



## Elsipogtog Band Council

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August 25, 2017

**Re: Environmental and Regulatory Reviews Discussion Paper**

I write on behalf of the Elsipogtog First Nation (“Elsipogtog”) in response to the federal government’s Environmental and Regulatory Reviews Discussion Paper, dated June 2017 (the “Discussion Paper”).

We have had an opportunity to review the Discussion Paper, along with Canada’s responses to the recommendations put forward by the Standing Committee on Fisheries and Oceans in connection with its review of the *Fisheries Act* (the “*Fisheries Act* Recommendations”) and the Standing Committee on Transport, Infrastructure and Communities regarding its review of the *Navigation Protection Act* (the “NPA Recommendations”). The Discussion Paper, in particular, sets out a number of Canada’s proposals for improving federal environmental assessment and regulatory processes and enhancing Indigenous participation in these processes both prior to and during a project assessment.

Elsipogtog supports many of these proposals in principle. We are also encouraged by the fact that Canada has identified the advancement of reconciliation with Indigenous peoples as a key principle guiding its recommendations for reform. We trust that this commitment to advance reconciliation will also guide our future discussions with the Crown on how best to achieve the recommended reforms.

However, we remain concerned that aspects of the proposals are inconsistent with Crown’s constitutional obligations as confirmed by the Supreme Court in *Tsilhqot’in*, the principles of the *United Declaration on the Rights of Indigenous Peoples* (“UNDRIP”) and the federal government’s commitment for a renewed relationship with Indigenous peoples based on recognition and respect. We have set out below our high level comments in response to Canada’s recommendations and our expectations for moving forward on a collaborative, nation-to-nation basis.

### **Environmental Assessment Review**

#### ***Partnering with Indigenous Peoples***

Elsipogtog supports the early involvement of Indigenous peoples in the assessment of projects that have the potential to impact our Aboriginal title, rights and treaty rights and our

territory. Such early involvement is important to ensure that Indigenous concerns about a proposed project are addressed and integrated at the earliest stage of decision-making, before irrevocable decisions about the proposed project are made. We expect that any steps taken by the federal government to implement this will be consistent with the Crown's constitutional obligations to consult and accommodate Indigenous peoples and to attempt to justify infringements in a manner consistent with the honour of the Crown. We look forward to meeting with the federal government to discuss ways to integrate this aspect of the impact assessment with our existing protocols and policies.

Elsipogtog supports incorporating collaborative decision-making processes that respect and recognize Indigenous jurisdictions, laws, practices and governance systems within impact assessment processes. We also support environmental assessment legislation that provides for cooperation with Indigenous jurisdictions and allows for substitution of project assessments to Indigenous governments. Implementing these reforms will assist with the federal government's proposals to strengthen the process for assessing project impacts on Indigenous peoples and their rights and the inclusion of Indigenous knowledge, alongside other sources of evidence, throughout the assessment process. The assessment of project impacts on Aboriginal title and rights and treaty rights and the application of Indigenous knowledge are processes that will feed into one another and must be driven by Indigenous peoples. This is particularly true when we consider the use of Indigenous knowledge, which is something very sacred as it encompasses our laws, culture and traditions.

We are very concerned, however, by the Crown's proposed retention of ultimate decision-making authority for project's undergoing impact assessments. As indicated in our written submissions to the Expert Panel during its review of federal environmental assessment processes (the "EA Expert Panel"), Elsipogtog's vision of a collaborative process of consent-based decision-making within the context of project assessments includes the ability of Elsipogtog to make final decisions about whether we will consent to an activity that has the potential to affect our Aboriginal title and rights and treaty rights. Our recommendation is based on accepted Canadian and international legal principles, including those set out in the UNDRIP. Allowing the Crown to retain ultimate decision-making authority is at odds with the recognition of Indigenous jurisdictions and law-making authority calls into question the ability of the proposed impact assessment reforms to achieve reconciliation.

Elsipogtog understands that the federal government is also proposing to establish a single government agency to be responsible for both project impact assessments and for coordinating the consultation and accommodation of Indigenous peoples. We request that the federal government provide further details on this proposal, including how the federal government expects that this agency will fulfil the Crown's constitutional obligations and advance the process of reconciliation.

### ***Cumulative Effects Assessments***

Elsipogtog is supportive of the federal government's proposal to assess and manage the cumulative effects of development through the use of strategic and regional assessments and the creation of national environmental frameworks to inform these assessments. As put forward in our written submissions to the EA Expert Panel, it is imperative that cumulative

effects assessments take place at the stage of strategic planning, before any decisions about the feasibility of a particular project are made by government.

We see an important role for Indigenous peoples in the development of strategic and regional assessments and the policy supporting these assessments. One way for Elsipogtog to be involved in these processes is to develop our own land use plan, which would set out our expectations about the way in which the land and resources within our territory will be managed and our role in their management. Such a land use plan would inform Elsipogtog decision-making about whether new development within our territory is feasible given existing pressures on the land and resources. As recommended in our submissions to the EA Expert Panel, Canada must invest the resources necessary to allow Elsipogtog and other Indigenous peoples to undertake their own regional land use planning initiatives. The valuable information contained within Indigenous land use plans, once completed, may be used to inform the strategic and regional assessment processes and any policy development being undertaken by the federal government in support of these processes. Elsipogtog looks forward to discussing our recommendation further with the federal government.

### **National Energy Board Modernization**

Overall, the federal government's proposal for modernizing the National Energy Board is severely lacking in its consideration of and recommendations aimed at enhancing Indigenous participation in the federal government's regulatory processes governing energy projects. Despite our detailed submissions on the importance of recognizing Indigenous jurisdictions and engaging in consent-based decision-making with Indigenous peoples on matters that have the potential to affect our rights, the Discussion Paper and the proposal for reforms recommended by the federal government are largely silent on these points. Elsipogtog is disappointed with the Crown's lack of consideration of these issues. We request that the Crown provide a revised proposal which meaningfully incorporates the recommendations of Elsipogtog and other Indigenous peoples for reform of the National Energy Board and its regulatory review processes.

### **Fisheries Act Review**

Elsipogtog is pleased that the federal government has committed to restore many of the fish and fish habitat protections lost as a result of the 2012/2013 amendments to the *Fisheries Act*. As we noted in our submissions to the Minister of Fisheries and Oceans, these protections are necessary to ensure that our constitutionally-protected rights, culture and traditions are preserved. We look forward to hearing from the federal government on the specific amendments it will propose to ensure that the protections lost as a result of the 2012/2013 amendments are restored.

Elsipogtog is also encouraged by the federal government's stated commitment to develop partnerships with Indigenous peoples, including by enhancing Indigenous participation in the conservation and protection of fish and fish habitats. However, based on our review of the Discussion Paper, the *Fisheries Act* Recommendations and Canada's response to the *Fisheries Act* Recommendations, it is not clear how the federal government intends to achieve this goal. In particular, we are concerned that the *Fisheries Act* Recommendations do not

include measures to increase Indigenous participation in fisheries management and are largely non-responsive to many of the concerns raised by Indigenous peoples, including Elsipogtog, during the review process.

The most significant omission from the *Fisheries Act* Recommendations and Canada's response to the *Fisheries Act* Recommendations is the necessity to create opportunities for Indigenous peoples to participate in decision-making regarding fish, fish habitat and fisheries management and conservation. The recommendations put forth by Elsipogtog for the modernization of the *Fisheries Act* call for the Crown and Indigenous peoples to work together to develop collaborative decision-making processes, based on the recognition of Indigenous jurisdictions and laws, to deal with the management and governance of fish, fish habitat and fisheries. As explained above, collaborative governance and management are integral to achieving the goal of reconciliation.

Elsipogtog will not accept the status quo of having the Crown unilaterally impose its regulatory processes and decisions on Indigenous peoples. Fish is integral to our culture, traditions and economy. We must be directly involved in its management and governance. This involvement must extend beyond Indigenous participation in advisory committees and open-ended promises of Indigenous engagement. Elsipogtog expects the federal government to undertake its amendment of the *Fisheries Act* in a manner that honours its commitment to implement *UNDRIP* and advances the goal of reconciliation.

### **Navigation Protection Act Review**

We note that Canada is proposing to undertake a number of initiatives to increase the number of waterways that would be subject to protection under the *Navigation Protection Act* (the "NPA"). These initiatives are important, and we look forward to working with the federal government to ensure that the waterways within our territory continue to be protected so that we may continue to exercise our Aboriginal title and rights and treaty rights, laws, culture and traditions.

Canada's proposed initiatives, however, fall short in their response to the recommendations made by various parties throughout the review process to restore the requirement that authorizations issued under the NPA trigger environmental assessments. This gap in the Discussion Paper and Canada's response to the NPA Recommendations has left us wondering how potential impacts of authorizations sought under the NPA, including on our Aboriginal title and rights and treaty rights, will be assessed. Elsipogtog requests that Canada clarify how the issuance of NPA authorizations will fit into the larger impact assessment process being contemplated by the federal government.

Elsipogtog expects that it will be involved in any decision-making surrounding the issuance of authorizations sought under the NPA that have the potential to affect our Aboriginal title and rights and treaty rights. Again, this can be achieved through the development of collaborative and consent-based decision-making processes involving both Indigenous peoples and the Crown, as described above. We appreciate that the federal government has identified this as one of the objectives of its proposed amendments to the NPA in the Discussion Paper. We look forward to discussions with the federal government on how this can be achieved.

Elsipogtog is also very concerned about the Crown's proposal to have proponents as the primary source of consultation with Indigenous peoples. The protection of Canada's waterways and the fulfillment of the duty to consult and accommodate Indigenous peoples and justify potential infringements of our Aboriginal title and rights and treaty rights are obligations that properly lie with the Crown. For the Crown to disengage with the consultation and accommodation process would be contrary to established law and inconsistent with the honour of the Crown. Elsipogtog requests that Canada clarify how it intends to meet these constitutional obligations.

Elsipogtog appreciates the work that has gone into the various environmental and regulatory review processes and the development of the Discussion Paper. The proposals set out therein provide an important start to the necessary reform of processes that have significant implications for the protection and preservation of our Aboriginal title and rights and treaty rights. However, we also have serious concerns that many aspects of the proposals fall short of the Crown's obligations and the federal government's recent commitments to Indigenous peoples. For this reason, it is absolutely necessary that Elsipogtog be directly involved in any decisions arising out of these processes that have the potential to affect our people, title and rights and territory. We have put forward our recommendations for achieving this. We look forward to discussing the implementation of these recommendations with the Crown and receiving clarification on the various issues we have identified above.

Yours truly,

ELSIPOGTOG FIRST NATION