



Honourable Minister Jim Carr
MINO/MINO
Natural Resources Canada
580 Booth Street, 21st Floor, Room. C7-1
Ottawa, ON
Canada K1A 0E4

July 20, 2016

Via E-mail: minister@nrcan-rncan.gc.ca

National Energy Board
517 Tenth Avenue SW
Calgary, Alberta
T2R 0A8

Via E-mail: NRCan.NEBModernization-ModernisationONE.RNCan@Canada.ca

**Re: National Energy Board Modernization
Request for consultation with Mikisew Cree First Nation**

Mikisew Cree First Nation ("Mikisew") requests that Canada consult with it directly regarding the National Energy Board ("NEB") modernization and the development of any amendments to the NEB Act. Mikisew also provides the following comments on the Expert Panel's (the "Panel's") draft Terms of Reference ("ToR").

Background to Mikisew's Request for Direct Consultation

Mikisew's Interest in the NEB Modernization

Mikisew has constitutionally protected Aboriginal and Treaty Rights. Mikisew members practice a unique way of life based on using their traditional territory for hunting, trapping, fishing, travelling along waterways, passing on Cree culture and spirituality to future generations, and other uses. Treaty 8 guarantees that Mikisew will be able to continue its traditional way of life. Canada's Treaty Commissioners assured the Aboriginal signatories that "they would be as free to hunt and fish after the Treaty as they would be if they never entered into it."

Mikisew is located in northeastern Alberta, in the heart of the oil sands. Mikisew is concerned that the rapid pace of development in its territory is threatening its way of life. Oil sands projects and related infrastructure, including pipelines, have caused landscape fragmentation, water loss and water quality degradation. Mikisew members are fearful of the contamination of natural resources from this development.



GOVERNMENT & INDUSTRY RELATIONS





Review processes for resource development projects, including those under the *NEB Act*, are one of the most important means of regulating development in Mikisew's traditional territory. Mikisew relies on regulatory processes to learn about the impacts of oil sands and other developments. Regulatory processes facilitate engagement with industry, as decision-makers may require or encourage proponents to address Mikisew's concerns before approving projects.

Mikisew, like many other First Nations, has concerns about the impartiality of the NEB and the accessibility of NEB proceedings. Mikisew's concerns also extend to the lack of clarity regarding how NEB processes relate to constitutional obligations to protect treaty rights, credibly assess impacts to Aboriginal and treaty rights before decisions are made, and consult in a manner that upholds the honour of the Crown. The Federal Court of Appeal's recent decision in *Gitxaala Nation v Canada*, 2016 FCA 187, highlights the ongoing lack of clarity regarding the NEB's mandate when reviewing applications for a certificate of public convenience and necessity and the Crown's reliance on the NEB process to fulfill the duty to consult.

Canada Must Consult With Mikisew on the NEB Modernization

Mikisew and other Aboriginal peoples are entitled to certainty that decision-making processes will take their Aboriginal and Treaty Rights into account, and transparency as to how this will be done. As the NEB modernization will engage these issues, there is a real possibility that the review process will result in decisions that may adversely impact Mikisew.

For these reasons set out above, Mikisew is of the view that Canada must, as a matter of law, consult with it directly regarding the NEB modernization. In addition to any legal obligations, Mikisew's extensive experience with regulatory processes means that there also are practical advantages to Canada consulting with Mikisew directly. We would be happy to meet with representatives of the Federal Government to discuss what this consultation process could look like and how it can be coordinated with the broader public engagement process.

Please confirm, as soon as possible, that Canada will consult with Mikisew bilaterally regarding the review of the NEB Act and any potential decisions arising from that review.

Mikisew's Comments on the draft ToR

Mikisew provides the following comments on the Panel's draft ToR:

Context

Consideration of impacts to Section 35 Rights is a key component of any public interest mandate. While consideration of Section 35 Rights overlaps with economic, environmental and social considerations, it is a distinct consideration.





So that the Panel has a clear understanding of the context of this review, Mikisew requests that the ToR be revised so that “Indigenous considerations” is explicitly included.

Scope of Review

Mikisew request that a new bullet be added to the list of potential outcomes under the heading titled “Governance”. The new bullet would add that the Panel can make finding and recommendations about the role of advisory bodies relating to Indigenous knowledge and Indigenous participation.

For the reasons provided above, Mikisew is concerned with how the draft ToR refers to the public interest component under the heading titled “Mandate”. Impacts on Aboriginal and Treaty Rights are an essential element of the public interest but are excluded from the list of considerations in this section.

Mikisew requests that the ToR be amended to require the Panel to consider how to properly incorporate consideration of impacts to Section 35 rights and the adequacy of Crown consultation in defining and measuring public interest.

Some of the language used under the heading titled “Indigenous Engagement” is deeply flawed. Consideration of Aboriginal peoples’ interests is not merely an exercise in “balancing”. The language here has a lengthy history of meaning the denial of Indigenous values, perspectives, interests and rights and the marginalization of Indigenous peoples. This language is used to avoid effective and transparent consideration of the Crown’s clear legal responsibilities respecting the interests of Indigenous peoples. In practice and effect, this language masks actions that are inconsistent with the process of reconciliation, which looks to ways that the Crown can accommodate Aboriginal peoples’ interests.

To avoid perpetuating a colonial mentality that is contrary to reconciliation, Mikisew requests that this “Indigenous Engagement” bullet be rephrased as follows:

- **How the interests of Indigenous peoples are protected in decision-making**
- **How the interests of Indigenous peoples are respected in decision-making**
- **How the NEB will promote reconciliation and support the UNDRIP in decision-making**





Complementary Mandates

The draft ToR state that:

In assessing NEB activities the Panel shall consider the relationship between processes and the Aboriginal and Treaty Rights of Indigenous peoples and reflect the principles outlined in the United Nations Declaration on the Rights of Indigenous Peoples.

Mikisew requests that the ToR be amended to:

- 1) Require the Panel to consider what changes to EA legislation are necessary to more transparently address the intersection of the duty to consult and regulatory proceedings where Canada proposes to rely on regulatory proceedings for fulfilling aspects of that duty, and**
- 2) Require the Panel to consider what changes to the NEB Act are necessary to bring it into compliance with the United Nations Declaration on the Rights of Indigenous Peoples, including how it will integrate free, prior and informed consent into the decision-making process during certificate reviews and any other decision-making stages.**

The Review Process: the Panel

Mikisew acknowledges the Government for including “Indigenous traditional knowledge” in the list of required experience for Panel members.

The Review Process: Indigenous Engagement and Consultation

The “Indigenous Engagement and Consultation” section of the ToR appears to be primarily aimed at ensuring that the Panel “hears” from Indigenous communities. It is equally important that the Panel actively engage with Indigenous communities and is responsive to the issues they raise such as by providing feedback and opportunities for dialogue and two-way information sharing. As described above, Canada has a duty to consult Mikisew directly regarding potential amendments to the NEB Act. There are likely opportunities to coordinate Canada’s direct engagement with Mikisew and this public review process, but that conversation needs to happen soon.

Until there is direct engagement with Mikisew, Mikisew requests that the ToR stipulates that the Panel will engage with Indigenous communities that have expressed an interest in this review (in addition to National Indigenous Organizations).





The Review Process: Timeline

The draft ToR state that “[t]he Panel shall complete its review and provide its report with recommendations to the Minister by January 31, 2017.” Given that the deadline for submitting comments on the ToR is July 20th, and that the Panel has not been formally established, this is an ambitious and relatively short time in which to complete this review. Imposing such a tight timeline risks turning the Panel’s work into a hollow exercise rather than a meaningful opportunity for Mikisew to be heard.

Mikisew requests that the Panel be required to share detailed information in advance, give adequate time for Mikisew to prepare submissions, hold at least one in-person meeting with Mikisew, and respond to the issues that Mikisew raises.

Mikisew requests that the Government give further consideration to the appropriateness of the proposed timelines and revise them if necessary.

The Review Process: Participant Funding

The draft ToR for the review of federal environmental assessment processes provide for participant funding, but the draft ToR for the NEB modernization do not. Mikisew will not be able to meaningfully participate in the NEB modernization review if it does not receive any participant funding.

Mikisew requests that the ToR be amended to state that Canada will provide participant funding for the NEB modernization. Given the review’s compressed timelines, Canada must provide that funding as soon as possible to allow for this meaningful engagement.

We look forward to the review,

[REDACTED]

[REDACTED]



[REDACTED]