment that could be affected in the event of an accident or malfunction, and that could potentially make the consequences worse (e.g., proximity of communities, natural sites of particular value). Where potentially significant impacts could occur as a result of an accident or malfunction and the necessary data are available, the proponent will consider assessing the probability of such an occurrence, taking into account weather or external events that present contributing factors.

In particular, for the marine project components, the proponent will assess the potential for minor and major accidental releases of oil or condensate. As appropriate, the proponent shall also provide an analysis of the potential environmental effects of such releases on the marine and terrestrial environment and on human health within the spatial boundaries described in Section 5.3 of this document.

In conducting this assessment, the proponent will consider, without being limited to, the following points, as appropriate:

- Properties of oil and condensate and its behaviour during an accidental spill;
- Probability analysis of the likelihood of an accidental condensate or oil release, using world-wide statistics for tankers of the size and configuration proposed for condensate and oil shipment to and from the Project;
- Modelling of the dispersion of oil and condensate, including a description of the dispersion models used for spills on land or at sea, including any formulated hypotheses, accompanied by supporting documentation and the results of the modelling;
- For the assessment of potential risks during navigation (e.g. vessel collisions), the proponent shall refer to Sections 3.8 and 3.15 of Transport Canada's publication, "TERMPOL Review Process 2001"; and
- Its environmental track record.

The proponent will describe the safety measures planned for the marine berths and tank terminal, and for the marine transportation component, including:

- how the design of the facilities and management of their operation will minimize the risks of accidents and malfunctions;
- with respect to shipping and transshipping at the terminal, the proponent shall consult Sections 3.8 and 3.15 in Transport Canada's publication, "TERMPOL Review Process 2001"; and
- with respect to the tank terminal, the proponent will consult the "Environmental Code of Practice for Aboveground and Underground Storage Tank Systems containing Petroleum Products and Allied Petroleum Products" (CCME, 2003).

The proponent shall also present a preliminary emergency measures plan and environmental protection plan making it possible to react adequately in the event of an accident. An emergency measures plan generally addresses the following elements:

- Recommended oil release contingency planning based on oil release trajectory modelling of hypothetical releases for both condensate and oil, at locations identified through a thorough navigational analysis;
- A sample oil pollution emergency plan that would be carried onboard each tanker;
- The Response Organization's role in relation to the tankers;
- A description of release emergency planning for the terminal, including potential infrastructure and other resources, *Canada Shipping Act (CSA)* requirements and facility designation under CSA;
- A sample oil release atlas that would be part of CSA requirements;
- Plans for alerting and evacuating employees during an emergency;
- Plans for alerting and notifying company officials and mobilizing emergency personnel to the site;
- Pertinent information in the case of an emergency (e.g. persons in charge, equipment available, plans and maps to locate works);
- The company's internal emergency intervention structure and decision-making mechanisms;
- The means of communication with the external emergency preparedness organization;
- The measures considered to protect the populations that could be affected; and
- The means to quickly alert populations that could be affected, in collaboration with the municipal, Aboriginal and government organizations concerned, advising public authorities of the alert and subsequent information about the situation.

7.6 Effects of the Environment on the Project

As required by the Act, the effects of the environment on the Project must be assessed. The assessment will take into account how local conditions and natural hazards, such as severe and/or extreme weather conditions and external events (e.g. flooding, fire, avalanches and earthquakes) could adversely affect all project components. The sensitivity of the Project to long-term climate variability and effects will also be identified and discussed.

Specific to assessing the effects of the environment on the marine components of the Project, the proponent shall consider in its assessment factors, such as exceptional meteorological conditions (e.g. strong winds, tides, fog and lightning), stability of the ocean floor, sediment dynamics, and shore zone physical processes. Further, the proponent will provide an analysis of the risks associated with seismic activity in the area surrounding the marine terminal and demonstrate how this information was integrated in both project planning and emergency measures planning.

7.7 Mitigation Measures

For all project components, the proponent shall describe the standard mitigation practices, policies and commitments that constitute mitigation measures and that would be applied as part of standard practice regardless of location. The proponent shall then describe its environmental protection plan and its environmental management system, through which it will deliver this plan. The plan shall provide an overall perspective on how potentially adverse effects would be minimized and managed over time. As well, the proponent shall describe its commitments, policies and arrangements directed at promoting beneficial or mitigating adverse socio-economic effects. The proponent shall discuss the mechanisms it would use to require its contractors and subcontractors to

comply with these commitments and policies, and with auditing and enforcement programs.

The application shall specify the actions, works, best available technology, corrective measures or additions planned during the Project's various construction and operation phases to eliminate or reduce the significance of adverse effects. The proponent will also present an assessment of the effectiveness of the proposed mitigation measures. The reasons for determining if the mitigation measure reduces the significance of an adverse effect shall be made explicit. Further, the proponent must identify who is responsible for the implementation of these measures and the system of accountability.

The proponent shall present a compensation program for losses in fish habitat that complies with Fisheries and Oceans Canada's (DFO) policies. The compensation plan should generally include the following elements:

- Detailed descriptions of the fish habitat impacted (i.e. amount, type, species present, productivity);
- A list of compensation options sufficient to ensure no net loss in the productive capacity of fish habitat (both temporally and physically);
- A description of the proposed fish habitat compensation (i.e. type, location, quantity and quality of habitat to be constructed);
- A description of how compensation is to be accomplished, including drawings, specifications and plans. These may be conceptual for the environmental assessment, but detailed designs would be required prior to DFO issuing any authorizations;
- Details regarding the ability to construct the proposed compensation (e.g. ownership of land, technically feasible);
- Locations of the proposed compensation sites, including scaled map and geographic coordinates;
- Where existing habitat is to be enhanced, the intrinsic value of this habitat must be considered when determining the amount of habitat gained through compensation. A description of any existing habitat in the area of the proposed compensation (i.e. type, species present, productivity) should be included;
- Photographs of existing conditions at the proposed compensation sites;
- An explanation of how the proposed compensation would offset impacts and result in no net loss in the productive capacity of fish habitat;
- If a less preferred compensation option is proposed then a rationale should be provided;
- A monitoring program to determine compliance with the compensation plan and the effectiveness of the habitat constructed; and
- An explanation of how any comments from the public and Aboriginal peoples have been incorporated into the design of the compensation plan, if applicable.

7.8 Determination of the Significance of Residual Effects

After having established the mitigation and compensation measures, the proponent will present any residual effects of the Project on the biophysical and human environments.

For all project components the proponent will include a summary of the Project's residual effects, the degree to which effects can be mitigated, and which effects cannot be mitigated or compensated for. A summary table that presents the effects before necessary mitigation measures on the various components of the environment are

applied, the mitigation measures applied, and the residual effects will be included in the application.

The proponent will identify the criteria used to assign significance ratings to any predicted adverse effects. It will provide a detailed analysis of the significance of the potential residual adverse environmental effects it predicts. It must contain clear and sufficient information to enable the Panel, Aboriginal peoples and the public to understand and review the proponent's judgment of the significance of effects. The proponent must define the terms used to describe the level of significance.

7.9 Cumulative Environmental Effects

As required by the Act, the cumulative effects of the Project must be assessed. In the conduct of its cumulative effects assessment, the proponent should refer to the Canadian Environmental Assessment Agency's *Cumulative Effects Assessment Practitioners Guide* (1999).

For all components of the Project, including the marine components, the proponent will identify and justify the biophysical and socio-economic elements that will constitute the focus of the cumulative effects assessment. The proponent's assessment should emphasize the cumulative effects on the biophysical and socio-economic elements that are likely to be affected by the Project. To this end, for the marine components of the Project, the proponent must consider, without limiting itself thereto, the following:

- Presenting a justification for the geographic and temporal boundaries of the cumulative effects assessment. The boundaries for the cumulative effects assessments will again depend on the effects being considered (i.e. will generally be different for different effects). These cumulative effects boundaries will also generally be different from (larger than) the boundaries for the corresponding project effects;
- Describing and justifying the choice of projects and selected activities for the cumulative effects assessment. These shall include past activities and projects, those being carried out and future projects or activities likely to be carried out, including current, potential marine shipping and terminal development;
- Describing the mitigation measures that are technically and economically feasible, and determine the significance of the cumulative effects. The proponent shall assess the effectiveness of the measures applied to mitigate the cumulative effects. In cases where measures exist that are beyond the scope of the proponent's responsibility that could be effectively applied to mitigate these effects, the proponent will identify these effects and the parties that have the authority to act; and
- Developing a follow-up and monitoring program to verify the accuracy of the assessment, or to dispel the uncertainty concerning the effectiveness of mitigation measures for cumulative effects.

7.10 Capacity of Renewable Resources

As per the Act, the capacity of renewable resources that is likely to be significantly affected by the Project to meet the needs of the present and those of the future must be assessed. In its conduct of this assessment, the proponent will identify those resources likely to be significantly affected the Project, and describe how the Project could affect their sustainable use. The proponent will identify and describe any criteria used in

considering sustainable use. Sustainable use may be based on ecological considerations, such as integrity, productivity and carrying capacity.

8. Follow-up and Monitoring

The proponent shall provide the details of a follow-up and monitoring program for all components of the Project, including the marine components. The program must be described in the Environmental Impact Statement in sufficient detail to allow independent judgment as to the likelihood that it will deliver the type, quantity and quality of information required to reliably verify predicted effects (or absence of effects), confirm environmental assessment assumptions, and confirm the effectiveness of mitigation. For greater clarity, the proponent should refer to the Canadian Environmental Assessment Agency's "Operational Policy Statement for Follow-up Programs under the *Canadian Environmental Assessment Act* (OPS/EPO-6-2002)" in its design of a follow-up program specific to the Act, for those specific elements or issues identified as being a concern.

9. REFERENCES

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Consideration of Aboriginal Group Comments on the Draft Joint Review Panel Agreement

PROJECT NAME: Northern Gateway Project

October 22, 2009

ISSUE / CONCERN AND / OR SUGGESTION	Response
Horse Lake First Nation / April 14, 2009	
<p>HLFN is concerned as to whether a further Environmental Impact Statement Terms of Reference will be required over and above this ToR. In stating this, we note that the Mackenzie Gas Project ToR was 66 pages with significant detail, while the current ToR is not the least bit as detailed. We seek clarity on this matter. If this ToR is the sole ToR, we would respectfully suggest that similar ToR to the Mackenzie ToR should be incorporated.</p>	<p>The Joint Review Panel (JRP) Terms of Reference have been revised to clarify the Scope of factors (Part III of the Terms of Reference) to be considered by the JRP. This section now states that the 'Panel in conducting its consideration of the factors outlined in Part II will have regard to the following:</p> <ul style="list-style-type: none"> ▪ The National Energy Board (NEB) Filing Manual (2004); and ▪ The document issued by the Canadian Environmental Assessment Agency (the Agency) entitled "Scope of the Factors – Northern Gateway Project". <p>The Scope of the Factors document prepared by the Agency, in consultation with other federal authorities, focuses mainly on factors to be considered for the marine components of the Northern Gateway Project (Project). The document addresses several of the concerns that were raised by Aboriginal groups and the public during the public comment period. The document will be provided to the proponent to guide the preparation of the environmental assessment (EA) documents.</p>
<p>There are no less than eight references in Section 6.3 and in the Appendix to "the public, including Aboriginal people..." regarding obligations of the JRP. Horse Lake First Nation takes exception to this reference as it implies that Aboriginal People are stakeholders, which is clearly contradictory to the SCC ruling in <i>Mikisew</i>. Horse Lake First Nation would respectfully request that the JRP recognize their unique and distinct obligation to Aboriginal people.</p>	<p>The JRP Agreement has been changed accordingly.</p>
<p>We also note (Section 6.4) that consultation between the Crown and Aboriginal people will be the subject of a separate</p>	<p>The Approach to Aboriginal Consultation for the Northern</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
<p>and more detailed communication, independent of the JRP. Our first comment, therefore, is related to the need for the identification of various important decision-making milestones and related opportunities into future decisions regarding Project design, implementation, monitoring, enforcement, and remediation prior to irrevocable decisions being made.</p> <p>It would be of interest to know how, or to what extent the consultations outlined in S 6.4 relates to the activities of t JRP, with respect to process and timing.</p> <p>Additionally, it would be of interest to know about the Proponent’s consultation program over the life of the Project such that community input into important decisions is realized prior to the making of irrevocable decisions. It is important to know precisely how the Proponent is consulting with Aboriginal communities and how will they be engaged as a two-way dialogue.</p> <p>It is also important to establish the manner in which this dialogue continues throughout the planning, construction and operational phases, so that HLFN have a chance to input into detailed routing and design. This is important in terms of protecting site-specific elements like special habitat features, travel routes, harvesting and hunting sites, and sites of spiritual or ceremonial importance. It is imperative that HLFN be involved in a fulsome fashion with all baseline studies.</p>	<p>Gateway Project was provided to Aboriginal groups in February 2009 and set out some of the general key steps to be undertaken for each phase of the environmental review process. Included in the same package as this table is a document entitled “Aboriginal Consultation Framework for the Northern Gateway Pipeline Project (Consultation Framework)” which provides additional detail on the phases of the environmental assessment and regulatory processes. This document is referred to as the Consultation Framework in the remainder of the table.</p> <p>The JRP Agreement has also been amended to include information on the involvement of Aboriginal groups in the JRP process (subsections 6.5 and 8.1 of the JRP Agreement).</p> <p>Part IV of the Terms of Reference (ToR) appended to the JRP Agreement now describe the main steps of the review process in more detail.</p> <p>Additionally, as per the JRP Terms of Reference, the JRP will be issuing a Hearing Order which will set out the procedures to be followed for the Joint Review of the Project. As well, the JRP Secretariat will be holding information sessions to assist in understanding the JRP process. The JRP process will allow Aboriginal groups to be involved in the review of the documents prepared by the proponent. If it is felt that the information is not adequate, there will be opportunities during the review process to request additional information from the proponent and / or to provide your views to the JRP on whether the information provided is adequate.</p> <p>The Consultation Framework provides further information about the integration of consultation into the JRP process and more details about the involvement of the Crown and Aboriginal Groups.</p> <p>As per the Filing Manual, the proponent is required to identify issues of concern to Aboriginal groups and how it has addressed</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
	<p>them. The proponent will also need to describe its engagement program with Aboriginal groups. These are expectations outlined in the NEB Filing Manual. The adequacy of the information provided by the proponent will be assessed through the JRP process.</p> <p>Information on the proponent's studies and communication/consultation plans should be discussed with the proponent. Additionally, there will be opportunities during the review process to formally request additional information from the proponent and / or to provide your views to the JRP on whether the information provided is adequate.</p>
<p>Frequently, the most important elements of mitigation lie in the precise siting of a pipeline facility, in order to avoid or reduce impacts on physical, biological and cultural elements. An approximate route is given in the preliminary information available from the Proponent, but we are not sure of the scale at which this is being assessed (macro- or micro-design). There should be some indication as to how Aboriginal communities such as the HLFN can be involved at this level of detailed planning, as well as in the review of the Panel's report. There needs to be effective community involvement in the assessment and site-specific planning, as the project planning proceeds. It is important that all VEC's of importance to HLFN be included in the assessment. Therefore, it is important that the investigators know what is important to the HLFN, and the HLFN should be consulted on the selection of VEC's.</p>	<p>As per the NEB Filing Manual, the proponent is required to identify issues of concern to Aboriginal groups and how it has addressed them. This may include concerns with respect to the determination of valued ecosystem components (VECs). The proponent will also need to describe its engagement program with Aboriginal groups. These are expectations outlined in the NEB Filing Manual. The adequacy of the information provided by the proponent will be assessed through the JRP process.</p> <p>It is recommended that Aboriginal groups discuss requests for information on the proponent's detailed planning directly with the proponent as this is the responsibility, and in the control, of the proponent. Additionally, there will be opportunities during the review process to request additional information from the proponent and / or to provide your views to the JRP on whether the information provided is adequate.</p> <p>The Consultation Framework provides further information about the integration of consultation into the JRP process and more details about the involvement of the Crown and Aboriginal Groups including consultation on the JRP's EA report.</p>
<p>Members of HLFN whose activities may be directly affected by the proposed project should be identified and consulted (e.g. hunting, guiding, outfitting, trapping).</p>	<p>The proponent will be expected to describe how it has identified issues of concern to Aboriginal groups and how it has addressed</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
	<p>them. The proponent will also need to describe its engagement program with Aboriginal groups. These are expectations outlined in the NEB Filing Manual. The adequacy of information provided by the proponent will be assessed through the JRP process.</p> <p>Aboriginal groups are encouraged to convey information on how their activities may be affected by the Project to the proponent and are encouraged to participate in the JRP process.</p> <p>The JRP Agreement has been modified to include subsection 8.1 which gives the JRP the mandate to receive information from Aboriginal peoples related to the nature and scope of potential or established Aboriginal and treaty rights that may be affected by the Project and the impacts or infringements that the Project may have on potential or established Aboriginal and treaty Rights.</p> <p>Part II of the JRP Terms of Reference (Factors to be considered) has been amended to include a consideration of community knowledge and Aboriginal traditional knowledge received during the review.</p> <p>As well, the Scope of Factors document issued by the Agency: states (see sections 7.3 Effect on Human Environment and 7.4 Effects on Aboriginal Rights and Interests) that the assessment take into account the views of pertinent parties and examine the social and economic effects to Aboriginal peoples that may arise as a result of the Project, as well as the potential effects on current uses of land and resources for traditional purposes.</p>
<p>In the discussion of alternatives, it will be important to establish what falls within the range of being “feasible”. While this would clearly include financial concerns from the Proponent’s perspective, the consideration of any alternative should not be omitted simply on financial grounds. The analysis should take into account the external, incidental and indirect costs of each alternative, as well as the direct cost. For example, the long term environmental and socio-economic costs of environmental degradation should be factored into the analysis, as well as the costs of construction and operation. It is important that Aboriginal communities be effectively involved in these analyses.</p>	<p>The consideration of alternatives will be assessed as part of the JRP process, and is a requirement of the <i>Canadian Environmental Assessment Act (CEAA)</i>. The Joint Review Panel (JRP) Terms of Reference includes alternatives to and alternative means. Section 3 of the Scope of Factors document issued by the Agency defines in more details how the assessment of alternatives is to be undertaken.</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
	<p>The JRP process will allow Aboriginal groups to be involved in the review of the documents prepared by the proponent. If it is felt that the information is not adequate, there will be opportunities during the review process to request additional information from the proponent and / or to provide your views to the JRP on whether the information provided is adequate.</p>
<p>Scientific Uncertainty and Adaptive Management – The Panel should take into account scientific uncertainty (traditional vs scientific or between scientists on likelihood and severity of potential ecological effects and the ability to control or minimize adverse effects) as well as the planning assumptions, and should note opposing scientific and traditional/community views where this occurs.</p> <p>There should be a recognition that scientific uncertainty is a reason for more closely examining alternatives to the project or alternative means of carrying out the project.</p> <p>Before proceeding or making a decision on project design, there must be a high level of confidence among experts that there are good prospects for reducing the risk of serious or irreversible harm to an acceptable level and that there are a range of tools and contingencies available to accomplish this.</p> <p>There must be a commitment to long-term monitoring and early-warning systems, the use of indicators and thresholds for further action, and the indication that potentially successful options exist for corrective action.</p> <p>In all decisions, the precautionary principle should be adopted. Plans should be developed accordingly, describing</p>	<p>The subject of scientific uncertainty is covered by the Filing Manual. In particular, page 4A-31 of the Manual states that if the information is insufficient or there is uncertainty, the proponent needs to identify this gap and indicate how it will be addressed.</p> <p>The Filing Manual also mentions that a follow-up program may be required in cases where there is uncertainty related to the effects of the project. The need for and requirements of a follow-up program is also required by the <i>CEAA</i> (see section 16).</p> <p>As well, during the JRP process, you will have the opportunity to provide your views to the JRP on how uncertainty and adaptive management should be taken into account during their review.</p> <p>Typically, the requirement for post construction environmental monitoring is attached as a condition to a NEB certificate. Chapter 4 A.2 and subsection A.2.7 of the Filing Manual state that the proponent indicate the required qualifications including training and experience of individuals who will be undertaking inspection and monitoring.</p> <p>Section 8.0 of the Scope of Factors document also requires that a Follow-up and Monitoring program be provided for all components of the project including marine components.</p> <p>There will be opportunities, during the JRP process, to provide your views on the adequacy of the information provided by the proponent.</p> <p>One of the purposes of the <i>CEAA</i> (see section 4(1)(a)) is to</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
<p>mitigation measures required; monitoring requirements (who, when, how, linkages and accountability); performance measures and targets; and thresholds for taking stronger measures (strengthening existing mitigation or using new methods).</p>	<p>ensure that projects are considered in a careful and precautionary manner before federal authorities take action in connection with them, in order to ensure that such projects do not cause significant adverse environmental effects.”</p> <p>Section 2.3 of the Scope of Factors document discusses the precautionary approach.</p> <p>Finally, the following statement was added to the JRP Agreement (subsection 6.3): “The Panel will review the Project in a careful and precautionary manner.”</p>
<p>Geotechnical stability and watercourse crossings are two areas that typically present technical challenges. In applying the precautionary principle, there needs to be not only a sound technical assessment on a site-specific basis, but also a system of evaluation and reporting, as construction progresses, on such matters as confirming design assumptions; revising forecasts, evaluating how physical constraints and challenges have been met, and itemizing the need for any strengthened or additional measures.</p>	<p>These matters are within the mandate of the JRP and will be assessed during the JRP process.</p> <p>As per the Terms of Reference – Part IV the JRP will provide Aboriginal groups and the public the opportunity to make known their views on the issues that should be considered by the JRP.</p> <p>Watercourse crossings are specifically mentioned as one of the components that is part of the Scope of Project (see Part I of JRP Terms of Reference).</p>
<p>In developing mitigation and monitoring plans, the Proponent should indicate any applicable codes of practice, guidelines or other best management practices that exist generally or within the different jurisdictions, or any such codes developed by industry. The Proponent should indicate which codes and guidelines are to be followed for each project element, and provide a rationale for using or not using those that are applicable.</p>	<p>These matters are within the mandate of the JRP. The JRP will consider all evidence submitted in the proceedings. The proponent is expected to identify all codes, standards or guidelines it intends to use in the context of the Project.</p> <p>If, following the review of the information provided by the proponent, you are of the view that the information is not sufficient, there will be opportunities to either formulate information requests or provide your views to the JRP on this subject.</p>
<p>Cumulative Effects – The project could potentially include a significant range of cumulative effects that result simply from the formation of a utility corridor including ancillary facilities (transmission, pipeline looping, new/increased exploration activity, roads, and so on – see letter for other examples). It is our opinion that the Proponent should take into account the potential “project-inducing” cumulative effects, using two or more development scenarios (moderate and rapid growth</p>	<p>It is within the mandate of the JRP to consider cumulative effects. Paragraph 16(1)(a) of the CEAA includes a requirement for the consideration of “cumulative effects that are likely” Section 7.9 of the document entitled ‘Scope of Factors – Northern</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
<p>scenarios).</p>	<p>Gateway Project’ outlines in more detail the information to be provided in the context of the cumulative effect assessment.</p> <p>As per the Terms of Reference – Part IV the JRP will provide Aboriginal groups and the Public the opportunity to make known their views on the issues that should be considered by the JRP.</p>
<p>The Proponent should identify and describe the possible involvement of Aboriginal communities in the follow-up phase. The training requirements and terms of reference for the required capacity should be considered and discussed in the 's report.</p>	<p>The proponent will be expected to describe how it has identified issues of concern to Aboriginal groups and how it has addressed them. The proponent will also need to describe its engagement program with Aboriginal groups. These are expectations outlined in the NEB Filing Manual. The adequacy of information provided by the proponent will be assessed through the JRP process.</p> <p>These matters are within the mandate of the JRP. The JRP will consider all evidence submitted during the proceedings.</p> <p>The NEB Filing Manual, Chapter 4 A.2 and subsection A.2.7 covers monitoring and follow-up.</p> <p>Section 8 of the document entitled ‘Scope of the Factors – Northern Gateway Project’ outlines in more details the information to be provided by the Proponent in relation to Follow-up and Monitoring.</p>
<p>Environmental Protection and Management – Proponent should describe any vegetation management activities that are likely to be conducted (e.g. suppression of vegetation on RoW). Questions concerning potential effects of contaminant levels in soils, vegetation and wildlife should be addressed, as well as possible alterations to terrestrial habitat that might result from vegetation management. Measures to be put in place to avoid long-term contamination of soil, vegetation and adjacent watercourses, should be defined.</p>	<p>The JRP must consider the environmental effects of the project. It is expected that the issue of vegetation management will be addressed by the proponent in its Application. If, you are of the view that this issue has not been addressed adequately, you will have an opportunity to request additional information on this subject or you will be able to provide your views to the JRP on this issue.</p> <p>Measures to avoid contamination are considered as mitigation, and should be described by the proponent as per the NEB Filing Manual (section A.2.1) and section 7.7-Mitigation Measure in the</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
	<p>Scope of Factors document issued by the Agency. The need for mitigation is also discussed in part II of the JRP Terms of Reference and in section 16(1) (d) d of the CEAA.</p>
<p>Contractors and sub-contractors must be knowledgeable regarding the environmental issues, mitigation and cautionary procedures.</p>	<p>As per section 7.7- Mitigation Measures in the Scope of the Factors document, “the Applicant shall describe its commitments, policies and arrangements directed at promoting beneficial or mitigating adverse socioeconomic effects. The Applicant shall discuss the mechanisms it would use to require its contractors and sub-contractors to comply with these commitments and policies and with auditing and enforcement programs.”</p> <p>The NEB Filing Manual specifies that an Environmental Protection Plan can include procedures and mitigations measures aimed at contractors (Section A.2-Environmental Protection Plan)</p>
<p>In terms of project management, it should be assured that the proposed responsibility structures and relationships are conducive to ensuring that mitigation and monitoring are carried out fully, and that emerging problems are resolved in a timely and satisfactory manner.</p>	<p>This matter is within the mandate of the JRP.</p> <p>You are encouraged to provide your views on this subject to the JRP. You will also have an opportunity to request additional information on this subject if you are of the view that the information provided by the Proponent is not sufficient.</p>
<p>Principles and practices to be used for removing aggregate material/gravel for access roads or other construction should be described in detail, along with locations and measures to be taken to avoid adverse impacts to sub-surface flows, soils, vegetation and wildlife. There should be overall guidelines and principles to be followed, but at some point in the process, there should also be a site-specific assessment for each such operation, detailing such mitigation measures as siltation and sedimentation control, spills prevention, re-contouring, final cover and re-vegetation. Monitoring plans to evaluate the success of reclamation and re-vegetation should be described.</p>	<p>This information is within the mandate of the JRP to consider. The Scope of the Project (Part I of the JRP Terms of Reference) includes borrow pits and quarries. The environmental assessment will therefore discuss the effects of these project components on the environment. The factors specified under Part II and Part III of the JRP Terms of Reference will have to be provided, where relevant, for these two project components.</p>
<p>The pipeline and associated facilities maintenance program should be fully described in the EIA, along with the environmental monitoring programs during construction, operational and post-operational phases and should include berms, ditches, ditch blocks etc. for surface water control and erosion prevention; the progress of roaching and subsistence; stream crossings and associated mitigation; and the success of re-vegetation.</p>	<p>The consideration of this information is within the mandate of the JRP. Reference to this information can be found in the NEB Filing Manual 4 A.2.5 Effects Assessment: The JRP may request an Environmental Protection Plan during the examination of an application, or as a condition of approval, prior to construction.</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
<p>Water Resources – For ALL watercourse crossings the method used in constructing the crossing needs to be described and justified, including the consideration of directional drilling for sensitive habitats. Codes, standards or guidelines to be followed should be clearly identified.</p> <p>The combined effects of multiple crossings of watercourses, and of many watercourses being crossed, should be assessed in the cumulative impacts section of the EIA.</p> <p>It will be important to determine what local changes in water flows and water quality will occur as a result of pipeline and access development. This particularly concerns the effects on vegetation communities (e.g. muskeg, fens) where changes in surface of subsurface water could affect the makeup of the vegetation community as well as the water quality over the long term.</p>	<p>These matters are within the mandate of the JRP.</p> <p>Watercourse crossings are included in the Scope of the Project (Part I of the JRP Terms of Reference) under “All related works and activities” The proponent is therefore expected to provide the information that you have identified.</p> <p>It is within the mandate of the JRP to consider cumulative effects. Paragraph 16(1)(a) of the CEAA includes a requirement for the consideration of “cumulative effects that are likely” Section 7.9 of the document entitled ‘Scope of Factors – Northern Gateway Project’ outlines in more details on the information to be provided in the context of the cumulative effect assessment.</p> <p>The proponent is expected to identify all codes, standards or guidelines used.</p> <p>Section 16(1) (a) of the CEAA includes a requirement for the consideration of “environmental effects” and “cumulative effects that are likely”. Changes in water flow and quality and quality are expected to be considered by the proponent in its Application.</p> <p>As per the Terms of Reference – Part IV, the JRP will provide Aboriginal groups and the public the opportunity to make known their views on the issues that should be considered by the JRP.</p>
<p>Wildlife –</p> <p>The means of avoiding impacts to avian wildlife during sensitive periods of spring migration should be detailed on a site-specific basis, particularly in sensitive points such as wetlands or riparian areas. Particular attention should be paid to raptor nesting sites.</p> <p>Under the Scope of Factors: natural movements of a wildlife population (e.g. seasonal migration) should be considered, along with the natural variation of a population.</p> <p>In Existing Environmental Setting there should be some discussion of the condition/health of wildlife (e.g. major parasites of concern, diseases and any evidence of human-induced effects or stressors such as contaminants. Effective community</p>	<p>These matters are within the mandate of the JRP.</p> <p>Environmental effects and mitigation measures are required under the CEAA 16(1) (a) and (d) and are included in the JRP Agreement, Part II – Factors to be Considered During the Joint Review.</p> <p>Additional information on this has been included in the Scope of the Factors document issued by the Agency in sections 5.1 Identification of Key Issues which briefly discusses the identification of valued ecosystem components. Additionally</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
<p>input is important here.</p> <p>Identifying clear effects in the follow-up stages could be difficult and complex, but would be particularly so without good baseline information.</p> <p>There should be consideration of indirect or secondary ecological effects of the pipeline development. The dynamics of predator-prey relationships which may be altered by the existence of the RoW and the effects of increased human access should be carefully examined as factors affecting the survival and health of a number of wildlife species that are or importance in terms of traditional and subsistence harvest.</p> <p>In its discussion of impacts on birds, mammals and other wildlife, the EIA should include a consideration of habitat fragmentation, ecological connectivity, and changes in the amount of core habitat resulting from the pipeline corridor and related access, relative to what is known about core habitat requirements.</p>	<p>sections 6 (Baseline Information) and 7 (Impact Assessment) provide additional information.</p> <p>The NEB Filing Manual Table A-4: Filing Requirements for Wildlife and Wildlife Habitat.</p> <p>Residual Effects (such as habitat fragmentation) requirements are outlined in the NEB Filing Manual section 4.2.1.</p> <p>As part of the review process, the JRP will be seeking comments on the list of issues to be considered and on whether the Proponent should be required to provide additional information that may not have been included in its Application. As part of the review of the Application, you will have an opportunity to provide your views to the JRP on this question.</p>
<p>Reclamation and Restoration –</p> <p>The success of reclamation of the RoW, borrow pits, temporary roads, slopes, etc. will be very important in the long term quality of the natural environment in the project zone falling within the HLFN Traditional Territory.</p> <p>Use of native species should be fully discussed, with rationale for using native or non-native species.</p>	<p>It is expected that the proponent will provide this information as part of its Application. The requirement for this information is captured in the following:</p> <p>NEB Filing Manual, Section A.2.5 Effects Assessment under the heading Environmental Protection Plan. This section states that at a minimum an Environmental Protection Plan should provide criteria for evaluating the success of practices and procedures particularly for reclamation and any new mitigation measures.</p> <p>Section 7.7 of the Scope of the Factors document requires the following:</p> <p><i>The Applicant shall then describe its environmental protection plan and its environmental management system through which it will deliver this plan. The plan shall provide an overall perspective on how potentially adverse effects would be minimized and managed over time. As well, the Applicant shall describe its commitments, policies and arrangements directed at promoting beneficial or mitigating adverse</i></p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
<p>The type of equipment to be used in construction, especially in sensitive areas and during sensitive periods should be fully described, along with the operators' efforts to minimize ground damage and maintain surface drainage control during and after construction.</p>	<p><i>socioeconomic effects. The Applicant shall discuss the mechanisms it would use to require its contractors and sub-contractors to comply with these commitments and policies and with auditing and enforcement programs.</i></p> <p>The requirement for this information is captured in the JRP Agreement, Part I – Scope of the Project and the NEB Filing Manual: 4.1 Project Description.</p>
<p>Elements of Historical and Traditional Importance –</p> <p>Special attention will need to be paid to lands and features that are of special interest to HLFN and its members. The criteria for assessing heritage resource potential should be explained in the EIA. The treatment of this subject should include a map all along the pipeline route, of the potential for heritage resource discovery as well as known features, based on physical, historical and cultural factors.</p> <p>Consultation with HLFN is essential with respect to the parts of the pipeline route that go through HLFN territory, in order to identify elements of historical or traditional importance.</p>	<p>The requirement for this information is captured in the following:</p> <p>JRP Agreement, Part II – Factors to be Considered During the Joint Review identifies the requirements of the CEAA including Environmental Effects. The definition of environmental effect includes the following in part (b): any effect or any change the project may cause in the environment on health and socio-economic conditions, physical and cultural heritage, the current use of lands and resources for traditional purposes by Aboriginal persons or any structure, site or thing that is of historical, archaeological, paleontological or architectural significance. This is therefore a basic requirement of the CEAA and is within the mandate of the JRP.</p> <p>Scope of Factors document, 6.4 Aboriginal Rights and Interests which states the following:</p> <p><i>Further to the general guidance provided in Chapter 3 of the Filing Manual regarding consultation and Table A-5 Filing Requirements for Socio-Economic Elements, the Applicant will identify the lands, waters and resources of specific social, economic, archaeological, cultural or heritage value to Aboriginal groups.</i></p>
<p>Human Health and Well Being</p> <p>The EIA should include an analysis of the degree to which country food supports and comprises diet in local communities.</p>	<p>These matters are within the mandate of the JRP and are covered in the following:</p> <p>Scope of Factors (August 2009), 6.4 Aboriginal Rights and</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
<p>In terms of noise levels potentially affected by the project (mainly the stations along the route), the local topography, prevailing winds, etc. need to be taken into account; and accepted techniques should be used to estimate noise levels, allowing for the range of expected conditions. The predicted noise levels should be compared with accepted standards / objectives in effect in each jurisdiction.</p>	<p>Interests (country foods and harvesting are covered) and 7.3 Effects on Human Environment includes effects of noise levels.</p> <p>NEB Filing Manual, Table A-4: Social and Cultural Well-being and Human Health. Table A-3 under Acoustic Environment.</p>
<p>Access</p> <p>Increased access to lands in the HLFN Traditional Territory is important, and raises questions important to HLFN, as well as regulatory and resource agencies. The EIA should contain an analysis and discussion of the potential effects of increased human access introduced by the pipeline and ancillary facilities over the long-term, taking into account multiple and spin-off developments of the project. Potential changes in wildlife health and condition (e.g. predator-prey interactions, parasites and diseases, changed visibility and exposure from ROW, and nutritional factors) brought about by the project should be addressed.</p> <p>Principles regarding the abandonment and/or reclamation of any temporary access roads will need to be established.</p> <p>The criteria for deciding whether to decommission access routes will need to be made, as well as for continued access on roads that are left in place.</p> <p>For access roads that will be abandoned, the mode of reclamation will need to be identified, as well as the means of controlling future unauthorized access.</p> <p>Effective stakeholder input from the community is important in making these decisions.</p>	<p>These matters are within the mandate of the JRP as per the following:</p> <p>The requirement to consider ‘Residual Effects’ (such as habitat fragmentation) is outlined in the NEB Filing Manual - section 4.2.1.</p> <p>Section 16(1)(a) of the CEAA includes a requirement for the consideration of “cumulative effects that are likely” Also, section A.2.6 of the NEB Filing Manual requires a cumulative effects assessment.</p> <p>NEB Filing Manual, Section A.2.5 Effects Assessment under the heading Environmental Protection Plan. This section states that at a minimum an Environmental Protection Plan should provide criteria for evaluating the success of practices and procedures particularly for reclamation and any new mitigation measures.</p> <p>NEB Filing Manual, Table A-3: Circumstances Triggering the Need for Detailed Biophysical and Socio-Economic Information under Heritage Resources: The project will create new access opportunities.</p> <p>NEB Filing Manual, Table A-5 Filing Requirements for Socio-Economic Elements: Social and Cultural Well-Being: Provide an overview of the potential sources of socio-cultural impacts on the local community from the project.</p> <p>As per the Terms of Reference – Part IV, there will be opportunities during the review process to formally request additional information from the proponent (as an intervenor) and</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
	/ or to provide your views to the JRP on whether the information provided is adequate. The JRP will provide Aboriginal groups and the public the opportunity to make known their views on the issues that should be considered by the JRP. Aboriginal groups are encouraged to participate in the JRP process to ensure the JRP knows their concerns.
<p>Community Support</p> <p>The Proponent should indicate the need for community support, in terms of logistics, accommodations, access and so forth.</p> <p>It needs to be known whether the community might be involved in the event of emergencies and unforeseen events, and if so, what might be the arrangements during both the construction and operational phases.</p> <p>The need for environmental monitoring or reclamation personnel from the community needs to be discussed, and HLFN would be pleased to enter into such discussions.</p>	<p>This is within the mandate of the JRP. Relevant information requirements are outlined in the following documents:</p> <p>NEB Filing Manual, Table A-5: Filing Requirements for Socio-Economic Elements, Infrastructure and Services and Employment and Economy.</p> <p>Scope of the Factors (August 2009), 4.2 Project Benefits needs to be identified by the proponent.</p> <p>JRP Agreement, Part II – Factors to be Considered During the Joint Review includes the requirement for Emergency Response Plans.</p> <p>NEB Filing Manual A.2.5 Emergency Plans should indicate how, what and who should be involved.</p>
<p>Follow-up Plan</p> <p>Proponent's plans for long-term monitoring should be fully described as part of the follow-up plan, along with the means for coordinating with Aboriginal communities including HLFN.</p>	<p>The JRP Agreement, Part II – Factors to be Considered During the Joint Review includes the requirement for Environmental Monitoring Plans. Therefore, this is within the JRP's mandate.</p> <p>See also the NEB Filing Manual, A.2.7: Inspection, Monitoring and Follow-up.</p>
Haisla Nation and Kitimat Village Council / Diane Barbetti, Environmental Relations Manager	
<p>Our overall impression is that this brief 12 page document might be useful as a starting point for discussion. It does not provide adequate definition with respect to the scope of the assessment, the JRP environmental review process nor how the requirements for environmental compliance that might result from a decision to issue a Certificate of Convenience and Public Necessity will be enforced</p>	<p>The JRP Agreement has been modified to clarify the scope of the project, the scope of the assessment and the factors to be considered (Part I, Part II and Part III of the JRP Agreement). Part IV now describes in more details the review process.</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
	<p>Part III – Scope of factors now states that the ‘JRP in conducting its consideration of the factors outlined in Part II will have regard to the following:</p> <ul style="list-style-type: none"> ▪ The National Energy Board (NEB) Filing Manual (2004); and ▪ The document issued by the Canadian Environmental Assessment Agency (the Agency) entitled “Scope of the Factors – Northern Gateway Project”. <p>The Scope of the Factors document prepared by the Agency, in consultation with other federal authorities, focuses mainly on factors to be considered for the marine components of the project. The document addresses several of the concerns that were raised by Aboriginal groups and the public during the public comment period.</p> <p>Compliance/enforcement will be based on the particulars of any eventual permits, authorizations or the Certificate of Public Necessity and Convenience that may eventually be issued and will be enforced by the authorizing department.</p>
<p>We see immediate problems with how the project is defined, how the composition of the JRP and its Secretariat will be determined and whether there will be clear criteria for determining the adequacy of scientific and technical information used for evaluating the environmental effects and risks of the project.</p>	<p>Regarding the JRP composition, the Agency and the NEB have been open to hearing names from Aboriginal groups for JRP candidates that meet the criteria set out in the legislation (are unbiased and free from any conflict of interest relative to the project and who have knowledge or experience relevant to the anticipated environmental effects of the project). Additionally, the Agency and the NEB have identified a qualified FN candidate and put that candidate’s name forward to the Minister of the Environment for consideration. The JRP will determine the adequacy of information provided.</p>
<p>The Project would be a massive undertaking with far reaching implications economically, socially and environmentally. Regardless of whether the review criteria are met, the proponent must demonstrate the capacity and competence to carry out this project without untoward consequences. The proponent’s past experience and record of compliance should weigh heavily in the final decision as to whether a Certificate is issued.</p>	<p>As per the Terms of Reference – Part IV the JRP will provide Aboriginal groups and the public the opportunity to make known their views on the issues that should be considered by the JRP.</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
Likewise, the Crown must demonstrate that the respective governments, responsible departments and permitting agencies have the resources and expertise to ensure that if the project is approved; all requirements for environmental compliance are met during its planning, development, construction, operation and decommissioning.	The Crown has a number of federal departments that will be involved in the JRP process including the Fisheries and Oceans Canada, Transport Canada, Indian and Northern Affairs Canada, Environment Canada, the Canadian Transportation Agency, Natural Resources Canada and Health Canada. Some of these departments will have permitting and enforcement responsibilities related to their mandates. The NEB will have the greatest involvement as it will be responsible for all aspects of the project. It is involved for the lifecycle of the project and it will be enforcing the conditions set out in the Certificate of Public Convenience and Necessity.
DETAILED COMMENTS ON THE DRAFT AGREEMENT AND TOR:	
SCOPE OF THE JRP REVIEW	
The Project Description in the ToR and Draft Agreement limits the review to the oil and condensate pipeline corridor and related structures including the marine terminal. There is no mention of the tar sands mining operations that will supply the oil for the pipeline.	It is within the mandate of the JRP to consider the cumulative effects that are likely to result from the project Paragraph 16(1)(a) of the CEAA includes a requirement for the consideration of “cumulative effects that are likely” Also Section A.2.5 and A.2.6 of the NEB Filing Manual include some requirements related to the cumulative effects assessment.
There is mention to the consideration of the potential environmental effects of marine transport of oil and condensate but no detailed specifications or criteria are provided with respect to the JRP EA review.	Marine Transportation of oil and condensate has been included in the scope of the project (Terms of Reference, Part I – Scope of the Project) as it is an activity being carried out in relation to the physical work and will be evaluated within the EA by the JRP. The Scope of the Factors document prepared by the Agency, in consultation with other federal authorities, focuses mainly on factors to be considered for the marine components of the Northern Gateway Project (Project). The document addresses several of the concerns that were raised by Aboriginal groups and the public during the public comment period.
Reference to the TERMPOL review process suggests that it will be relied upon to some extent for EA.	The JRP Agreement now clearly state that the TERMPOL process will take place separately from the JRP process. However, the Scope of Factors document, where relevant, refers to information required in the TERMPOL process that should also be provided

ISSUE / CONCERN AND / OR SUGGESTION	Response
	<p>for the JRP process. It is expected that any information required for the TERMPOL process that could be useful for the environmental assessment of the Project should be submitted by the proponent to the JRP.</p>
<p>In order to properly assess cumulative effects of the proposed project, the project description needs to reflect the reality of the proposed operation. The pipeline is not a standalone operation. It cannot exist without supply from the tar sands mining operations. The pipeline is an extension of the tar sands that will expand tar sands mining operations and thereby result in additional environmental effects from the mining operations, which must be considered as part of the review. Likewise, the pipeline as an extension of the tar sands is worthless without marine transport. Therefore, the risks and effects of oil and condensate spills must be analyzed in detail and evaluated in depth as part of the JRP environmental review. A realistic definition of the project that includes the tar sands mining operations, the pipelines, the marine terminal and marine transport is necessary to truly understand to what extent the environmental risks and effects can be mitigated and thereby understand the trade-off between economic gain and environmental loss.</p>	<p>The Project proposed by the proponent includes a pipeline and marine terminal. As per the requirements of the CEAA in 15(3), this is the project which will be evaluated by the JRP. Oil sands projects are separate projects proposed by other proponents, however, the JRP may consider any potential cumulative effects as they relate to the proposed Project. Separate projects or existing infrastructure may be relevant to the cumulative effects assessment of the project. The JRP will consider what is appropriate in terms of the cumulative effects that are likely (16(1)(a) of CEAA). Also, as per the Terms of Reference – Part IV, the JRP will be seeking comments from the public and Aboriginal groups on the List of Issues to be considered in the proceeding.</p>
<p>Other environmental effects of ship traffic such as shoreline erosion due to wave action from tanker wakes must also be addressed in the review.</p> <p>The TERMPOL (voluntary) review should not be relied upon to address potential environmental effects. There is no mandate within the TERMPOL review to address mitigation of potential environmental effects. One example from a recent TERMPOL review was with respect to spills of condensate into the marine environment. A risk assessment of the effects of a condensate spill indicated that it would be toxic to biota and had different physical characteristics from oil in how it would disperse into the environment. This demonstrated that the existing technology used for emergency response in oil spill clean-up would not be effective for condensate spills. However, nothing further was addressed in the TERMPOL review.</p>	<p>The Scope of the Factors document section 7.2 Effects on the Marine Environment includes the following:</p> <p>The potential effects on the marine environment, including the effect on increased vessel traffic on shoreline erosion due to wave action on vessel wakes.</p> <p>Mitigation and emergency response in relation to oil or condensate spills are addressed independently from the TERMPOL process in section 7.5 in the Scope of Factors document.</p> <p>Remediation by Transport-Canada of the deficiencies in emergency response procedures for the north coast of BC is outside the JRP mandate. However, in section 7.5 (Potential Accidents and Malfunctions) it is stated that:</p> <p>The Applicant will describe and evaluate the potential effects of project-related accidents and malfunctions on the environment,</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
	<p>including impacts on social, economic or cultural elements of the environment and human health to people in close proximity of spilled contaminants.</p> <p>It is also stated that for the assessment of risk during navigation (e.g. vessel collisions), the applicant shall refer to section 3.8 and 3.15 of Transport Canada’s publication, “TERMPOL Review Process 2001”</p>
<p>This same review also identified serious deficiencies in emergency response procedures for the north coast of BC and Kitimat in particular that needed to be remedied. At that time, Transport Canada was in the process of updating their protocols. It is incumbent on Transport Canada as a key responsible agency for this project to provide a comprehensive plan for ship traffic management and emergency response for Kitimat that addresses previous deficiencies.</p>	<p>7.5 Potential Accidents and Malfunctions of the same Scope of the Factors document includes:</p> <p>The effect and probability of condensate or oil spills will be assessed by the proponent as well as remedial measures.</p>
<p>CROWN CAPACITY AND EXPERTISE TO UNDERTAKE THE JRP ENVIRONMENTAL ASSESSMENT REVIEW</p>	
<p>It is important that the selection of JRP members and Secretariat staff fully understand Aboriginal issues and perspectives.</p> <p>It is also crucial that the JRP members and Secretariat have the technical competence to understand and evaluate all aspects of the proposed project. In other federal/provincial EAs, we have observed a lack of expertise on the part of the Crown representatives involved in reviewing project. This has lead to a reliance of the Proponent’s consultants to determine the technical feasibility or environmental risk of specialized aspects of the project. This should not be allowed to happen, particularly with a project of this scope and magnitude.</p> <p>The Draft Agreement should clearly stipulate the JRP will retain as independent consultants to the JRP world class experts to evaluate components of the project as required. These experts will be used to cover gaps where Crown agencies cannot provide such expertise. Seeking experts worldwide should decrease the likelihood that they will have any conflict of interest and increase the inventory of available experts. Some areas where specialized or unique independent expertise could be required include: geotechnical expertise for tunneling, slope stability, etc.; pipeline technology and materials; pipeline construction technology; pipeline security; marine engineering for terminals and tankers; the effects of oil and/or condensate spills on fish and wildlife; and emergency response procedures.</p> <p>The selection of JRP members and Secretariat technical staff should be a transparent process. The range of expertise required for this review should be outlined either as part of the Draft Agreement or in separate documents. The resumes of all candidates should be made available. Nomination of candidates by the public should be considered. An itemized list of outside expertise that the JRP would expect to use should be published after the JRP and Secretariat is formed and should be open to comment.</p>	<p>The JRP selection process is outlined in section 5.1 to 5.2 of the JRP Agreement. The JRP Secretariat will include staff with expertise in various aspects of the proposed project. Should the JRP determine that additional expertise is needed it may hire consultants or request Special Advisors. Section 10 (Specialist Advisors to the JRP) of the JRP Agreement was added to provide more clarity and address this.</p> <p>Section 10.3 of the JRP Agreement states:</p> <p><i>“The names of experts retained pursuant to section 10.2 (independent non-government experts) and any documents obtained or prepared by such experts and that are submitted to the Panel will be placed on the public registry”.</i></p> <p>The JRP process is a process where experts can be cross-examined by other parties. If there is concern about the qualifications of one of the technical staff or consultants hired to fill gaps, then their information can be challenged within the process.</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
<p>The JRP should solicit recommendations for expert advice from the public.</p>	<p>The following was added to sections 6.4 and 6.5 of the JRP Agreement:</p> <p>Section 6.4 The JRP will conduct its review in a manner which will facilitate the participation of the public and Aboriginal peoples, and enable them to convey their views on the Project to the JRP by various means, such as oral statements, letters of comment or participation as interveners.</p> <p>Section 6.5 of the JRP Agreement requires the Proponent to provide evidence regarding the concerns of Aboriginal Groups, so the JRP may carefully consider all evidence provided in this regard by Aboriginal peoples.</p> <p>The JRP process will allow Aboriginal groups to be involved in the review of the documents prepared by the proponent. If it is felt that the information is not adequate, there will be opportunities during the review process to request additional information from the proponent and / or to provide your views to the JRP on whether the information provided is adequate. This provides the opportunity for expert advice from the public to be considered in the JRP process.</p>
<p>ADEQUACY OF DATA FOR ENVIRONMENTAL ASSESSMENT</p>	
<p>A lack of evidence does not necessarily presume a lack of harm. It depends on whether adequate evidence was gathered using best practices and procedures. The ToR does not specifically address this issue. This is a concern because standard requirements for gathering baseline data under CEAA for assessing environmental effects do not necessarily provide adequate data for assessment or for planning development and construction.</p> <p>Will the assessment identify and discuss the risks and the scope of potential effects from the proposed project sufficiently to enable a realistic assessment of adverse residual effects from the project?</p> <p>We have found in other reviews that there was a heavy reliance on as yet undefined commitments of mitigation to address risks that have not been fully clarified. We think there should be more emphasis on prevention of adverse effects or avoidance of risks. The first step is by providing better baseline data to begin with. This can be done at an early stage if the proponent ensures that their consultants consult with local interests when they are preparing their baseline study</p>	<p>Adequacy of data and methodologies is up to the JRP to determine based on the evidence in front of them. Section 9.1 of the JRP Agreement requires the JRP to prepare a Report setting out its rationale, conclusions and recommendations relating to the EA of the project.</p> <p>The NEB Filing Manual A4.2.1 covers residual effects and section A.2.5 is used to assess the significance and likelihood of residual cumulative effects.</p> <p>CEAA Purposes 4(1)(a):</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
<p>design. There should also be an emphasis on an ecosystem-based approach to any baseline studies, and not a stream crossing by stream crossing approach.</p> <p>In a recently completed EA, there was a serious lack of baseline data on fish and fish habitat utilization. A pipeline corridor was proposed to cross 50 or more of tributaries of a major river. Monitoring and survey work was not done directly in the river itself but in only a few of the tributaries that the pipeline was proposed to cross. Thus, fish survey work done by the proponent was limited and did not include the river itself. Historical data provided by the Crown was very limited.</p> <p>It is not possible to adequately evaluate the effects in the watershed as whole when you do not know what species or life stage is present in the main river, where and when it is utilizing habitat and how varying seasonal and weather conditions will influence the environmental risks or properly quantify fish habitat compensation without better information. This is an example of a serious shortcoming in the review process.</p> <p>We would like to see the Draft Agreement stipulate the need for criteria to address the adequacy of data for EA. The JRP should address what baseline data is sufficient to ensure minimal environmental risk should the project proceed and solicit input.</p>	<p><i>“The purposes of this Act are to ensure that projects are considered in a careful and precautionary manner before federal authorities take action in connection with them, in order to ensure that such projects do not cause significant adverse environmental effects.”</i></p> <p>Also, 2.3 of the Scope of Factors document issued by the Agency in August 2009 addresses the precautionary approach. Finally, the following was added to subsection 6.3 of the JRP Agreement:</p> <p><i>“The Panel will review the Project in a careful and precautionary manner.”</i></p> <p>The CEAA defines Mitigation as the elimination, reduction or control of the adverse environmental effects of the project, and includes restitution for any damage to the environment.</p> <p>The JRP will conduct sessions with the public and Aboriginal groups for the purpose of seeking comments on whether the proponent ought to be required to file any additional information which was not included in its application.</p> <p>The primary purpose of the Agreement (4.1 of the JRP Agreement) is to coordinate the EA required under the CEAA and the National Energy Board Act (NEBA). Nothing in the Agreement should be construed as limiting the ability of the JRP to have regard to all considerations that appear to it to be relevant pursuant to section 52 of the NEBA.</p> <p>With respect to the request that an ecosystem-based approach to any baseline studies be used, and not a stream crossing by stream crossing approach:</p> <p>This is within the mandate of the JRP to consider and further details of what the proponent is required to provide in its application can be found in the NEB Filing Manual (A.2 Environmental and Socio-Economic Assessment and 2.1 Introduction) which requires the proponent to provide the</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
	<p>rationale used to identify issues and provide an explanation of the analysis. The level of detail may vary with the nature and magnitude of the project and its anticipated effects. The Proponent is required to provide an appropriate level of detail represented by a set of facts and a transparent and defensible line of reasoning that is sufficient to support identified issues, analysis and conclusions with respect to the effects of the project.</p> <p>The Proponent is expected to define the appropriate boundaries used for its assessment for each biophysical or socio-economic element assessed. The Proponent will also provide a justification and rationale for all of the boundaries chosen. Of course, this is subject to review in the JRP process.</p> <p>Federal departments will participate in the JRP process in areas relevant to their mandates and expertise.</p>
RISK ASSESSMENT	
<p>We recommend that the ToR stipulate a specific risk assessment based on the past experience and record of the proponent. It might be that the project is deemed to be environmentally feasible, but based on their past record, the proponent may not be the best choice to carry it out.</p>	<p>As per the Terms of Reference – Part IV the JRP will provide Aboriginal groups and the public the opportunity to make known their views on the issues that should be considered by the JRP.</p> <p>The JRP will conduct sessions with the Aboriginal groups and the public for the purpose of seeking comments on whether the proponent ought to be required to file any additional information which was not included in its application.</p> <p>The primary purpose of the JRP Agreement (4.1 of the JRP Agreement) is to coordinate the EA required under the CEAA and the NEBA. Nothing in the JRP Agreement should be construed as limiting the ability of the JRP to have regard to all considerations that appear to it to be relevant pursuant to section 52 of the NEBA.</p> <p>Aboriginal groups are encouraged to bring their views to the</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
	JRP. The JRP will consider the proponent’s past experience and record of compliance
The Kitamaat Village Council through correspondence has been seeking involvement in the development of a meaningful process to address Haisla Nation Aboriginal rights, including title, within the context of the potential impacts of the proposed project.	The Consultation Framework provides further information about the integration of consultation into the JRP process and more details about the involvement of the Crown and Aboriginal Groups. The Crown is open to discussing how consultation, within the framework provided, will be carried out.
The federal Crown has set out a process for a JRP assessment of the Project, in a Draft Agreement. Pursuant to the Draft Agreement, the JRP has been given a limited mandate: to meet the requirements of the Canadian Environmental Assessment Act and the National Energy Board Act. The Terms of Reference component of the Draft Agreement identifies factors listed in subsections 16(1)(a) to (d) and 16(2) of the CEAA as factors to be considered during the review. Significantly, these sections do not include any assessment of potential impacts of a project on Aboriginal interests that do not have an “environmental” dimension.	The Panel will be directed, by way of the Panel Agreement (section 8.1 of the JRP Agreement, to receive information from Aboriginal groups on the nature and scope of existing or potential Aboriginal rights and treaty rights that may be affected by the project and on the impacts or infringements that the project may have on existing or potential Aboriginal rights and treaty rights.
The JRP review process is to be conducted in accordance with the NEB Rules of Practice and Procedure, 1995, making this a quasi-judicial process in which there is no ability for the Panel to engage directly in consultation with First Nations. The proposed JRP process clearly groups “Aboriginal people” with “the public”. The role of First Nations, including the Haisla Nation, in the JRP process, as currently conceived, would be that of interveners. Case law recognizes the right of First Nations to “a distinct, if not more extensive” consultation process.	The JRP Agreement has been changed accordingly to separate Aboriginal groups from the public. The Consultation Framework provides further information about the integration of consultation into the JRP process and more details about the involvement of the Crown and Aboriginal Groups. The Crown is open to discussing how consultation, within the framework provided, will be carried out.
The Haisla Nation’s numerous requests for meaningful engagement at the early stages of the review process – at the design stage of the process – have gone unaddressed.	The opportunity for Aboriginal groups, including the Haisla Nation, to provide input into the design of the EA process (draft Agreement and terms of reference) was initiated in October 15, 2008. A description of the framework for consultation was provided and discussed with the Haisla Nation during the January 16, 2009 meeting. The revised JRP Agreement is the result of carefully considering the input received from the Haisla Nation and other Aboriginal groups. The Consultation Framework provides further information about

ISSUE / CONCERN AND / OR SUGGESTION	Response
	<p>the integration of consultation into the JRP process and more details about the involvement of the Crown and Aboriginal Groups. The Crown is open to discussing how consultation, within the framework provided, will be carried out.</p>
<p>The Haisla Nation has also identified a number of other matters that are beyond the JRP mandate, including but not limited to: Consideration of Haisla law and stewardship; Shared decision making; and Potential infringements of Haisla Nation title and rights that are not environmental.</p>	<p>The Consultation Framework provides further information about the integration of consultation into the JRP process and more details about the involvement of the Crown and Aboriginal Groups. The Crown is open to discussing how consultation, within the framework provided, will be carried out.</p> <p>The Panel will be directed, by way of the Panel Agreement (section 8.1 of the JRP Agreement, to receive information from Aboriginal groups on the nature and scope of existing or potential Aboriginal rights and treaty rights that may be affected by the project and on the impacts or infringements that the project may have on existing or potential Aboriginal and treaty rights.</p>
<p>The unilateral imposition of a crown selected regulatory and environmental review process ignores two fundamental aspects of Haisla Nation aboriginal title and rights. Firstly, the Haisla people are the stewards of their territory and hold the lands and waters in trust for future generations. Secondly, the Haisla Nation operates under a system of traditional law (<i>Haisla Nuyem</i>) and Haisla land ownership concepts of <i>wa'wais</i> and <i>bagwaiyas</i>.</p> <p>By failing to involve the Haisla Nation in the design of the regulatory and environmental review process for the proposed project, the Crown has ignored aspects of Haisla Nation governance, an important dimension of Haisla Nation aboriginal title and rights.</p>	<p>Within the approach provided, how consultation was integrated into the process as a “whole-of-government” approach was provided, however, how that consultation is conducted was not defined. The Crown has been and continues to be open to discussing how consultation, within the framework provided, will be carried out.</p>
<p>Enbridge has caused irreparable harm to Haisla Nation traditional sites through the felling of culturally modified trees, as a result of work conducted by its contractor, AMEC. The Kitamaat Village Council has asked both Enbridge and the Crown to mitigate the losses flowing from this activity, but to date neither part has addressed this in good faith.</p>	<p>The Haisla Nation is encouraged to continue discussions with the proponent regarding this issue. The Crown will raise this issue with the proponent.</p>
<p>Samson Cree Nation / Clayton D. Leonard, (MacPherson Leslie & Tyerman LLP)</p>	
<p>On a general level, Samson takes the position that the Agreement and associated Terms of Reference are deficient in ways that will seriously hinder the ability of the Joint Panel to address potential impacts of the Project on Treaty and Aboriginal rights and prevent the Joint Panel from fulfilling its legal obligations to FNs.</p>	<p>The Panel will be directed, by way of the Panel Agreement (section 8.1 of the JRP Agreement, to receive information from Aboriginal groups on the nature and scope of existing or</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
	<p>potential Aboriginal rights and treaty rights that may be affected by the project and on the impacts or infringements that the project may have on existing or potential Aboriginal rights and treaty rights.</p>
<p>1. THE DUTY TO CONSULT AND ACCOMMODATE</p>	
<p>A. Failure to Consult with the Samson Cree Nation</p> <p>Neither the Minister of Environment, nor any of the other “responsible authorities” identified in the preamble of the Agreement have made any attempt to consult with the Samson Cree Nation regarding the Agreement or Terms of Reference.</p> <p>In the matter at hand the duty to consult was engaged at the point when the Board and other relevant federal ministries knew that the proposed Project would pass through the Treaty 6 and 8 regions in Alberta.</p> <p>There is a clear and compelling parallel between the Cooperation Plan (MGP) and Treaty Rights at issue in <i>Dene Tha’</i> and the Agreement and Terms of Reference and Samson’s Treaty rights in this matter. Samson expects that the Joint Panel will adhere to the ruling <i>Dene Tha’</i>.</p>	<p>Discussions have occurred since April 2009 between Samson Cree’s legal counsel and the Agency to assist in determining Samson’s interests in the project which relate primarily to the Small Boy Camp near Edson, Alberta.</p> <p>Samson Cree’s counsel was provided with a copy of the AFE funding application (June 8, 2009) to apply for funding and the Agency has discussed options and the types of items eligible.</p> <p>The Agency has offered to meet with the Maskwacis Cree Nations to provide a more detailed overview of the JRP process and how federal Crown consultation fits into that process.</p>
<p>B. The Joint Panel’s Obligations Regarding the Duty to Consult</p> <p>Samson supports an approach to consultation with FNs that is separate from consultation with other stakeholders. This is necessary to ensure that the FNs consultation process appropriately focuses on potential impacts on Treaty and Aboriginal rights and required accommodation measures. The regulatory process reviewed by the Supreme Court in Taku River provides a model for the inclusion of FNs in the EA process. Specifically, there should be a distinct FNs’ component to the EA process but it should not be distinct from the EA.</p> <p>Accordingly, Samson strongly objects to the position espoused by the Joint Panel in 6.4 of the Agreement:</p> <ul style="list-style-type: none"> - the manner in which the Crown proposes to consult with Aboriginal people whose potential or established Aboriginal rights could be adversely affected by the Enbridge Gateway Project will be the subject of a separate and more detailed communication, independent of the Joint Review Panel, with all participants. <p>Samson views 6.4 of the Agreement as an effort to park consultation with FNs outside the Joint Panel process. It is an attempt by the Joint Panel to shed its legal obligation to FNs to address the duty to consult and accommodate. The law on consultation does not permit the Joint Panel the option of taking such an approach.</p>	<p>The Consultation Framework provides further clarification of the consultation related to this project including a distinct Aboriginal component that is integrated into the EA process.</p> <p>Section 6.4 has been removed from the JRP Agreement.</p> <p>The JRP Agreement has also been amended to include information on the involvement of Aboriginal groups in the JRP process (subsections 6.5 and 8.1 of the JRP Agreement).</p> <p>Section 6.5 of the JRP Agreement “...requires the Proponent to provide evidence regarding the concerns of Aboriginal Groups, and will also carefully consider all evidence provided in this regard by Aboriginal peoples.”</p> <p>JRP Agreement subsection 8.1 gives the JRP the mandate to</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
<p>The Crown's obligation is to consult, not to review the adequacy of its own consultation. The question of whether the Crown has discharged its duty of consultation remains for determination by an adjudicative decision maker such as the Joint Review Panel .</p> <p>The Joint Review Panel, particularly the NEB, has the same jurisdiction (as the BC Utilities Commission – <i>Sekani</i> decision) and the attendant obligation to correctly determine whether the duty to consult and accommodate has been satisfied with respect to the proposed Project. In the course of doing so, the Joint Panel's process must involve an assessment of the potential impacts of the Project on Treaty and Aboriginal rights.</p>	<p>receive information from Aboriginal peoples related to the nature and scope of potential or established Aboriginal and treaty rights that may be affected by the Project and the impacts or infringements that the Project may have on potential or established Aboriginal and treaty Rights.</p> <p>The duty to consult lies with the Crown. A key part of the consultation process, Phase IV – Consultation on the JRP Environmental Assessment Report, occurs after the JRP issues its EA report. The Consultation Framework provides additional detail on how the Crown will determine the adequacy of consultation.</p> <p>The JRP Agreement has been modified to include subsection 8.1 which gives the JRP the mandate to "...receive information from Aboriginal peoples related to the nature and scope of potential or established Aboriginal and treaty rights that may be affected by the Project and the impacts or infringements that the Project may have on potential or established Aboriginal and treaty Rights." In this way, the JRP process will provide a detailed record of Aboriginal groups' concerns about potential adverse impacts that the project may have on their established or potential Aboriginal and treaty rights and the JRP may recommend appropriate measures to avoid or mitigate potential adverse impacts on such rights and interests.</p>
<p>2. GREATER CLARITY ON FIRST NATION PARTICIPATION IS REQUIRED</p> <p>The Samson Cree Nation is also concerned that the Agreement and ToR lack clarity on important aspects of the participation of FNs in the review process. Without limiting Samson's concerns, the following issues arise in this regard:</p> <p>A. 4.3 Participant Funding – sufficient resources must be in place prior to finalizing the Agreement and ToR to ensure that FNs will have the capacity to meaningfully participate in the Joint Panel process.</p>	<p>The Consultation Framework provides information on the participation of FNs in the review process. The JRP Agreement also provides additional information on the review process as discussed above.</p> <p>A letter announcing the availability of funding under the Aboriginal Funding Envelope of the Agency's Participant Funding Program was provided to Aboriginal groups, including the Maskwacis Cree Nations, July 24th/27th, 2009.</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
<p>B. 6.1 Joint Review Panel Composition and Appointment – The third member of the Joint Panel should be an individual with significant experience relating to FN’s concerns with resource projects. The Joint Panel needs this sort of expertise if it is to understand, fully appreciate and address the concerns of FNs. Strater Crowfoot of Indian Oil and Gas Canada is an example of a suitable candidate. He has years of experience working with both the oil and gas sector and FNs and has served both as a Chief and at the NEB.</p> <p>C. 6.3 Joint Review Panel Procedures</p> <p>This section states that the Proponent will be required to provide evidence regarding potential concerns of Aboriginal peoples and that there will also be an opportunity for FNs to present their own evidence. In light of Samson’s letter to Enbridge of April 7, 2009, and the position that the Proponent has taken with respect to Samson, the Nation is justifiable skeptical that the Joint Panel will get sufficient, if any, information from the Proponent regarding the potential impacts of the Project on Samson. However, Samson lacks the capacity to collect and present its own evidence. The Joint Panel must ensure that adequate resources are in place for FNs to collect and present the evidence that is necessary for the Joint Panel to be “fully informed of potential impacts” on Samson’s Treaty and Aboriginal rights.</p> <p>D. Factors to be considered During Joint Review (Terms of Reference)</p> <p>This portion of the ToR must include an express statement that the Joint PanelJRP will consider whether the duty to consult and accommodate is satisfied with respect to the proposed Project.</p> <p>The Samson Cree Nation would be pleased to meet with representatives of the Joint Panel to discuss the concerns and issues set out above and work towards a successful resolution of these problems. All further correspondence to the Samson Cree Nation should be addressed to Holly Johnson, Samson’s Consultation Coordinator, and copied to the firm MacPherson Leslie &Tyerman LLP</p>	<p>The Agency and NEB have identified a qualified FN candidate and put that candidate’s name forward to the Minister of the Environment for consideration.</p> <p>Refer to response to 4.3 Participant Funding above.</p> <p>The federal cabinet will ultimately decide whether the duty to consult has been satisfied, in part, because it is the Crown’s responsibility to consult and determine the adequacy of consultation Further details on the process for determining the adequacy of consultation are provided in the Communiqué.</p> <p>JRP Agreement, Part IV – Review Process: Aboriginal peoples may choose the manner in which they wish to participate in the review of the project. The options include filing a letter of comment, providing an oral statement or becoming an intervener as methods to engage the JRP.</p> <p>The Agency is willing to meet with the Maskwacis Cree Nations.</p>
Alexander First Nation, Henry Arcand	
<p>As the Crown, NEB, Minister and the Applicant know, the obligations of the Crown with respect to the AFN’s Reserve Lands and TLE Lands go beyond the duty to consult and all aspects of the Project that touch on these lands require the approval of the AFN. Thus, any decision rendered or approval granted with respect to the Project is subject to an absolute</p>	<p>As per INAC’s response to Alexander First Nation (June 16, 2009) INAC confirmed that “It is Indian and Northern Affairs Canada’s practice and policy that, regardless of the length of a permit</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
<p>veto by the AFN with respect to these lands. Confirmation of this veto is evidenced by the AFN's correspondence with the Minister of Indian Affairs and Northern Development Canada dated March 20, 2009 and April 9, 2009 (and copies of same are attached the letter).</p> <p>For the purposes of the Crown's duty to consult, the proposed route for the Northern Gateway Project impacts the AFN directly with respect to:</p> <ul style="list-style-type: none"> a) its Treaty Lands; and b) its Treaty Right including but not limited to, hunting, fishing, trapping, plant harvesting and the cultivation of medicinal herbs and roots, ceremonial practice, use and preservation of sacred sites, and access to clean drinking water. 	<p>(Section 28(2) of the Indian Act), the Department would issue one permit, only upon request of the Band Council by way of a Band Council Resolution.</p> <p>The Consultation Framework provides further information about the integration of consultation into the JRP process and more details about the involvement of the Crown and Aboriginal Groups.</p>
<p>I. ACKNOWLEDGEMENT OF LIMITATIONS OF NEB DECISION</p> <p>As the aforementioned interests of the AFN are directly impacted by the Project, the NEB is obligated, "at a minimum, to conduct a rigorous, thorough, and proper cost-benefit analysis.</p> <p>Since the AFN is the only entity that can truly evaluate the merits of a cost-benefit review with respect to its rights, any decision or approval that is finally rendered by the NEB, based on the JRP Report, can only be conditional on AFN approval unless the process provides for a joint decision to be rendered by both the NEB and AFN.</p>	<p>The Scope of Factors document issued by the Agency: requires (see sections 7.3 Effect on Human Environment and 7.4 Effects on Aboriginal Rights and Interests) that the assessment take into account the views of pertinent parties and examine the social and economic effects to Aboriginal peoples that may arise as a result of the Project, as well as the potential effects on current uses of land and resources for traditional purposes.</p> <p>If, following the review of the information provided by the proponent, you are of the view that the information is not sufficient, there will be opportunities to either formulate information requests or provide your views to the JRP on this subject.</p> <p>The JRP Agreement has been modified to include subsection 8.1 which gives the JRP the mandate to receive information from Aboriginal peoples related to the nature and scope of potential or established Aboriginal and treaty rights that may be affected by the Project and the impacts or infringements that the Project may have on potential or established Aboriginal and treaty Rights.</p> <p>NEB Filing Manual A.2.5 Effects Assessment (2.): <i>"For those biophysical and socio-economic elements that require further analysis (as outlined in Table 3 which includes traditional land and resources use, human health and aesthetics, infrastructure and</i></p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
	<p><i>services and employment and economy), describe, quantify and justify appropriate: spatial and temporal boundaries; local and regional conditions of the element, or valued component; and key receptors that could potentially be affected”.</i></p>
<p>II. CROWN'S DUTY TO CONSULT</p> <p>Our reply is with respect to the Crown's duty to consult with the AFN and in no way touches upon the Project's impact on the Reserve Lands and TLE Lands (as such matters fall completely outside the scope of the JRP Agreement in its present form), and the recognition that this response in no way derogates the Crown's duty to consult with the AFN, we reply as follows:</p>	<p>The Consultation Framework provides further information about the integration of consultation into the JRP process and more details about the involvement of the Crown and Aboriginal Groups.</p>
<p>III. The JRPA must clearly articulate the scope, obligations and limitations of the NEB's decision-making authority, including acknowledgement of the absolute veto right of the AFN with respect to any decision or approvals of the Project in connection with its Reserve Lands and TLE Lands.</p> <p>1. Role of RAs and the Crown – the Agreement does not indicate if and how the various departmental jurisdictions overlap and how this will be reconciled to prevent conflict of authority on completion of the review and rendering of a final decision. More specific to the AFN and other Aboriginal groups and people, the Crown is connected to this project by way of its legal duty to consult. Although the CEA Agency indicated to the AFN by way of letter dated February 9,2009 that the “Government of Canada will take a whole-of-government approach to Aboriginal Consultation”, there is no acknowledgement of this relationship within the JRPA and whether or not the JRP is intending to facilitate the fulfillment of this duty on the part of the federal Crown or address the issue of scope and fulfillment of the duty as per the NEB's obligations.</p> <p>AFN Recommendations:</p> <p>a. The JRP Agreement should provide a clear definition of the roles, responsibilities and authority of each RA connected with the review to allow for public accountability and transparency of each RA's participation in the</p>	<p>This is outside the JRP Agreement which has the primary purpose to coordinate the EA required under the CEAA and the NEBA. The NEB's decision making authority and obligations are set out in the NEBA.</p> <p>The JRP Agreement has also been amended to include information on the involvement of Aboriginal groups in the JRP process (subsections 6.5 and 8.1 of the JRP Agreement).</p> <p>Section 6.5 of the JRP Agreement “...requires the Proponent to provide evidence regarding the concerns of Aboriginal Groups, and will also carefully consider all evidence provided in this regard by Aboriginal peoples.”</p> <p>JRP Agreement subsection 8.1 gives the JRP the mandate to receive information from Aboriginal peoples related to the nature and scope of asserted or established Aboriginal rights that may be affected by the Project and the impacts or infringements that the Project may have on potential or established Aboriginal and treaty Rights.</p> <p>The JRP Agreement identifies those federal departments that are responsible authorities or potential responsible authorities for</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
<p>Joint Review process and connection to the potential approval of the Project.</p> <p>b. The JRP Agreement should provide a clear acknowledgement of the Crown’s duty to consult and articulate what, if any, role the JRP process will have with respect to this duty.</p>	<p>this project. The <i>CEAA</i> defines a responsible authority as in relation to a project, means a federal authority that is required pursuant to subsection 11(1) (<i>CEAA</i>) to ensure that an environmental assessment of the project is conducted . The responsibilities of responsible authorities with respect to environmental assessments are outlined in the <i>CEAA</i>. The roles and responsibilities of the federal departments are also outlined in the Consultation Framework and the Project Agreement available from the Major Projects Management Office.</p> <p>The following “Whereas” clause was added to the JRP Agreement: “Whereas the Government of Canada will rely upon the consultation effort of the Proponent, and the Joint Review Panel process, to the extent possible, to assist in meeting the duty to consult.”</p> <p>Sections 6.5 and 8.1 of the JRP Agreement as identified above identify the role for the JRP in this matter.</p>
<p>2. Terms of Reference (5.1 & Appendix) – In the context of AFN’s connection to the Project, the definition of “environmental effect” adopted by the JRP Agreement, as well as the current requirements imposed by law on the NEB as a quasi-judicial body bound by the Honour of the Crown, the current draft JRP Agreement provides ToR that are significantly lacking.</p>	<p>The definition of “environmental effect” is set out in the <i>CEAA</i>.</p> <p>The Joint Review Panel (JRP) Terms of Reference have been revised to clarify the Scope of factors (Part III of the Terms of Reference) to be considered by the JRP. This section now states that the ‘Panel in conducting its consideration of the factors outlined in Part II will have regard to the following:</p> <ul style="list-style-type: none"> ▪ The National Energy Board (NEB) Filing Manual (2004); and <p>The document issued by the Canadian Environmental Assessment Agency (the Agency) entitled “Scope of the Factors – Northern Gateway Project”.</p>
<p>AFN Recommendations:</p> <p>a. The JRPA requires the inclusion of a mandatory cost-benefit review of the Project with respect to the AFN to be added to the ToR.</p> <p>i) Factors to be Considered: “Comments from the public, including Aboriginal people...” is grossly inadequate to assess the impact of the Project on the AFN. Furthermore, it is within the scope of the Minister under s.</p>	<p>The JRP Agreement has been amended to include information on the involvement of Aboriginal groups in the JRP process (subsections 6.5 and 8.1 of the JRP Agreement) as noted above.</p> <p>JRP Agreement, Part II – Factors to be Considered During the</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
<p>16(1)(e) of CEAA to expand the factors considered by the Joint Review Panel, including those which could address the unique impact on the AFN, but the current JRP Agreement does not include such parameters.</p> <p>ii) Scope of Factors: There is no specific reference to cultural heritage, land and resource use for traditional purposes by Aboriginal persons or structure or sites of historical, archaeological, paleontological or architectural significance, all of which exist outside the scope of the ecology of the region, are referenced in the definition of “environmental effects” and directly connect with the AFN. The AFN recommends the JRPA should make specific reference to the components of cultural heritage, land and resources use for traditional purposes, by Aboriginal persons or structures and sites of historical, archaeological, paleontological or architectural significance as part of the Scope of Factors used to determine the boundaries of the Assessment.</p>	<p>Joint Review identifies the requirements of the CEAA including environmental effects. The definition of environmental effect (CEAA) includes the following: part (b): any effect or any change the project may cause in the environment on health and socio-economic conditions, physical and cultural heritage, the current use of lands and resources for traditional purposes by Aboriginal persons or any structure, site or thing that is of historical, archaeological, paleontological or architectural significance. This is therefore a basic requirement of the CEAA and is within the mandate of the JRP.</p> <p>Scope of Factors (August 2004), 6.4 Aboriginal Rights and Interests which states the following: <i>“Further to the general guidance provided in Chapter 3 of the Filing Manual regarding consultation and Table A-5 Filing Requirements for Socio-Economic Elements, the Applicant will identify the lands, waters and resources of specific social, economic, archaeological, cultural or heritage value to Aboriginal groups”.</i></p>
<p>3. Joint Review Panel Procedures (6.3) – AFN Recommendation: The JRPA should provide for specific procedures that allow for the assessment and accommodation of the interests of the AFN with respect to the Project, including the availability of hearing materials to AFN members in their native language.</p>	<p>As noted above, see sections 6.5 and 8.1 of the JRPA. The JRP can also consider other requests from Aboriginal groups, including the request for translation.</p> <p>The Consultation Framework provides further information about the integration of consultation into the JRP process and more details about the involvement of the Crown and Aboriginal Groups. Consultation and accommodation lie with the Crown.</p>
<p>4. Aboriginal Crown Consultation (6.4) – The fundamental concern with this provision has already been addressed under the heading “Crown’s Duty to Consult”. With respect to paragraph 6.4 specifically, the language used is very vague and undefined and it fails to indicate the significance of the ‘separate and more detailed communication’ with respect to anything, including the review itself and the Crown’s duty to consult. In short, there is absolutely nothing within this provision to even acknowledge the obligations that exist with the duty. The AFN recommends the JRPA should provide particulars as to how the JRP will address the issue of the Crown’s duty to consult i.e. Will it assume the obligations imposed on the NEB by Honour of the Crown and how it will evaluate the fulfillment of the same? Or will it facilitate the Crown’s fulfillment of the duty.</p>	<p>This section has been removed from the JRP Agreement and is addressed in the Communiqué.</p>
<p>5. Reporting and Decision-Making (6.5) – Without a clear understanding of the roles and authority of the various</p>	<p>Responsible Authorities will be involved in the JRP for issues</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
<p>RAs, this provision is unable to clearly identify what the Joint Review Panel will be able to report and advise on at the end of the hearing process. The AFN recommends the JRPA should provide a clear outline of the contents and implications of the JRP Report and what significance it will have in the final determination of whether or not the Project is approved.</p> <p>In closing, we reference the judgment of Carier Sekani Tribal Council v. B.C. (Utilities Commission) as a current and relevant reminder of the significance of a well-drafted JRP Agreement that clearly articulates the roles, responsibilities and authority of all who will participate in its process.</p> <p>We trust you will find the above to be in order and look forward to a revised draft of the JRP Agreement in due course.</p>	<p>within their departmental mandates.</p> <p>The JRP will conduct the EA in accordance with the requirements of the CEAA and the NEBA and prepare an environmental assessment report based on what the JRP deems to be the relevant information/evidence. The environmental assessment report will include the rationale and conclusions of the JRP. The federal government will prepare a response to the report to be considered by the federal Cabinet. The federal Cabinet could decide that further consultation with Aboriginal groups is required. The approved government response will be sent to all Aboriginal groups and made public. The JRP will then issue its “reasons for decision” pursuant to the NEBA.</p> <p>Section 8.2 of the JRP Agreement requires the JRP to reference the information provided by Aboriginal peoples regarding the manner in which the Project may affect asserted or established rights, and the information provided by Aboriginal groups regarding the strength of claim respecting Aboriginal rights in its EA Report.</p>
<p>Alexis Nakota Sioux Nation / John A. Kosolowski (Duncan & Craig LLP)</p>	
<p>COMPOSITION OF THE JOINT REVIEW PANEL</p>	
<p>In recognition of the unique knowledge held by the Nation’s Elders and the community collectively, including traditional knowledge about the local environment, how it functions, and the ecological relationships that characterize it, the Nation feels it appropriate to include members of the Nation as part of the Joint Review Panel. This will ensure that the traditional knowledge, customs and protocols of the Nation including harvesting, cultural well-being, land use, heritage resources, and others are properly addressed and considered from the Nation’s perspective during the EIA.</p> <p>In the alternative, CEAA should, at the very least, expand the composition of the JRP to allow for the appointment to the Panel, of a duly qualified First Nation’s individual who will be well equipped for understand the implications of this Project and the extent of the impacts on traditional ways and Treaty Rights.</p>	<p>Section 5.4 of the JRP Agreement -Constitution of the Panel: The members of the JRP are to be unbiased and free from any conflict of interest in relation to the Project and are to have knowledge or experience relevant to the anticipated environmental effects of the Project. This section is taken from the CEAA.</p> <p>The Agency and NEB have identified a qualified FN candidate to and put that candidate’s name forward to the Minister of the Environment for consideration.</p> <p>With respect to members of the Nation being on the JRP to ensure the Nation’s interests are properly addressed and</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
	<p>considered, sections 6.4, 6.5 and 8.1 are included in the JRP Agreement to ensure that the Nation's concerns can get into the JRP process and receive adequate consideration.</p> <p>6.4: The JRP will conduct its review in a manner which will facilitate the participation of Aboriginal peoples, and enable them to convey their views on the Project to the JRP.</p> <p>6.5: the JRP will require the Proponent to provide evidence regarding the concerns of Aboriginal groups, and will also carefully consider all evidence provided in this regard by Aboriginal peoples.</p> <p>8.1: the JRP will receive information from Aboriginal peoples related to the nature and scope of potential or established Aboriginal and treaty rights that may be affected by the Project and the impacts or infringements that the Project may have on potential or established Aboriginal and treaty rights. The JRP may include in its Report recommendations for appropriate measures to avoid or mitigate potential adverse impacts on Aboriginal and treaty rights and interests.</p>
TRADITIONAL LAND USE STUDY	
<p>The Nation feels it appropriate to undertake a traditional land use study prior to any approval process. This study would be conducted by the Nation's Elders with the help of others in the community as necessary. The study would include comments with respect to how the land has been traditionally used including traditional practices such as hunting, fishing, trapping and gathering and the impact the Project may have on those traditional practices. This process will also identify the state of the land and establish a standard so that, upon completion of the Project, the land can be returned to its traditional land use capacity. Additionally, future studies may be necessary post-construction to examine whether any impact on the environment caused by the Project remain and , where necessary, those impacts will need to be addressed which will further ensure that the land is returned to its traditional use capacity.</p>	<p>Terms of Reference Part II – Factors to be Considered during the Joint Review states: In accordance with subsection 16(1) of the CEAA, the assessment by the JRP will include a consideration of the community knowledge and aboriginal traditional knowledge received during the review.</p> <p>Section 6.4 of the Scope of the Factors document states that further to the general guidance provided in Chapter 3 of the NEB Filing Manual regarding consultation and Table A-5 Filing Requirements for Socio-Economic Elements, the Proponent will identify the lands, waters and resources of specific social, economic, archaeological, cultural or heritage value to Aboriginal groups.</p> <p>As per the Filing Manual the proponent is expected to include in</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
	<p>its Application issues of concern to Aboriginal groups and how it has addressed them. The Proponent will also need to describe its consultation program with Aboriginal groups. The proponent is also expected to incorporate traditional knowledge into the design of the project, where appropriate. These information requirements will be assessed through the JRP process.</p> <p>Aboriginal groups are encouraged to discuss traditional land use funding with the proponent. However, it is possible that limited funding for this purpose may be considered under the Agency's Participant Funding Program's Aboriginal Funding Envelope.</p>
CONSULTATION	
<p>With respect to paragraph 6.4 the Nation feels the need for greater certainty with respect to these independent communications so that it is aware of the processes to be used. In particular, the scope and procedure of these communications needs to be established in a clear and concise way so as to avoid confusion and establish guidelines to be followed thus helping the Nation understand and identify ways in which their concerns can be heard and addressed in a proper fashion. Additionally, the Nation would like to see ongoing consultation continuing over the full length of the Project and beyond. The Nation wishes to ensure that the consultation process is adequate and includes accommodation, compensation and the consent of the Nation.</p>	<p>The Consultation Framework provides further information about the integration of consultation into the JRP process and more details about the involvement of the Crown and Aboriginal Groups.</p> <p>Section 6.4 has been removed from the JRP Agreement.</p>
METHODOLOGY	
<p>The process by which the prediction of the potential effects of the Project on the biophysical and socio-economic setting within the Nation are not set out in a clear fashion. It would be appropriate to set out the way in which these predictions will be made and the factors that will be considered so as to provide certainty and to ensure the Nation that the results of the predictions are legitimate and the prediction process has taken into account the traditional use of the lands as well as all other factors that may be of concern to the Nation and may be a part of their unique traditional knowledge.</p>	<p>NEB Filing Manual section A.2 Environmental and Socio-economic Assessment describes the process and outlines the information that is expected to be included in an application. The information provided must clearly demonstrate and justify how the environment and socio-economic elements were determined, provide an explanation of the analysis and it must provide a rationale for the level of detail included.</p> <p>The factors to be considered are set out in section 16 of the CEAA. The list of factors to be considered are also found in the Terms of Reference, Part II – Factors to be Considered During the Joint Review. This section identifies factors to be considered including 'Environmental Effects'. The definition of environmental effect includes the following in part (b): any effect</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
	<p>or any change the project may cause in the environment on health and socio-economic conditions, physical and cultural heritage, the current use of lands and resources for traditional purposes by Aboriginal persons or any structure, site or thing that is of historical, archaeological, paleontological or architectural significance. This is therefore a basic requirement of the <i>CEAA</i> and is within the mandate of the JRP.</p> <p>Section 9.0 of the JRP Agreement requires the JRP to prepare a Report setting out its rationale, conclusions and recommendations relating to the EA of the project.</p>
GOVERNMENT AGENCIES	
<p>The specific mention of some government agencies within the Preamble may be to the exclusion of all other government agencies that may at some point be required to become involved (i.e. Heritage Canada). A further clause within the preamble that addresses this concern may be necessary.</p>	<p>Government participant status will be afforded to federal authorities and provincial departments with an environmental assessment or regulatory responsibility and who file a declaration to this effect. The requirements of a Government participant will be outlined in the Hearing Order (See Part IV - Panel Agreement)</p> <p>Only the responsible authorities or potential responsible authorities have been included in the ‘Whereas’ clauses because, as a responsible authority, a department would have to meet appropriate legislative requirements. Other departments may be involved in the process as required.</p>
EMPLOYMENT AND TRAINING	
<p>The Nation desires some certainty as to the training and employment opportunities that will be available to Nation members. In particular, the Nation would like to see its members provided with the training necessary for all types of employment prior to the commencement of the project along with confirmation that a percentage of its members be employed throughout, at the very least, the Alberta portion of the construction phase of the Project. The training would be provided at an agreed upon location on the Nation lands and would give the Nation members the opportunity to fill a variety of jobs during the construction of the Project. Where opportunities are available the Nation would also like to see its members employed post-construction in some capacity. For example, Nation members could be employed to monitor the post-construction impact on the traditional lands and the effect on traditional practices and ensure that the lands are returned to traditional use capacity.</p>	<p>Scope of Factors 4.2 Project Benefits includes “measures to enhance any beneficial environmental effects” in its review of the project. As such the Application is expected to discuss the benefits including employment and training opportunities and social and economic benefits to the public and Aboriginal peoples.</p> <p>It is recommended that the First Nation have discussions with the proponent regarding employment opportunities. These</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
	<p>matters will also be considered by the JRP.</p> <p>The Consultation Framework provides further information about the integration of consultation into the JRP process and more details about the involvement of the Crown and Aboriginal Groups.</p>
FINAL COMMENTS	
<p>The consultation and accommodation process must continue throughout the various phases of the Project to ensure the Nation's unique concerns are met and distinctive features respected on an ongoing basis pursuant to the Crown's duty to comply with its constitutional obligations.</p> <p>The Nation looks forward to working with the CEAA and NEB in fair and meaningful ongoing consultation that properly respects and acknowledges the Nations unique and distinctive features.</p>	<p>The Consultation Framework provides information about the integration of consultation into the JRP process and more details about the involvement of the Crown and Aboriginal Groups.</p>
Lax Kw'alaams Band Council / Chief John Helin	
<p>We wish to remind you that there is a duty of consultation and, if necessary accommodation with First Nations, and that duty is an interactive one, which cannot be met by simply soliciting comments from the general public.</p> <p>Lax Kw'alaams does not support the approach the Government of Canada has taken to the Joint Review Panel process, nor will this process meet Canada's duty of consultation with Lax Kw'alaams. We urge you not to proceed with the Joint Review Panel Agreement, until you have moved forward with adequate consultation about the process.</p>	<p>The Consultation Framework provides information about the integration of consultation into the JRP process and more details about the involvement of the Crown and Aboriginal Groups. The opportunity for input into the Agreement was initiated with Aboriginal groups starting October 15, 2008 almost four months ahead of the general public.</p>
Nak'azdli Band Council / Chief Fred Sam	
<p>Our Nation has significant concerns regarding the potential environmental, social, cultural, legal and economic impacts of this project. Nak'azdli has significant concerns regarding both the proposed Joint Review Panel Agreement as well as the Aboriginal Consultation Approach.</p> <p>Nak'azdli is in receipt of the Feb 2009 document entitled "Approach to Crown Consultation for the Northern Gateway Project." This document was unilaterally developed and it does not allow for the discussion of alternate or parallel processes to address Aboriginal rights and Title. Nak'azdli, along with other member nations of the CSTC called for a First Nations Review process in 2006. Our requests to meet with the responsible Ministers to discuss this option were denied. Nak'azdli continues to be open to meeting with the responsible federal agencies to discuss the First Nations Review Process.</p>	<p>The Consultation Framework provides further information about the integration of consultation into the JRP process and more details about the involvement of the Crown and Aboriginal Groups. The Crown is open to discussing how consultation, within the framework provided, will be carried out. The Crown has been and continues to be open to discussing how consultation, within the framework provided, will be carried out.</p> <p>The JRP is the decision maker under the <i>NEBA</i> and their process is defined in regulation (Rules of Practice and Procedure). Involvement in the JRP review process is the main way to get</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
<p>The Approach to Crown Consultation document was appended to a letter announcing the 'public comment period' for the Joint Review Panel Agreement, which has a deadline of April 14, 2009. While comments have been welcomed on the JRP agreement, there has been no similar request for comments, meeting, or input on the Consultation document. It appears that the Crown is not willing to modify this document or approach.</p>	<p>your information to the decision makers. The federal government does not support a separate, parallel First Nations review process. The rationale for this is provided in the Communiqué.</p>
<p>Nak'azdli has the following concerns regarding the "Approach to Crown Consultation for the Northern Gateway Project":</p>	
<p>1. The Crown's proposed approach was unilaterally developed without First Nations involvement. While the Crown has requested First Nations' comments on the draft terms of reference for the JRP, to date the Crown has not been prepared to negotiate changes to its overall framework for First Nations consultation. In particular, there has been no meaningful consultation on the preliminary question of the appropriate role of the JRP, if any, in meeting the Crown's constitutional duties.</p>	<p>Within the approach provided, how consultation was integrated into the process as a "whole-of-government" approach was provided, however, how that consultation is conducted was not defined. The Crown has been and continues to be open to discussing how consultation, within the framework provided, will be carried out.</p>
<p>2. The Crown's proposed approach to consultation disregards First Nations' rights of governance, management and decision-making in their territories. By unilaterally proceeding with the JRP process, the Crown has made it impossible to have good faith, meaningful, reasonable and responsive consultation in regard to First Nations' Aboriginal Rights of governance. Although the specifics of the jurisdictional authority of each nation may not yet have been adjudicated by a court or defined in treaty, the honour of the Crown nevertheless demands consultation and accommodation to give appropriate 'interim effect' to First Nations' decision-making authority. By way of contrast, the JRP process does not involve First Nations as decision makers on a government-to-government basis.</p>	<p>The Consultation Framework provides further information about the integration of consultation into the JRP process and more details about the involvement of the Crown and Aboriginal Groups.</p>
<p>3. The Crown's proposed approach treats First Nations consultation as an 'afterthought' to standard public participation requirements. CEAA and NEB have statutory obligations regarding public participation in the JRP process; however, the JRP process engages First Nations only indirectly as a subset of the public. The only distinct First Nations consultation offered is late in the day after the EA report has been completed, and then only on the 'residue' of issues that have not been addressed by the JRP or the proponent. This is not consistent with the Crown's duties as outlined by the courts.</p>	<p>The public comment period on the draft Joint Review JRP Agreement was initiated February 9, 2009 however, the opportunity for input into the Agreement was initiated with Aboriginal groups starting October 15, 2008 almost four months ahead of the general public.</p> <p>Funding has been made available through the Aboriginal Funding Envelope of the Participant Funding Program of the Canadian Environmental Assessment Agency to assist Aboriginal groups with their involvement in the JRP process.</p> <p>The Agency was available and offered to discuss the JRP process with the Nak'azdli First Nation.</p> <p>Many changes have been made to the JRP Agreement to account</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
	<p>for comments/concerns of Aboriginal groups as seen throughout this document.</p> <p>The JRP Agreement has been amended to include information on the involvement of Aboriginal groups in the JRP process (subsections 6.5 and 8.1 of the JRP Agreement). JRP Agreement section 8.1 gives the JRP the mandate to receive information from Aboriginal peoples related to the nature and scope of potential or established Aboriginal and treaty rights that may be affected by the Project and the impacts or infringements that the Project may have on potential or established Aboriginal and treaty Rights. The Consultation Framework provides more detail.</p>
<p>4. The JRP has no mandate to conduct First Nations consultation or to fully assess potential impacts on Aboriginal Title and Rights. Before federal authorities can issue approvals for the pipeline, CEEA must conduct an EA. However, the CEA Act limits this assessment to impacts on current First Nations land uses and cultural heritage, not the full scope of potentially affected Aboriginal Rights. The JRP has not mandate, for example, to assess impacts on the jurisdictional aspects of Aboriginal Title and governance rights, including the right to decide the uses to which the land and water will be put, or indeed impacts on any future uses of land or water grounded in Aboriginal Title and Rights. While the JRP also has the power under the NEB act to consider the public interest and any other relevant factor in deciding whether a Certificate of Public Convenience and Necessity should be issued to approve the pipeline, impacts on Aboriginal Title and Rights are not among the considerations explicitly listed in the NEB Act, which focuses on more narrow financial and economic considerations. The courts have held that there is a “duty to focus on the relevant issues” in consultation with First Nations. The JRP does not have the mandate to do so with respect to Aboriginal Title and Rights.</p>	<p>The Consultation Framework provides further information about the integration of consultation into the JRP process and more details about the involvement of the Crown and Aboriginal Groups.</p> <p>Further to the general guidance provided in Chapter 3 of the Filing Manual regarding consultation and Table A-5 Filing Requirements for Socio-Economic Elements, the Applicant will identify the lands, waters and resources of specific social, economic, archaeological, cultural or heritage value to Aboriginal groups.</p> <p>The Joint Review JRP Agreement has been amended to include information on the involvement of Aboriginal groups in the JRP process (subsections 6.5 and 8.1 of the JRP Agreement).</p> <p>Section 6.5 of the JRP Agreement requires the Proponent to provide evidence regarding the concerns of Aboriginal Groups , so the JRP may carefully consider all evidence provided in this regard by Aboriginal peoples.</p> <p>JRP Agreement subsection 8.1 gives the JRP the mandate to receive information from Aboriginal peoples related to the nature and scope of potential or established Aboriginal and treaty rights</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
	that may be affected by the Project and the impacts or infringements that the Project may have on potential or established Aboriginal and treaty Rights.
<p>5. The Crown's Proposed Approach Involves Inappropriate Delegation to the Applicant/Proponent – The implication is that the proponent has the principal substantive obligation of consultation, with the Crown merely dealing with the 'residue' or any outstanding issues. This seems directly at odds with direction of the Supreme Court of Canada in <i>Haida</i>. For these reasons, Nak'azdli has been working with other affected First Nations to develop a First Nations Review Process for the proposed Enbridge Northern Gateway Pipeline. Nak'azdli is interested in meeting with responsible federal agencies to discuss a separate process to address these concerns. I would be pleased to meet with you to discuss the above-listed issues at your earliest convenience.</p>	<p>Proponents are expected to consult Aboriginal groups and as appropriate, make changes/adjustments to their project based on concerns raised before an Application is filed.</p> <p>The Crown is committed to fulfill its legal duty to consult and is relying on the JRP and proponent to the extent possible. The Consultation Framework provides further information about the integration of consultation into the JRP process and more details about the involvement of the Crown and Aboriginal Groups.</p>
<p>There needs to be clear indication from the federal government if there is an openness to discuss alternatives to the existing process, or the ability of First Nations to significantly alter or modify the current process to reflect a true government-to-government decision-making process. To this end, I request that you respect our interests in this matter and make no further decisions or announcements until we have reached an agreement on the Aboriginal consultation approach for this project.</p>	<p>The JRP Agreement has been amended to include information on the involvement of Aboriginal groups in the JRP process (subsections 6.5 and 8.1 of the JRP Agreement). JRP Agreement subsection 8.1 gives the JRP the mandate to receive information from Aboriginal peoples related to the nature and scope of potential or established Aboriginal and treaty rights that may be affected by the Project and the impacts or infringements that the Project may have on potential or established Aboriginal and treaty Rights.</p> <p>The Consultation Framework provides further information about the integration of consultation into the JRP process and more details about the involvement of the Crown and Aboriginal Groups. The Crown is open to discussing how consultation, within the framework provided, will be carried out.</p>
St'at'imc Chiefs Council / Grand Chief Saul Terry	
<p>The St'at'imc were not consulted in regards to the proposed 1,170 km Enbridge Gateway Pipeline project. This project is of concern to us as it would ultimately traverse the headwaters of the Fraser River.</p> <p>The current consultation process Canada is utilizing entitled "Approach to Crown Consultation for the Northern Gateway Project" is flawed. The Crown must complete its consultation with Aboriginal People in a way that fulfills the duty to consult before it makes a decision on the project.</p>	<p>The Consultation Framework provides further information about the integration of consultation into the JRP process and more details about the involvement of the Crown and Aboriginal Groups.</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
<p>We have a number of concerns regarding the potential impacts of the proposed oil pipeline through the headwaters of the Fraser River. This includes concerns for the increased traffic of oil tankers through the migration routes of our wild salmon in the coastal waters of BC. This project also gives us great concern for the Dene, Cree and Metis People of the Athabaska River basin who are already being impacted by the current development of the Alberta tar sands. We also have concerns for other Aboriginal people who rely on the Fraser, Skeena, and Mackenzie Rivers for their way of life that have been in existence for millennia.</p> <p>We look forward to having discussions with you and suggest that an initial meeting with the St'at'imc occur in St'at'imc Territory at your earliest convenience.</p>	<p>Potential impacts of the project will be assessed through the JRP process. Tanker traffic will be considered by the JRP. See the Terms of Reference, Part I Scope of Project which includes marine transportation of oil and condensate within the confined channel assessment area as defined by the proponent, Hecate Strait and the proposed shipping routes to be used for the Project that are within the 12 nautical mile limit of the Territorial Sea of Canada.</p> <p>The Crown is open to discussing how consultation, within the framework provided, will be carried out.</p>
Saik'uz First Nation / Jacqueline Thomson	
<p>We have been asked as “Stakeholders” to submit our concerns regarding the pipeline. Firstly, we are not just “Stakeholders” we are the traditional stewards of this area.</p> <p>It is our understanding that your Agency should look after the honour of the Crown as discussed in Haida and that you cannot delegate this to the proponent to complete.</p> <p>We expect further discussions with either yourself or a delegation that can speak for the Crown to ensure that you respect the authority, governance, management and decision making of Saik'uz First Nation for our traditional territories.</p>	<p>The Crown is committed to fulfill its legal duty to consult and in doing so will rely, as much as possible, on the JRP process as the main tool to gather information and help the Crown fulfill its duty.</p> <p>The Consultation Framework provides further information about the integration of consultation into the JRP process and more details about the involvement of the Crown and Aboriginal Groups.</p> <p>The Crown is open to discussing how consultation, within the framework provided, will be carried out.</p>
Nee Tahi Buhn Indian Band / Ray Morris, Chef	
<p>Main issue: Composition of the Panel: Need an Aboriginal Person on the Panel</p> <p>At least one member of the Panel must be an Aboriginal person from the territories affected. The three member Panel should not be composed primarily of permanent members of the NEB. The Band feels that a strong First Nations presence on the Panel is integral to the legitimacy of the process. The Band wishes to nominate Harley Chingee on the Panel since his knowledge of the issues relevant to the project, and his respect within First Nations communities makes him an ideal candidate for this position.</p>	<p>The Agency and NEB have been open to hearing names from Aboriginal groups that fit the criteria set out in the legislation (unbiased, free from conflict of interest relative to the project and who have knowledge or experience relevant to the anticipated environmental effects of the project.). Additionally, the Agency and NEB have identified a qualified FN candidate and put that candidate's name forward to the Minister of the Environment for</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
<p>Main issue: COMPOSITION OF THE PANEL: NEED AN ABORIGINAL PERSON ON THE PANEL. At least one member of the Panel must be an Aboriginal person from the territories affected. The three member Panel should not be composed primarily of permanent members of the NEB. The Band feels that a strong First Nations presence on the Panel is integral to the legitimacy of the process. The Band wishes to nominate Harley Chingee on the Panel, since his knowledge of the issues relevant to the project, and his respect within First Nations communities makes him an ideal candidate for this position</p>	<p>consideration.</p> <p>The NEB did contact with Mr. Chingee to get a copy of his resume for review.</p>
<p>Consultation procedures have put a substantial burden on us with little effort by either the proponent or the Crown to enable our participation. So far, Enbridge's only contact with us has been to send a large booklet for us to review. In our view, the consultation process is therefore lacking in substance, and puts the burden on First Nations when in fact the Crown holds the duty to consult. Furthermore, this duty cannot be delegated to the proponent, which it seems the JRP Agreement seems to do in section 6.3.</p>	<p>The Consultation Framework provides further information about the integration of consultation into the JRP process and more details about the involvement of the Crown and Aboriginal Groups.</p> <p>Funding has been made available through the Aboriginal Funding Envelope of the Agency's Participant Funding Program. Funding was made available for Phase I starting October 15, 2008. Nee Tahí Buhn applied for and received funding during Phase I to assist with their involvement. A letter announcing the availability of funding for Phase II and III under the Aboriginal Funding Envelope was provided to Aboriginal groups starting July 24th, 2009 to assist with their involvement in this process. Nee Tahí Buhn is encouraged to pursue Phase II and III funding under this program to assist with their involvement in the Pre-hearing and Oral Hearing phases of the JRP process. The deadline to receive applications is two weeks after the release of the final JRP Agreement. The Agency is available to discuss the preparation of applications.</p>
<p>In section 6.4 of the JRP agreement, it states that there will be "a separate and more detailed communication" to deal with the potential impact on Aboriginal rights. What is this separate process? How will it be managed? Will we have any input into its design? This is far too abstract and vague to be acceptable. We demand that Aboriginal-Crown Consultation be an integral part of the environmental assessment itself. And if the information that we have is correct, CEAA plans on simply touring the affected Aboriginal communities with a draft copy of the environmental assessment once it is complete in order to fulfill the Crown's duty to consult. Such a strategy is not consultation, and will surely result in delays in the environmental assessment process.</p>	<p>The Approach to Aboriginal Consultation for the Northern Gateway Project was provided to Aboriginal groups in February 2009 and set out some of the general key steps to be undertaken for each phase of the environmental review process. The Consultation Framework provides further information about the integration of consultation into the JRP process and more details about the involvement of the Crown and Aboriginal Groups.</p> <p>The JRP Agreement has also been amended to include information on the involvement of Aboriginal groups in the JRP</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
	process (subsections 6.5 and 8.1 of the JRP Agreement).
<p>Neé Tahí Buhn is concerned not only about the environmental impact of the project, but the potential for negative social impacts as well. A large project such as Enbridge's proposed pipeline brings a great number of workers into the area. Realistically, most of these workers are going to come from Alberta, and therefore will have no ties to the communities. They will bring their vices with them, including appetites for illegal drugs and prostitutes. We do not want to see an influx of drugs, an increased demand for the sex-trade, and the attendant increase in sexually transmitted and blood-borne diseases in our community. How does Enbridge plan on mitigating these effects? We believe that the environmental assessment of the project must also take such social impacts into consideration.</p>	<p>Neé Tahí Buhn is encouraged to raise these concerns with the JRP.</p>
<p>Wet'suwet'en , / David de Wit, Manager, Natural resources Office of the Wet'suwet'en</p>	
<p>-The Approach to Crown Consultation document does not mention the Rights and Title. Need to incorporate Wet'suwet'en Title, Rights, and interests in a meaningful review process. The crown consultation process is inadequate to understanding and accommodating Indigenous Rights and Title issues and concerns. Need "deep" consultation based on Wet'suwet'en un-extinguished Rights and Title on their territory.</p> <p>-A strategic level assessment process is required that first addresses policy considerations relevant to "whether" the project should proceed, rather than "how".</p>	<p>The Joint Review JRP Agreement has been amended to include information on the involvement of Aboriginal groups in the JRP process (subsections 6.5 and 8.1 of the JRP Agreement). The JRP Agreement in subsection 8.1 gives the JRP the mandate to receive information from Aboriginal peoples related to the nature and scope of potential or established Aboriginal and treaty rights that may be affected by the Project and the impacts or infringements that the Project may have those rights.</p> <p>A decision is made under the NEBA as to whether the project should proceed.</p>
<p>The strength of claim assessment should not only inform the Crown that the Wet'suwet'en should be consulted in regards to the Northern Gateway Pipeline project, but also how deep consultation should occur. As the strength of claim report has not been provided to our office for review and comment, we would like to inform you that the 1997 Delgamuukw/Gisdaywa Supreme Court ruling stated that the Wet'suwet'en have un-extinguished Rights and Title on their territory.</p>	<p>As discussed at our meeting on September 8, 2009, the Joint Review JRP Agreement has been amended to include information on the involvement of Aboriginal groups in the JRP process (subsections 6.5 and 8.1 of the JRP Agreement). The JRP Agreement in subsection 8.1 gives the JRP the mandate to receive information from Aboriginal peoples related to the nature and scope of potential or established Aboriginal and treaty rights that may be affected by the Project and the impacts or infringements that the Project may have on potential or established Aboriginal and treaty Rights.</p>
<p>The Wet'suwet'en have grave concern about the lack of First Nations representation on the proposed review panel. The Wet'suwet'en have recently participated in a regulatory process with CEAA and found the process inadequate in regards to understanding and accommodating Indigenous Rights and Title issues and concerns, hence meaningful resolution to</p>	<p>The Agency and NEB have identified a qualified FN candidate to and put that candidate's name forward to the Minister of the Environment for consideration.</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
<p>Rights and Title issues were never achieved.</p>	<p>The Joint Review JRP Agreement has been amended to include information on the involvement of Aboriginal groups in the JRP process (subsections 6.5 and 8.1 of the JRP Agreement). The JRP Agreement in subsection 8.1 gives the JRP the mandate to receive information from Aboriginal peoples related to the nature and scope of potential or established Aboriginal and treaty rights that may be affected by the Project and the impacts or infringements that the Project may have on potential or established Aboriginal and treaty Rights.</p>
<p>We stated in our March 26, 2009 letter that “First Nations were neither informed nor consulted prior to the drafting of the Joint Review Panel Agreement, or development of Terms of Reference.” Our question of “How does the Crown, through your agency plan to remedy this oversight, and incorporate Wet’uwet’en Title, Rights, and interests in a meaningful review process?” has yet to be answered.</p>	<p>The opportunity for Aboriginal groups, including Wet’suwet’en, to provide input into the design of the EA process (draft Agreement and terms of reference) was initiated in October 15, 2008.</p> <p>The Joint Review JRP Agreement has been amended to include information on the involvement of Aboriginal groups in the JRP process (subsections 6.5 and 8.1 of the JRP Agreement). The JRP Agreement in subsection 8.1 gives the JRP the mandate to receive information from Aboriginal peoples related to the nature and scope of potential or established Aboriginal and treaty rights that may be affected by the Project and the impacts or infringements that the Project may have on potential or established Aboriginal and treaty Rights.</p>
<p>Gitga’at First Nation / Dan Cardinal, Gitga’at Stewardship Manager David Benton/Hartley Bay Band Project Manager</p>	
<p>Gitga’at unextinguished Aboriginal rights and title within their territory. Reliance on harvest of marine and intertidal plants, fish and other marine species for Cultural, society and economic values. Have economic development plans in commercial fisheries, commercial shellfish aquaculture, marine ecotourism. They have developed a stewardship framework and ecosystem-based land use plan for Gitga’at territory, and reached formal agreement with the Province of B.C. on a government-to government basis.</p> <p>The Gitga’at along with other coastal First Nations, have formal understanding with the Government of Canada to develop and promulgate a broader integrated marine management plan for North Coast of B.C.</p>	<p>The Joint Review JRP Agreement has been amended to include information on the involvement of Aboriginal groups in the JRP process (subsections 6.5 and 8.1 of the JRP Agreement). JRP Agreement subsection 8.1 gives the JRP the mandate to receive information from Aboriginal peoples related to the nature and scope of potential or established Aboriginal and treaty rights that may be affected by the Project and the impacts or infringements that the Project may have on potential or established Aboriginal and treaty Rights.</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
<p>The ENGP project would infringe a number of Gitga'at constitutionally protected rights such as, the right to govern, regulate and manage their territorial waters and intertidal areas, the right to pursue a path of territorial stewardship and sustainable economic development , the right to continue their marine and intertidal harvesting activities, including their right to fish for and harvest salmon, halibut, seaweed and other marine species.</p>	
<p>Risks of accident: The ENGP project with significant number of sizeable oil and condensate tankers trough the heart of Gitga'at Territory could create the potential for catastrophic impact that would occur in the event of a major marine oil spill.</p>	<p>Consideration of accidents and malfunctions is required as per paragraph 16(1)(a) of the Canadian Environmental Assessment Act. Tanker traffic will be considered by the JRP and therefore, accidents and malfunctions related to the transport of oil and condensate within the marine environment are within the JRP mandate to consider. The Terms of Reference, Part I Scope of Project includes marine transportation of oil and concentrate within the confined channel assessment area as defined by the proponent, Hecate Strait and the proposed shipping routes to be used for the Project that are within the 12 nautical mile limit of the Territorial Sea of Canada.</p>
<p>The consultation approach is not effective, clear and does not accommodate the Gitga'at</p> <p>The Scope of the consultation process : The draft agreement and terms of reference for the ENGP environmental assessment do not treat marine transportation of oil and condensate as integral to, and a key element of, the proposed project, they do not clearly specify how assessment activities performed by Transport Canada under a TERMPOL will be formally integrated and addressed by the CEAA during the environmental assessment, they do not clearly specify the geographic scope of the assessment in relation to the full spectrum of the marine and intertidal effects of the ENGP project within the territory.</p>	<p>The Consultation Framework provides further information about the integration of consultation into the JRP process and more details about the involvement of the Crown and Aboriginal Groups.</p> <p>The JRP Agreement has been changed to clearly include marine transportation of oil and condensate in the scope of project.</p> <p>TERMPOL is a separate process, however, it is expected that many of the studies prepared and information collected for the TERMPOL process will be made available by the proponent in the JRP process, as appropriate.</p>
<p>The Draft agreement and terms of reference do not specify that the assessment will consider the multitude of effects that the project will have on the cultural, social and economic well-being of the Gitga'at. They do not identify the legal and policy criteria by which the project will be assessed.</p>	<p>Section 6.4 of the Scope of the Factors document states that further to the general guidance provided in Chapter 3 of the Filing Manual regarding consultation and Table A-5 Filing Requirements for Socio-Economic Elements, the Applicant will identify the lands, waters and resources of specific social, economic, archaeological, cultural or heritage value to Aboriginal groups.</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
	<p>The criteria by which the project will be assessed are based on the requirements of the <i>CEAA</i> and <i>NEBA</i>. JRP Agreement, Part II – Factors to be Considered During the Joint Review identifies the requirements of the <i>CEAA</i> including Environmental Effects. The definition of environmental effect includes the following in part (b): any effect or any change the project may cause in the environment on health and socio-economic conditions, physical and cultural heritage, the current use of lands and resources for traditional purposes by Aboriginal persons or any structure, site or thing that is of historical, archaeological, paleontological or architectural significance.</p> <p>In the preamble of the JRP Agreement it is mentioned that both the NEB and CEA acts apply. Policy criteria and general guidance can be found in Guide A.2 of the NEB Filing Manual and in the Scope of Factors document. Additional guidelines and policies can be found in section 9- References of the Scope of Factors document.</p>
<p>They do not provide Gitga'at with a meaningful opportunity to engage in key aspects of the assessment and decision making process such as review and selection of JRP panel members, participation in inter-government steering and technical working committees.</p>	<p>Scope of Factors document, 6.4 Aboriginal Rights and Interests states the following will be included: Further to the general guidance provided in Chapter 3 of the Filing Manual regarding consultation and Table A-5 Filing Requirements for Socio-Economic Elements, the Applicant will identify the lands, waters and resources of specific social, economic, archaeological, cultural or heritage value to Aboriginal groups.</p> <p>Regarding the JRP composition, the Agency and NEB have been open to hearing names from Aboriginal groups for JRP candidates that meet the criteria set out in the legislation (are unbiased and free from any conflict of interest relative to the project and who have knowledge or experience relevant to the anticipated environmental effects of the project). Additionally, the Agency and NEB have identified a qualified FN candidate and put that candidate's name forward to the Minister of the Environment for consideration.</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
	<p>The JRP members are appointed according to section 5 of the JRP Agreement.</p> <p>As per sections 6.5, 8.1 and 8.2 Aboriginal peoples can contribute to the assessment of the Project. In part IV, of the Terms of Reference of the JRP Agreement it is explained that Aboriginal peoples can participate in the review process in various ways.</p> <p>Although steering and technical working committees typically form part of the BC environmental assessment process and comprehensive studies under the CEAA they are not part of a JRP process. As a quasi-judicial body, it is imperative that the JRP remain independent and consider all of the evidence in front of it. Technical and steering committees come to conclusions without all of the same information being available to all participants.</p>
<p>Procedural and technical recommendations: CEAA and relevant Crown agencies should establish a process that provides for deep consultation and an opportunity to achieve meaningful and workable accommodation with respect to matters that lie outside the scope of the EA.</p> <p>Despite the fact that they are prior occupants and users of the land and waters, and despite the fact that by the law on aboriginal title, they are entitled to the exclusive occupation and use of the land and waters, the Gitga'at are committed to the reconciliation of conflicting Gitga'at-Crown interests through collaborative approach to management built on recognition of their governance, title and other aboriginal rights.</p> <p>The Gitga'at are working to develop and implement cooperative management which includes consultation and negotiation with provincial and federal governments agencies and businesses operating in their territory. The harvest from their land and waters, together with the products of their efforts, continue to serve a key role in Gitga'at culture, particularly in feastings.</p>	<p>The Crown is committed to fulfill its legal duty to consult. Aboriginal groups are encouraged to participate in the JRP process as described in sections 6.5, 8.1 and 8.2 of the JRP Agreement to present evidence as to how the project may infringe on their existing or potential Aboriginal or treaty rights. The Consultation Framework provides further information about the integration of consultation into the JRP process and more details about the involvement of the Crown and Aboriginal Groups.</p>
<p>Gitga'at First Nation and the Federal government have differing conceptions of sustainability based on differing priorities relating to the environment and economic development. The federal is concerned primarily with achieving sustainable development. The Gitga'at are concerned foremost with sustaining their relationship with the land, waters, and living</p>	<p>4.1 (b) purpose of the CEAA: to encourage responsible authorities to take actions that promote sustainable development in addition, in section 2.2 of the Scope of the Factors document it</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
<p>beings. To the Gitga'at people, their territory is their ancestral home, their only home, it is not merely one of many more or less interchangeable locales or areas that make up Canada.</p>	<p>is stated that: The Applicant shall strive to integrate and balance this objective (of sustainable development) within its application and clearly outline how it has been incorporated.</p>
<p>These differing conceptions and priorities provide a further basis for saying that neither Federal nor Provincial responsibility for the environment in regard to economic developments touching upon Gitga'at territory can be said to represent or substitute for Gitga'at responsibility.</p> <p>The Federal government had more than a year to consult the Gitga'at prior Enbridge's subsequent request to the NEB and CEAA in late November 2006 to put environmental assessment process on hold. However, the Federal government made no effort to consult the Gitga'at or thus begin to understand Gitga'at during this period. The Federal government has a duty to consult and accommodate the Gitga'at First Nation prior to finalizing and submitting a Report to the Minister of Environment.</p>	<p>The Consultation Framework provides further information about the integration of consultation into the JRP process and more details about the involvement of the Crown and Aboriginal Groups.</p> <p>Sections 6.5, 8.1 and 8.2 in the JRP Agreement states that the JRP will consider all information received from any interested parties in relation to the nature and scope of potential or established Aboriginal and treaty rights that may be affected by the Project and the impacts or infringements that the Project may have on potential or established Aboriginal and treaty rights. The JRP may include in its Report recommendations for appropriate measures to avoid or mitigate potential adverse impacts on Aboriginal and treaty rights and interests.</p>
<p>The Crown must approach its consultation with First Nations flexibly since the level of consultation required may change as the process goes on and new information comes to light. Responsiveness is a key requirement of both consultation and accommodation. The Government may even have to use its legislative authority to respond to its legal obligations.</p> <p>The project as contemplated by the Federal government would infringe a number of Gitga'at First Nation's constitutional rights. Absent Gitga'at agreement to the Project, a decision to approve the project would potentially infringe Gitga'at's rights to govern, regulate, and manage their territorial waters, and in particular, waters within their core territory, in accordance with their Ayaawx, Waap, and Traditional Chief system. Their right of governance includes a right to assess the Project themselves and accept or reject it as they see fit.</p>	<p>In addition to the Table A-5 Filing Requirements in the NEB Filing Manual and as specified in section 6.4 Aboriginal rights and interest in the Scope of the Factors document, the Applicant is expected to identify the lands, waters and resources of specific social, economic, archaeological, cultural or heritage value to Aboriginal groups, that assert Aboriginal rights that may be affected by project components.</p> <p>Subsection 8.1 of the JRP Agreement gives the JRP the mandate to receive information from Aboriginal peoples related to the nature and scope of potential or established Aboriginal and treaty rights that may be affected by the Project and the impacts or infringements that the Project may have on potential or established Aboriginal and treaty Rights.</p>
<p>The Gitga'at right to exclusive use and occupation means that the waters and routes of marine travel through the core of Gitga'at territory are the Gitga'at's alone to use. The Gitga'at right to exploit the economic potential of their title means that they are entitled to exact payment, if they so choose, for tanker passage through their territory, to prefer other paths of economic development, say eco-tourism.</p>	<p>Sections 7.3 and 7.4 in the Scope of the Factors Document include "Effects on Human Environment" and "Effects on Aboriginal Rights and Interests" respectively. Please see these sections for detail.</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
<p>A federal decision that results in Project-related tankers passing through Gitga'at title territory with little or no economic benefit to the Gitga'at and contrary to their own economic development plans is an infringement of Gitga'at title. A Federal decision to approve the Project –by associated creation of Project related oil/condensate tanker traffic-would infringe Gitga'at aboriginal marine harvesting rights, it would also infringe their rights in regard to sacred and spiritual places through interference with access and use in violation of the Ayaawx in regard to such places. It would also infringe their rights in regard to their access and use of traditional marine routes.</p> <p>The seriousness of these potential infringements of Gitga'at Firt Nation's constitutional rights is measured by the seriousness of the potentially adverse-direct and indirect or collateral effects of the infringements on their rights.</p> <p>Gitga'at title has significance difficult to convey to non-aboriginal peoples. Such infringement would build on the Crown's long history of holding the Gitga'at people in a position of powerlessness, pain, and shame by denying them any meaningful consultation place.</p>	<p>Aboriginal groups are encouraged to participate in the JRP process as described in sections 6.5, 8.1 and 8.2 of the JRP Agreement to present evidence as to how the project may infringe on their existing or potential Aboriginal or treaty rights.</p> <p>The Crown understands the concerns of the Gitga'at and is of the view that the JRP process is the best process to review the Northern Gateway Project. The Consultation Framework provides further information about the integration of consultation into the JRP process and more details about the involvement of the Crown and Aboriginal Groups.</p>
<p>The most significant potentially adverse impact beyond the direct impacts of the infringements themselves would be an oil tanker spill. A major oil spill would be catastrophic.</p>	<p>Consideration of accidents and malfunctions is required as per paragraph 16(1)(a) of the CEAA and is mentioned in part II – Factors to be considered during the Joint Review, in the JRP Agreement. Marine transportation of oil and condensate has been included in part I - Scope of the Project, in the JRP Agreement. Therefore, accidents and malfunctions related to the transport of oil and condensate within the marine environment are within the JRP mandate to consider.</p> <p>The JRP Agreement has been changed to clearly include marine transportation of oil and condensate in the scope of project.</p> <p>TERMPOL is a separate process, however, it is expected that many of the studies prepared and information collected for the TERMPOL process will be made available by the proponent in the JRP process as appropriate.</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
<p>The Crown's long history of ignoring the Gitga'at people and disregarding, when not denying their rights is a further factor adding depth to its duty with respect to the Project.</p> <p>The number and nature of the rights at stake point to a duty to yield a share in the decision making, including a share in the responsibility for the design and conduct of the Project's EA.</p> <p>The duty owed by the Crown in this Project is comparable in scope and content to the duty owed by the Crown in right of British Columbia to the Take River Tlingit First Nation in regard to the proposal to reopen the Tulsequah Chief Mine. In the Taku River case, the Supreme Court of Canada found that the Take River Tlingit First Nation " have <i>prima facie</i> aboriginal rights and title over at least some of the area that they claim" The Tlingit's participation in the EA included the participation with other members of the Project Committee in the coordination of the review of the project [proposal, participation in Project Committee meetings, a steering group dealing with aboriginal issues, securing Province's commission of a study on traditional land use by an expert approved by the Tlingit and a submission of a Minority Report stating their concerns with the process and proposal and its referral to the Ministers along with the Project Committee recommendations Report. The Gitga'at First nation is entitled to consultation and accommodation at a level at least comparable to what the Taku River Tlingit First Nation was entitled.</p> <p>The Federal Government's current approach to consultation with the Gitga'at First Nation and accommodation of their rights in both its overall decision making process and its environmental assessment process does not suffice to uphold the honour of the Crown, it is inconsistent with the goal of reconciliation , and thus with the honour of the Crown.</p> <p>The consultation process in five phases does not reflect, or exhibit an openness to accommodating, the Gitga'at First Nation's decision making authority and responsibility associated to their governance, title and other aboriginal rights.</p>	<p>The Consultation Framework provides further information about the integration of consultation into the JRP process and more details about the involvement of the Crown and Aboriginal Groups.</p>
<p>A JRP environmental assessment process was settled upon without consultation with the Gitga'at.</p>	<p>The public comment period on the draft Joint Review JRP Agreement, which outlines the EA process, was initiated on February 9, 2009 whereas, the opportunity for input into the draft JRP Agreement was initiated with Aboriginal groups starting October 15, 2008 almost four months ahead of the general public.</p> <p>Funding has been made available through the Aboriginal Funding Envelope of the Participant Funding Program of the Canadian Environmental Assessment Agency to assist Aboriginal groups with their involvement in the JRP process.</p> <p>Many changes have been made to the JRP Agreement to account for comments/concerns of Aboriginal groups as seen throughout</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
	this document.
<p>The draft JRP agreement and Terms of Reference fail to reflect, or even show an openness to accommodating, the aforesaid authority and responsibility.</p> <p>No amount of consultation outside the JRP process or subsequent to the JRP Recommendation Report can remedy the Crown's exclusion of the Gitga'at from any share in the decision making powers and responsibilities in connection with the EA process of the Project.</p> <p>The Gitga'at Chiefs had stated their objectives to the Federal government in a letter sent to CEEA and NEB that requested that the "Gitga'at First Nation must have a central role in decisions made about the proposed NGP. "</p> <p>The Federal government still has an opportunity to rethink its approach and begin discussions with the Gitga'at First Nation in an effort to fashion a fair and reasonable accommodation of its governance, title and other rights.</p> <p>Gitga'at governance, title and other aboriginal rights are specific to Gitga'at. The Crown cannot point out its desire for economy, administrative and otherwise, to excuse the infringement of aboriginal and treaty rights on a massive scale. For the sake of reconciling Gitga'at and Crown interests, the Gitga'at First nation is committed to working collaboratively with the Crown and other First nations to fashion a fair and administratively efficient environmental review process. Indeed, the Gitga'at have initiated discussions seeking common ground with other First Nations potentially affected by the Project.</p>	<p>The Consultation Framework provides further information about the integration of consultation into the JRP process and more details about the involvement of the Crown and Aboriginal Groups. The Crown is open to discussing how consultation, within the framework provided, will be carried out.</p>
Comments on the Draft environmental assessment Terms of Reference:	
<p>The scope of the Project and EA review: The draft TOR is unclear whether the marine shipping is included in the definition and scope of the Project. Marine transportation is not identified in the listing of Project components. Gitga'at's position is that the marine transportation within the boundaries of the Canadian waters needs to be included as part of the Project description.</p> <p>Gitga'at recommend that the Project scope extends to the outer limit of the EEZ (Economic Exclusion Zone) and EA must include all waters in Canadian jurisdiction to cover issues related to community interconnections, economic connections and ecosystem connectivity. As an example, herring collapses would have important and far-reaching economic and social ramifications that need to be assessed by the EA process.</p>	<p>The JRP Agreement has been changed to clearly include marine transportation of oil and condensate in the scope of project. The Terms of Reference, Part I Scope of Project includes marine transportation of oil and condensate.</p>
<p>The draft TOR acknowledges some level of overlap between the EA process and the TERMPOL review. While TERMPOL is a useful review of several technical issues related to shipping, those issues should be included in EA deliberations and decision-making.</p>	<p>TERMPOL is a separate process, however, it is expected that many of the studies prepared and information collected for the TERMPOL process will be made available by the proponent in the JRP process, as appropriate, especially given that the Scope of the Project now includes Marine transportation. The JRP</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
	<p>Agreement has been changed to reflect that TERMPOL is a separate process.</p>
<p>Cumulative effects: Considering marine transportation development, the Gitga'at are aware of numerous projects that are currently operating, expanding, or being proposed for waters within Canadian jurisdiction that would completely or partially follow the same or similar shipping routes as the proposed Project. Two tables compile projects associated with current and proposed marine terminal facilities in Prince Rupert and Kitimat. The assessment of cumulative effects needs to consider future increase in the export of Alberta tar-sands oil via BC's coastal waters. Increased oil export would result in a matching increase in oil shipping. Many projects include new expanding pipelines that would impact the Skeena and Fraser River watersheds as well as numerous others. The scope of the cumulative effects needs to include risk and impacts associated with the project in combination with a series of proposed marine transportation, pipeline and future expanded oil tar-sands development and export projects.</p>	<p>It is within the mandate of the JRP to determine the extent of cumulative effects for the review. Paragraph 16(1)(a) of the CEAA includes a requirement for the consideration of "cumulative effects that are likely". Section A.2.6 (Cumulative Effects Assessment) requires that the applicant file with the JRP, an analysis of the cumulative effects, mitigation measures and an evaluation of significance. The NEB Filing Manual has now been referenced in the JRP Agreement.</p> <p>As per the Terms of Reference – Part IV, the JRP will provide Aboriginal groups and the public with the opportunity to make known their views on these matters that should be considered by the JRP. The Gitga'at are encouraged to raise these concerns with the JRP.</p>
<p>Gitga'at suggest that cumulative impacts needs to consider the effects of increasing tar-sands development on the communities and ecosystems adjacent to and downstream of current and future development.</p>	<p>The Project as proposed by the proponent includes a pipeline, marine terminal and associated marine transportation of oil and condensate. Subsection 15(3) of the Canadian Environmental Assessment Act provides that, in the case of a JRP review, where a project is in relation to a physical work, an environmental assessment shall be conducted in respect of every construction, operation, modification, decommissioning, abandonment or other undertaking in relation to that physical work that is proposed by the proponent or that is, in the opinion of the Minister, after consulting with the responsible authority is likely to be carried out in relation to that physical work.</p> <p>The proponent has not indicated that it intends to develop any oil sands project. Rather, the evidence indicates that it would solely be an oil and condensate transportation provider for a number of producers and shippers. As a result, oil sands development has not been included in the scope of the Project. The JRP must however consider those environmental effects from existing and proposed oil sands mines that are likely to act cumulatively with</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
	<p>the environmental effects of the proposed Project, pursuant to Subsection 16(1) of the Canadian Environmental Assessment Act.</p> <p>The JRP will provide Aboriginal groups and the public the opportunity to make known their views on this issue that should be considered by the JRP. Participants are encouraged to make their views known to the JRP.</p>
<p>Marine Transportation issues should be incorporated into the EA process and deliberations on the Project, they are related to potential risks and impacts; those associated with accidents and oil spills, and those associated with routine operation of shipping activities.</p> <p>Oil spill risk modeling needs to take into account unique risk issues associated with double-hull tankers since they are planned to be employed in proposed Project.</p> <p>Oil spills impacts can be considered at two general levels: - Ecological impacts, and socioeconomic impacts.</p>	<p>Since marine transportation has been clearly included in the scope of the project, these would be reviewed as per 16(1)(a) of the CEAA (and within the Scope of the Factors document).</p>
<p>Socioeconomic impacts should cover health effects, cultural activities and sectors including traditional and commercial fishing, eco-tourism and aquaculture, negative impacts economic impacts resulting from depleted resources and high levels of community stress and conflict, and impacts to heritage resources.</p> <p>The Proponent's environmental track record is also to be assessed and the efficacy of his response to accidents in terms of mitigating environmental impacts and compensating for damages.</p> <p>An extensive inventory of heritage resources needs to be completed in areas along and adjacent to the proposed shipping lanes.</p>	<p>JRP Agreement, Part II – Factors to be Considered During the Joint Review identifies the requirements of the CEAA including Environmental Effects. The definition of environmental effect includes the following in part (b): any effect or any change the project may cause in the environment on health and socio-economic conditions, physical and cultural heritage, the current use of lands and resources for traditional purposes by Aboriginal persons or any structure, site or thing that is of historical, archaeological, paleontological or architectural significance. This is therefore a basic requirement of the CEAA and is within the mandate of the JRP.</p> <p>Scope of Factors document, 6.4 Aboriginal Rights and Interests which states the following:</p> <p>Further to the general guidance provided in Chapter 3 of the Filing Manual regarding consultation and Table A-5 Filing Requirements for Socio-Economic Elements, the Applicant will identify the lands, waters and resources of specific social,</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
	<p>economic, archaeological, cultural or heritage value to Aboriginal groups.</p> <p>Section A.2 of the NEB Filing Manual describes the NEB’s environmental and socio-economic assessment (ESA) process and the Filing Requirements for Socio-Economic Elements can be found in Table A-5. These express how the socio-economic impacts of the projects can be assessed.</p>
<p>Lack documentation of the potential socioeconomic costs of the Project and cumulative impacts. A full cost/benefit analysis is required to support the EA process and Gitga’at decision-making.</p> <p>Employment and spending can accrue to First Nations, negative impacts such as degradation of the traditional resource base and impediments to traditional culture can occur.</p>	<p>NEB Filing Manual A.2.5 Effects Assessment (2.): For those biophysical and socio-economic elements that require further analysis (as outlined in Table 3 which includes traditional land and resources use, human health and aesthetics, infrastructure and services and employment and economy), describe, quantify and justify appropriate: spatial and temporal boundaries; local and regional conditions of the element, or valued component; and key receptors that could potentially be affected.</p>
<p>Mitigation measures include incentives for shipper to use cleaner fuels while in port, or incorporating shore-power infrastructure into ports. Invasive species have an impact on shellfish species. Shipping noise generated by large vessels can be damaging and disruptive to marine species, especially cetaceans (humpback whales and killer whales, two species considered threatened under SARA Act).</p> <p>Mitigation strategies should be prepared to avoid potential whale strikes, ship wake and shoreline erosion and the accumulation of debris and litter that could impact fish, marine mammals, birds, turtles and benthic habitats.</p>	<p>Mitigation measures are required according to 16(1)(d) of the CEAA. Therefore, this is within the mandate of the JRP to consider.</p>
<p>Gitxaala First Nation / Mark Ignas</p>	
<p>Gitxaala Nation has stated both in our meetings and in written correspondence that “the CEAA/ NEB joint review panel process identified to manage and deliver the Enbridge Pipeline project is not the appropriate structure to ensure meaningful consultation with the Gitxaala Nation. Specifically, the EA process as proposed does not ensure adequate protection of Gitxaala aboriginal rights and title interest(s) as per Section 35 of the Canadian Constitution”.</p> <p>In your response to the above statement you noted that “the Crown welcomes further discussion with the Gitxaala Nation in regard to your concerns about the federal review and consultation process” followed by a statement saying “The JRP process will be the primary vehicle through which the concerns of the Gitxaala Nation regarding project-related impacts on its rights can be heard”. In one sentence you state the Crown’s willingness to discuss Gitxaala’s concerns with the federal review process, while demonstrating an unwillingness, on the part of the Crown, to consider the development of a process</p>	<p>The Consultation Framework provides further information about the integration of consultation into the JRP process and more details about the involvement of the Crown and Aboriginal Groups.</p> <p>The JRP Agreement has been amended to include information on the involvement of Aboriginal groups in the JRP process (subsections 6.5 and 8.1 of the JRP Agreement). Subsection 8.1 of the JRP Agreement gives the JRP the mandate to receive information from Aboriginal peoples related to the nature and</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
<p>that provides adequate address of the impacts to Gitxaala Nation's asserted and established aboriginal rights arising from the contemplated Enbridge Pipeline Project.</p> <p>As you are no doubt aware the Supreme Court of Canada's 2004 decision in <i>Haida Nation v. British Columbia</i> confirms that the Federal and Provincial governments owe a duty of consultation to aboriginal groups whose aboriginal rights are protected by s. 35 of the <i>Constitution Act, 1982</i>. The Honour of the Crown requires that governments consult with, and accommodate, claims of aboriginal rights (including title) even in advance of their formal proof. Once the Crown has notice of the aboriginal rights claim, it has an obligation to investigate the strength of the claim and the degree to which the proposed activity will negatively affect the right; and then to consult with, and accommodate, the First Nation accordingly. Government(s) and proponents duty to consult applies at each stage of the planning process, and to be effective, the consultation must occur early on in the planning process. Adequate and meaningful consultation as it relates to the Environmental Assessment process for the Enbridge Pipeline Project has yet to occur.</p>	<p>scope of potential or established Aboriginal and treaty rights that may be affected by the Project and the impacts or infringements that the Project may have on potential or established Aboriginal and treaty Rights.</p>
<p>Accordingly, the Environmental Assessment as proposed for this project, should not proceed until Canada has adequately consulted with all First Nations early on, and at each step of the way. As part of this consultation, Canadian Environment Assessment Agency must ensure Gitxaala is meaningfully consulted in the following and other EA-related steps:</p>	<p>The Consultation Framework provides further information about the integration of consultation into the JRP process and more details about the involvement of the Crown and Aboriginal Groups.</p>
<p>- the decision to review the project, and what level of review it should be subjected to (e.g., screening or comprehensive)</p>	<p>The decision to review the project is based on the CEAA and the NEBA requirements and was taken in 2006. A JRP is the most rigorous level of review under the CEAA. The decision to refer the project to a JRP was made by the Minister of the Environment on September 29, 2006.</p>
<p>- designing and setting up the EA process</p>	<p>The opportunity for Aboriginal groups, including Gitxaala, to provide input into the design of the EA process (draft Agreement and terms of reference) was initiated in October 15, 2008.</p>
<p>- the guidelines (terms of reference) that are issued to the Proponent for the preparation of the EA Application/Project Report</p>	<p>The JRP Terms of Reference have been revised to clarify the scope of factors to be considered by the JRP. This section now states that the 'JRP in conducting its review will have regard to the following:</p> <p style="padding-left: 40px;">The National Energy Board (NEB) Filing Manual (2004); and</p> <p style="padding-left: 40px;">The document issued by the Agency entitled "Scope of the Factors – Northern Gateway Project" and dated</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
	<p data-bbox="1757 310 1924 337">August 2009.</p> <p data-bbox="1661 370 2491 581">The Scope of the Factors document was prepared by the Agency in consultation with other federal authorities and focuses on factors to be considered for the marine components of the Project. This additional direction addresses concerns raised by Aboriginal groups and the public during the public comment period. The document will be provided to the proponent to guide the preparation of the EA documents.</p>
<p data-bbox="190 607 1239 634">- determining the adequacy of the information contained in the Application/Project Report</p>	<p data-bbox="1661 607 2491 1029">Part IV of the Terms of Reference (ToR) appended to the JRP Agreement now describes the main steps of the review process in more detail. After the initial Application has been filed by the proponent, the JRP will review it to determine if there is sufficient information in the Application to proceed with a public hearing on the project. If it is determined by the JRP that there is sufficient information, it will proceed to issue a Hearing Order. If there is not sufficient information, the proponent will be notified and the process will not continue until the required information has been filed with the JRP. If the initial Application is deemed adequate to proceed to a public hearing all parties will have an opportunity to determine how they want to participate in the review. The adequacy of information will be subject to an extensive review process through the JRP.</p> <p data-bbox="1661 1062 2491 1175">The Consultation Framework provides further information about the integration of consultation into the JRP process and more details about the involvement of the Crown and Aboriginal Groups.</p>
<p data-bbox="190 1208 903 1235">- the Minister's decision to issue an environmental certificate</p>	<p data-bbox="1661 1208 2491 1382">The decision of whether to recommend the issuance of a Certificate of Public Convenience and Necessity will be made by the JRP under the NEBA. It is important that Aboriginal groups participate in the JRP process to ensure that their concerns are taken into account in any decision to recommend the issuance of a Certificate of Public Convenience and Necessity.</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
<p>- project permitting</p>	<p>Most project permitting issues will be addressed throughout the JRP process, however project permitting issues that are not dealt with through the JRP process may require further consultation and will be based on information provided through the JRP process. More information is provided in Phase V described in the Communiqué.</p>
<p>- capacity funding to participate in this process</p>	<p>Funding has been made available through the Aboriginal Funding Envelope of the Agency's Participant Funding Program. Funding was made available for Phase I starting October 15, 2008. A letter announcing the availability of funding for Phase II and III under the Aboriginal Funding Envelope was provided to Aboriginal groups starting July 24th, 2009 to assist with their involvement in this process. The Gitxaala First Nation is encouraged to pursue Phase II and III funding under this program to assist with their involvement in the Pre-hearing and Oral Hearing phases of the JRP process. The deadline to receive applications is two weeks after the release of the final JRP Agreement. The Agency is available to discuss the preparation of applications.</p>
<p>To further facilitate CEAA's understanding of this requirement I encourage you to review the <i>Dene Tha' First Nation v. Canada</i> case (Nov. 2006), wherein the Federal Court applied the <i>Haida</i> principles and found that the Crown had failed to adequately consult with the Dene Tha' First Nation when designing the process by which the environmental assessment for the McKenzie Gas Project would be carried out. As a result, the Court ordered that the entire EA process must be put on hold until the Dene Tha' were properly consulted. It is Gitxaala's position that CEAA do the same with the Enbridge process until proper consultation has occurred.</p> <p>Gitxaala Nation's preliminary assessment of the potentially adverse effects / infringements of the Enbridge Pipeline Project and the seriousness of these effects on Gitxaala people suggest that the Crown has a duty to engage in consultation model that ensures the ability of Gitxaala to participate as an equivalent governmental authority in all aspects decision making process.</p>	<p>The opportunity for Aboriginal groups, including Gitxaala, to provide input into the design of the EA process (draft Agreement and terms of reference) was initiated in October 15, 2008.</p> <p>The Consultation Framework provides further information about the integration of consultation into the JRP process and more details about the involvement of the Crown and Aboriginal Groups.</p> <p>The process outlined in the JRP Agreement provides the Gitxaala Nation with a process that allows their concerns to be considered including the ability to cross examine the proponent's evidence and experts should the Gitxaala Nation choose to be an intervenor. The JRP will be directed to receive information related to the nature and scope of established or potential Aboriginal and treaty rights that may be affected by the</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
	<p>project and the impacts that the project may have on these rights.</p>
<p>The approach taken to decide what existing legislative process will be used to ensure a fair and orderly review falls under the Crown's duty to consult with Gitxaala Nation. Discussions on how such a decided upon process will meaningfully recognise Gitxaala's decision making authority over its territorial lands and waters also fall under the duty of the Crown. As indicated, these determinations need to take place prior to determining what review process is to be used. Legal precedent confirms, that the duty of the Crown to consult is triggered by the Crown's knowledge that a project under its consideration may adversely affect unresolved aboriginal rights, and that the scope of the consultation is proportionate to the seriousness of the potential adverse effect upon the rights and title claimed.</p>	<p>The review process being used to review this project is based on legislation, particularly the <i>CEAA</i> and the <i>NEBA</i>. The proponent initiated the process by providing a Preliminary Information Package in 2005.</p>
<p>Gitxaala requirement that a review process be adopted which properly assesses the impacts and the precise level of infringement on Gitxaala's rights and title is consistent with legal requirements. Further, such an assessment cannot be effectively determined until a comprehensive inventory and meaningful valuation of the resources within our territory, including the uses and their significance to the people of Gitxaala has been completed in studies designed, controlled and in consultation with our community.</p>	<p>Further to the general guidance provided in Chapter 3 of the Filing Manual regarding consultation and Table A-5 Filing Requirements for Socio-Economic Elements, and as per the Scope of the Factors document, the Applicant is expected to identify the lands, waters and resources of specific social, economic, archaeological, cultural or heritage value to Aboriginal groups.</p> <p>The Joint Review JRP Agreement has been amended to include information on the involvement of Aboriginal groups in the JRP process (subsections 6.5 and 8.1 of the JRP Agreement).</p> <p>Section 6.5 of the JRP Agreement requires the Proponent to provide evidence regarding the concerns of Aboriginal Groups. The JRP will carefully consider all evidence provided in this regard by Aboriginal peoples.</p> <p>JRP Agreement subsection 8.1 gives the JRP the mandate to receive information from Aboriginal peoples related to the nature and scope of potential or established Aboriginal and treaty rights that may be affected by the Project and the impacts or infringements that the Project may have on potential or established Aboriginal and treaty Rights.</p> <p>A letter announcing the availability of funding under the Aboriginal Funding Envelope was provided to Aboriginal groups</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
	<p>on July 24th/27th, 2009 to assist with their involvement in Phases II and III of the process.</p>
<p>A further failing of the joint review process is that it does not present an avenue for presenting this information in a meaningful manner. “Public hearings” and “informal opportunities” to convey Gitxaala Nation’s interests are neither effective nor meaningful. The proper determination of effective measures for mitigation and accommodation that be undertaken as a result of infringements on Gitxaala Nation rights and title resulting from the project, cannot be completed without an appropriate reporting and decision making structure in place.</p>	<p>The Consultation Framework provides further information about the integration of consultation into the JRP process and more details about the involvement of the Crown and Aboriginal Groups.</p>
<p>Gitxaala Nation would like the opportunity to discuss with the Crown the option of initiating an independent First Nation Review Process which may run parallel to the federal joint panel review process. A process as such, if properly structured, would allow for Gitxaala to be directly involved with the scoping of the review, the development of an effective and meaningful process in which to convey our Nations interests and evaluate the risks and infringements associated with the Enbridge Pipeline Project.</p> <p>In the interim we strongly suggest Enbridge cease all environmental assessment work in our territory until the issue of adequate consultation is resolved and appropriate terms of reference for this project is determined. Failure to do so will necessitate Gitxaala effecting the appropriate action to protect community well being. A fiduciary responsibility that the crown, and CEAA, to date, have failed to uphold.</p>	<p>The Consultation Framework provides further information about the integration of consultation into the JRP process and more details about the involvement of the Crown and Aboriginal Groups. The Crown is open to discussing how consultation, within the framework provided, will be carried out.</p>
<p>Nadleh Whut’en First Nation / Tara Marsden</p>	
<p>Our Nation has significant concerns regarding the potential environmental, social, cultural, legal and economic impacts of this project. Nadleh Whut’en has significant concerns regarding both the proposed JRPA as well as the Aboriginal Consultation Approach.</p> <p>Nadleh Whut’en is in receipt of the Feb 2009 document entitled “Approach to Crown Consultation for the Northern Gateway Project.” This document was unilaterally developed and it does not appear that it incorporates any of the comments made to date by Nadleh Whut’en, or any other FNs. Moreover, the document was appended to a letter announcing the ‘public comment period’ for the JRPA, which has a deadline of April 14 2009. While comments have been welcomed on the JRPA, there has been no similar request for comments, meetings, or input on the Consultation document. It appears that the Crown is not willing to modify this document or approach.</p> <p>No opportunity for discussion on a parallel or separate process to address Aboriginal rights and title. Nadleh Whut’en has been clear on the concerns over the proposed process, and has been reasonable in proposing alternate processes. The response from CEAA has been to neither address Nadleh Whut’en concerns, nor to agree to discuss any separate process. This does not represent the give-and-take consultation process that the courts have called for.</p>	<p>The Consultation Framework provides further information about the integration of consultation into the JRP process and more details about the involvement of the Crown and Aboriginal Groups. The Crown is open to discussing how consultation, within the framework provided, will be carried out.</p> <p>The JRP is the decision maker under the NEBA and their process is defined in regulation (Rules of Practice and Procedure). Involvement in the JRP review process is the main way to get your information to the decision makers. The federal government does not support a separate, parallel First Nations review process. The rationale for this is provided in the Communiqué.</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
Concerns regarding the “Approach to Crown Consultation for the Northern Gateway Project”:	
<p>1. The Crown’s proposed approach to consultation on the Enbridge project was unilaterally developed without FNs involvement. [reference to courts]. While the Crown has requested FNs comments on the draft ToR for the JRP, to date the Crown has not been prepared to negotiate changes to its overall framework for FNs consultation. In particular, there has been no meaningful consultation on the preliminary question of the appropriate role of the JRP, if any, in meeting the Crown’s constitutional duties.</p>	<p>Within the approach provided, how consultation was integrated into the process as a “whole-of-government” approach was provided, however, how that consultation is conducted was not defined. The Crown has been and continues to be open to discussing how consultation, within the framework provided, will be carried out.</p>
<p>2. The Crown’s proposed approach to consultation disregards FNs rights of governance, management and decision-making in their territories. By unilaterally proceeding with the JRP process, the Crown has made it impossible to have good faith, meaningful, reasonable and responsive consultation in regard to FNs Aboriginal Rights of governance. Although the specifics of the jurisdictional authority of each nation may not yet have been adjudicated by a court or defined in treaty, the honour of the Crown nevertheless demands consultation and accommodation to give appropriate ‘interim effect’ to FNs decision-making authority. By way of contrast, the JRP process does not involve FNs as decision-makers on a government-to-government basis.</p>	<p>The Consultation Framework provides further information about the integration of consultation into the JRP process and more details about the involvement of the Crown and Aboriginal Groups.</p>
<p>3. The Crown’s proposed approach treats FNs consultation as an ‘afterthought’ to standard public participation requirements. CEAA and NEB have statutory obligations regarding public participation in the JRP process; however, the JRP process engages FNs only indirectly as a subject of the public. The only distinct FNs consultation offered is late in the day after the EA Report has been completed, and then only on the ‘residue’ of issues that have not been addressed by the JRP or the proponent. This is not consistent with the Crown’s duties as outlined by the courts.</p>	<p>The public comment period on the draft Joint Review JRP Agreement was initiated February 9, 2009 whereas, the opportunity for input into the Agreement was initiated with Aboriginal groups starting October 15, 2008 almost four months ahead of the general public.</p> <p>Funding has been made available through the Aboriginal Funding Envelope of the Participant Funding Program of the Canadian Environmental Assessment Agency to assist Aboriginal groups with their involvement in the JRP process.</p> <p>Many changes have been made to the JRP Agreement in response to comments/concerns of Aboriginal groups as seen throughout this document.</p> <p>The JRP Agreement has been amended to include information on the involvement of Aboriginal groups in the JRP process (subsections 6.5 and 8.1 of the JRP Agreement). JRP Agreement section 8.1 gives the JRP the mandate to receive information from Aboriginal peoples related to the nature and scope of potential or established Aboriginal and treaty rights that may be</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
	<p>affected by the Project and the impacts or infringements that the Project may have on potential or established Aboriginal and treaty Rights.</p>
<p>4. The JRP has no mandate to conduct FNs consultation or to fully assess potential impacts on Aboriginal Title and Rights. Before federal authorities can issue approvals for the Enbridge pipeline, CEAA must conduct an EA. However, the <i>CEA Act</i> limits this assessment to impacts on current FNs land uses and cultural heritage, not the full scope of potentially affected Aboriginal Rights. The JRP has no mandate, for example, to assess impacts on the jurisdictional aspects of Aboriginal Title and governance rights, including the right to decide the uses to which the land and water will be put, or indeed impacts on any <i>future</i> uses of land or water grounded in Aboriginal Title and Rights. While the JRP also has the power under the <i>NEB Act</i> to consider the public interest and any other relevant factor in deciding whether a Certificate of Public Convenience and Necessity should be issued to approve the pipeline, impacts on Aboriginal Title and Rights are not among the considerations explicitly listed in the <i>NEB Act</i>, which focuses on more narrow financial and economic considerations. The courts have held that there is a “duty to focus on the relevant issues” in consultation with FNs. The JRP does not have the mandate to do so with respect to Aboriginal Title and Rights.</p>	<p>The Consultation Framework provides further information about the integration of consultation into the JRP process and more details about the involvement of the Crown and Aboriginal Groups.</p> <p>Further to the general guidance provided in Chapter 3 of the Filing Manual regarding consultation and Table A-5 Filing Requirements for Socio-Economic Elements, as per the Scope of the Factors document, the Applicant is expected to identify the lands, waters and resources of specific social, economic, archaeological, cultural or heritage value to Aboriginal groups.</p> <p>The Joint Review JRP Agreement has been amended to include information on the involvement of Aboriginal groups in the JRP process (subsections 6.5 and 8.1 of the JRP Agreement).</p> <p>Section 6.5 of the JRP Agreement requires the Proponent to provide evidence regarding the concerns of Aboriginal Groups and the JRP, so the JRP may carefully consider all evidence provided in this regard by Aboriginal peoples.</p> <p>JRP Agreement subsection 8.1 gives the JRP the mandate to receive information from Aboriginal peoples related to the nature and scope of potential or established Aboriginal and treaty rights that may be affected by the Project and the impacts or infringements that the Project may have on potential or established Aboriginal and treaty Rights.</p>
<p>5. The Crown’s proposed approach involves inappropriate delegation to the applicant/proponent. [reference to past court cases]. However, policy documents from the NEB indicate that it relies almost exclusively on the company who is planning the project to consult with FNs. The company is then expected to provide evidence of its engagement with FNs to the NEB (or JRP), who then assesses the consultation and accommodation efforts of the company in its recommendations/decision. This approach is echoed in the “Approach to Crown Consultation for the</p>	<p>Proponents are expected to engage Aboriginal groups and as appropriate, make changes/adjustments to their project based on concerns raised before an Application is filed.</p> <p>The Crown is committed to fulfill its legal duty to consult and is</p>

ISSUE / CONCERN AND / OR SUGGESTION	Response
<p>Northern Gateway Project” document. The implication is that the proponent has the principal substantive obligation of consultation, with the Crown merely dealing with the ‘residue’ or any outstanding issues.</p>	<p>relying on the JRP and proponent to the extent possible. The Consultation Framework provides further information about the integration of consultation into the JRP process and more details about the involvement of the Crown and Aboriginal Groups.</p>
<p>For these reasons, Nadleh Whut’en has been working with other affected FNs to develop a FNs Review Process for the proposed project. Nadleh Whut’en is interested in meeting with responsible federal agencies to discuss a separate process. We have outlined the significant concerns regarding the current process, which have gone unheeded. CEAA has agreed to meet with us to discuss our concerns, but not agreed to discuss a separate process to address these concerns. I would be pleased to meet with you to discuss the above-listed issues at your earliest convenience.</p> <p>There needs to be clear indication from the federal government there is an openness to discuss alternatives to the existing process, or the ability for FNs to significantly alter or modify the current process to reflect a true government-to-government decision-making process. To this end I request that you respect our interests in this matter and make no further decisions or announcements until we have reached an agreement on the Aboriginal consultation approach.</p>	<p>The JRP Agreement has been amended to include information on the involvement of Aboriginal groups in the JRP process (subsections 6.5 and 8.1 of the JRP Agreement). JRP Agreement subsection 8.1 gives the JRP the mandate to receive information from Aboriginal peoples related to the nature and scope of potential or established Aboriginal and treaty rights that may be affected by the Project and the impacts or infringements that the Project may have on potential or established Aboriginal and treaty Rights.</p> <p>The Consultation Framework provides further information about the integration of consultation into the JRP process and more details about the involvement of the Crown and Aboriginal Groups. The Crown is open to discussing how consultation, within the framework provided, will be carried out.</p>
<p>Muskwacis Cree / Clayton Leonard, Legal</p>	
<p>Our firm has been retained to represent the Maskwacis Cree Nations (Samson Cree Nation, Louis Bull Tribe, Montana First Nation, and Ermineskin Cree Nation) in the Joint Review Panel process and to advise the Maskwacis in any related discussions with Enbridge Northern Gateway Pipelines Limited Partnership. The Montana First Nation, Louis Bull Tribe and Ermineskin Cree Nation also wish to confirm that they concur with the positions and concerns expressed by the Samson Cree Nation in its letters to Enbridge dated April 8, 2009 and to the JRP dated April 14, 2009 regarding the ToR and draft JRP agreement.</p> <p>Further the Maskwacis Cree Nations formally raise the objection that they did not receive the Aboriginal Consultation Initiation Letter of October 15, 2008 nor the Aboriginal Consultation Letter of January 6, 2009 and accompanying information regarding the JRP for the above captioned pipeline project. We expect that the JRP will take immediate steps to remedy this failure to consult with the Maskwacis Cree Nations.</p>	<p>Several discussions have occurred between the Maskwacis Cree Nations’ legal council and the Agency to assist in describing Samson’s interests in the project.</p> <p>A copy of the Aboriginal Funding Envelope funding application has been provided for the Maskwacis Cree Nations to apply for funding and the Agency has discussed options and the types of items eligible.</p> <p>The Agency has offered to meet with the Maskwacis Cree Nations to provide a more detailed overview of the JRP process and how Crown consultation fits into that process.</p>