

December 17, 2015

OPEN LETTER TO THE RIGHT HONOURABLE PRIME MINISTER TRUDEAU

**Re: Fixing the Broken Review Process for Tar Sands Pipelines**

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Kindly accept our sincere congratulations on your election victory. There are real opportunities now for the federal government to finally recognize First Nations' rightful place at the core of Canada's past and its future. One such opportunity is the critical roadmap provided in the Final Report of the Truth and Reconciliation Commission (TRC). We are pleased that your Government is committed to implement all 94 Calls to Action.

First Nations and Canada have a lot of work to do regarding measures needed to finally put us all on the path of reconciliation and partnership. We focus here on one such measure – the overhaul of the review and assessment process for Tar Sands export pipelines.

The current system, a product of the unconstitutional Omnibus Bills C-38 and C-45 which First Nations vigorously opposed, has: recklessly compressed pipeline reviews; sidelined critics; excluded essential considerations such as climate change; and violated Indigenous rights and sovereignty. Meanwhile, the National Energy Board (NEB) is no longer an independent arbiter in such reviews. It has become a politicized and industry-captured 'rubber stamper' that pays only lip service to the respect for the positions and rights of First Nations. All of these changes unravel opportunities for First Nations who are directly impacted by regulators like the NEB to offer them and industry vitally important information about the lands and resources. The current restrictions further damage the relationship with First Nations and undermine the public trust, legitimacy and openness of the federal environmental assessment process.

All of the current NEB reviews of proposed Tar Sands export pipelines suffer from the same major defects identified above, including the reviews of TransCanada's Energy East pipeline (potential for 1,100,000 bpd of Tar Sands), Enbridge's Line 3 pipeline (potential for 760,000 bpd of Tar Sands) and Kinder Morgan's Trans Mountain pipeline (expanded potential to at least 890,000 bpd of Tar Sands).

The current review and assessment process for the above pipelines has violated:

- The Crown's Constitutional consultation and accommodation duties.
- The Aboriginal Title, Aboriginal Rights and Treaty Rights of First Nations, which are all protected by the Constitution of Canada as well as the Royal Proclamation.
- The Principle of Free, Prior and Informed Consent enshrined in the United Nations *Declaration on the Rights of Indigenous Peoples* (which we were very happy to hear that Canada will finally implement).
- The bans instituted by a number of First Nations, including under their inherent authority and jurisdiction over their territory pursuant to their own Indigenous laws and customs, refusing passage to the pipelines as a result of the unacceptable risks and impacts that they present for such First Nations.

The following remain some of the most egregious flaws in the NEB process:

- The lack of anything close to adequate funding for First Nation participants has been a critical defect of the NEB process. In the case of the Energy East review for example, the NEB recently slashed the amount of funding available in half, from the long promised but inadequate amount of \$80,000 to the truly meagre amount of \$40,000. Such inadequate funding severely limits First Nations' meaningful participation and represents both a failure of the Federal Crown's duty to consult as well as a breach of the rules of natural justice. Even the originally insufficient amount of \$80,000 promised by the NEB had led many First Nations to sign agreements with TransCanada in order to obtain the necessary funding to study the pipeline.

First Nations should not be forced to deal with TransCanada just to be able to properly understand and assess the impacts of the pipeline. Making matters worse, TransCanada has often unfairly and falsely portrayed such agreements in the media as being illustrative of First Nations' support for the pipeline. If the NEB was lacking in the necessary funds as it claims, then TransCanada should have been required to provide the NEB with the necessary funding to make up the difference – rather than permitting TransCanada to have a say in how First Nations' studies will be funded.

- The NEB has demonstrated a clear bias in favour of pipelines by almost never rejecting a pipeline project, even shamefully giving conditional approval to the Northern Gateway project despite it being firmly opposed by First Nations across BC. A number of recent events seem to confirm such bias, including the NEB having accepted TransCanada's demand this summer that the NEB continue to study the pipeline even though TransCanada has yet to file a complete project description. The NEB has even recently asked First Nations to file Oral Traditional Evidence – once again before TransCanada has even filed a complete application. In addition, the NEB has immunized pipeline company proponents from cross-examinations in a number of recent hearings (including Kinder Morgan's Trans Mountain and Enbridge's Line 3). Public hearings that are bereft of the necessary analytical rigour clearly favour industry. The evidence of such bias in favour of industry is only compounded by the crass revolving door of personnel between the NEB and the industry it is supposed to regulate, as in the case of the recent appointee to the NEB who had most recently been contracted by Kinder Morgan to submit evidence to the NEB on the economic benefits of the Trans Mountain project. The NEB's conflict of interest issues need to be urgently resolved.
- Finally, and perhaps most importantly, despite longstanding criticism by First Nations and others, the NEB continues to exclude from its analysis one of the biggest impacts of the Tar Sands pipelines: their heavy contribution to climate change as a result of the expanded Tar Sands production that the pipelines will allow. First Nations were never consulted on the original decisions to exclude such a critical issue from the NEB reviews and the NEB's continued refusal to reconsider such exclusion makes their reviews completely devoid of legitimacy. Overly rigid and prescriptive processes diminish and frustrate the ability for concerns of First Nations to be heard. Our Indigenous laws tell us that actions have consequences. Mother Earth is giving us signs that she is out of balance. Climate change is one of these signs. At a time when our First Nations are already suffering major climate change related impacts to their ways of life, the full consideration of climate change impacts has to be a major focus of any new review and assessment process for the pipelines.

In light of your Government's stated positions in respect to such matters, our First Nations in British Columbia, Manitoba and Quebec call for the establishment of a new pipeline review and assessment process, to be developed and implemented in collaboration with First Nations, that will enable a thorough and objective environmental assessment of these pipelines that respects our rights under the Constitution of Canada as well as under the United Nations *Declaration on the Rights of Indigenous Peoples*.

The crafting of a new Canada-First Nations review and assessment process for these pipelines needs to also be part and parcel of a greater collaboration between First Nations and Canada. Aimed at ensuring that the already unsatisfactory environmental regulatory framework in Canada – further weakened by the Harper government's Omnibus Bills C-38 and C-45 – is transformed into a system that we can all be proud of. Conscious of newcomers' legacy of broken promises and the taking of First Nations' land and resources without consent, First Nations wish to see a new relationship based on the protection of First Nations' alliance with Mother Earth. Environmental regulatory frameworks should be the hallmark of building strong and healthy relationships between First Nations, governments, regulators and industry.

Before proceeding with such desperately needed reforms, however, **we insist on the immediate cancellation of the NEB review processes for Kinder Morgan's Trans Mountain, Enbridge's Line 3 and TransCanada's Energy East Tar Sands pipelines.** Such reviews will need to be completely re-thought in line with the above reforms to be established collaboratively by First Nations and Canada. We are encouraged that Liberal MP Terry Beech, Burnaby North-Seymour, has already said there will be no decision on Kinder Morgan in January, and that Kinder Morgan will have to go through a new, revised process.

Finally, we applaud your recent announcement of an oil tanker ban on the North Coast of British Columbia, which would mirror under Canadian Law the ban instituted by a number of First Nations pursuant to their Indigenous Laws. We look forward to the swift legally enforceable implementation of the ban under Canadian Law as well as a rejection of Enbridge's Northern Gateway Tar Sands pipeline permit approval. We can only hope that your Government will be just as open to listening to and cooperating with First Nations on the key issues set out in this letter as you have been in the Northern Gateway file.

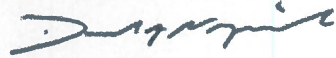
In Peace and Friendship,

**Assembly of First Nations of Quebec and Labrador (AFNQL)**



Regional Chief Ghislain Picard

**Assembly of Manitoba Chiefs (AMC)**



Grand Chief Derek Nepinak, LLB, BA (HONS)

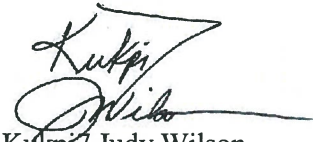
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Mr. Peter Watson, Chair/CEO, National Energy Board