

OUR LAND IS OUR FUTURE

UNION OF BRITISH COLUMBIA INDIAN CHIEFS

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April 13, 2016

NEB Pipeline Damage Prevention Regulations
Sheri Young, Secretary of the Board National Energy Board
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Calgary, AB
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Email: damagepreventionregs@neb-one.gc.ca

OPEN LETTER: UBCIC Comments on Proposed Amendments to NEB Regulations for Pipeline Damage Prevention

Dear Sheri Young:

We are writing with respect to your correspondence from March 18, 2016 regarding “Information about the Proposed Amendments to National Energy Board Regulations for Pipeline Damage Prevention, Now Available for a 30-Day Comment Period”. On behalf of the Union of BC Indian Chiefs (UBCIC) we are submitting this letter to clarify some potential concerns for First Nations in terms of regulations developed under the *Pipeline Safety Act* (“the Act”). In providing these comments, we are not in any way providing our approval of the *Pipeline Safety Act* or its regulations.

For context, please be advised that the UBCIC continues to strongly oppose two major pipeline projects that are and will be going through the National Energy Board hearing process, Kinder Morgan’s Trans-Mountain and Energy East. We are extremely concerned that Prime Minister Trudeau has indicated that these two projects must become priorities for his government, despite his public commitments to implement the *United Nations Declaration on the Rights of Indigenous Peoples*, which provides for the free, prior and informed consent of Indigenous peoples on projects that are proposed for their territories. As you are well aware, Indigenous peoples on whose territories these projects are proposed for have not provided their consent.

By Resolution 2011-54, the UBCIC Chiefs Council unanimously endorsed the Save the Fraser Declaration prohibiting the transportation of tar sands crude oil by pipeline and tanker on the north coast, the south coast, and through the Fraser River watershed and opposed the proposed Enbridge Northern Gateway Pipeline and the Kinder Morgan Trans-Mountain oil pipeline and tanker expansion given that

they pose an unacceptable risk to the health, safety and livelihoods of First Nations throughout British Columbia, and will contribute to the negative environmental and health impacts experienced by Indigenous peoples downstream of the tar sands, and of all peoples throughout the world as a result of accelerating global climate change. By Resolution 2015-41, the UBCIC fully support the Mohawk Council of Kanesatake, Eagle Lake First Nation and other First Nations that are working to protect their territories from the risks and impacts of the Energy East project.

UBCIC Comments

As you are likely aware, a number of First Nations have not expressed confidence in the National Energy Board's ability to fully consider and address critical issues of concern, including harvesting rights, territorial rights and governance rights of First Nations. The UBCIC strongly encourages the Board to fully and effectively engage First Nations on the scope and content of all new regulations, consistent with the nation-to-nation relationship between Canada and First Nations. At minimum, the UBCIC expects that the Board will engage First Nations in some manner other than soliciting electronic or written submissions to be unilaterally accepted or rejected by the Board. The UBCIC further notes that some federal departments have already adopted a position that the development of regulations involves a duty to consult and accommodate impacted First Nations. This principle should be applied by the Board, as well.

The UBCIC reminds the Board that First Nations rights are fundamental human rights, and are constitutionally protected. It is beyond the power of the Board to eliminate First Nations rights through regulations. Moreover, the UBCIC expresses its concerns that the *Pipeline Safety Act* appears to recognize greater rights for pipelines than for First Nations. Additionally, the regulations have been carefully constructed to recognize a number of specific exemptions for agricultural workers, suggesting that the Board places much greater emphasis on the rights and interests of agricultural land users than on harvesters. Many First Nations harvesters would likely consider this disparity discriminatory. Many First Nations territories contain several unmarked or barely marked pipelines. Depending on how constructed, the regulatory framework developed under the *Pipeline Safety Act* would likely enjoin First Nations from continuing to access critical areas for any number of harvesting activities. Paradoxically, the regulations will introduce situations where corporations hold a 'regulatory veto' over the constitutional rights of First Nations (until the regulations themselves are subjected to challenge on these grounds).

The UBCIC expresses concerns regarding use of power operated equipment near pipelines and with ground disturbances. The regulations appear to prohibit crossing a submerged pipeline with a motorized vehicle. This means that First Nations using motorized vehicles to access traditional harvesting areas may be enjoined from doing so under the regulations.

The regulatory requirement to seek permission of the owner of the pipeline introduces a 'reverse veto', placing the power of determining whether First Nations can continue activities central to their distinctive cultures in the hands of corporate actors. Because there is no Crown involvement in these determinations, such decisions would be insulated from challenge under the duty to consult and accommodate, leaving First Nations no option but to challenge the entire regulatory framework itself.

Please note further that this concern should not come as a surprise to the Board. In June, 2015, the Assembly of First Nations tabled a submission with the Senate Committee on Energy, the Environment and Natural Resources, expressing concern regarding vehicles and proposing an explicit exemption for

First Nations harvesters. This would not appear to be an unreasonable proposal, as the regulations reflect specific exemptions for agricultural activities. Yet this proposal does not appear to have been considered by either Parliament as it considered the Act, nor by the Board as it developed the regulations.

We are also concerned about the use of the term 'ground disturbance'. 'Ground disturbance' is broader than the previous 'excavate using power-operated equipment or explosives' and might capture activities that First Nations, particularly harvesters, might conduct when out on the land. Again, the National Energy Board should engage with First Nations and make a reasoned determination whether an exemption for First Nations harvesters should be developed in the case of ground disturbances.

Finally, we stress that each First Nations community requires safety and emergency plans, which would include pipeline safety, and it is critical that the government must provide funds to First Nations to create such plans. Further, for both existing and proposed pipelines, the government must provide funds to First Nations so that they can protect their communities and the environment. First Nations must be directly involved in monitoring for water, lands and environment.

In closing, the UBCIC appreciates the opportunity to comment. The National Energy Board must directly engage with the rights holders, all potentially impacted First Nations, to ensure the pipeline safety regime accomplishes both of these goals.

On behalf of the UNION OF BC INDIAN CHIEFS



Grand Chief Stewart Phillip
President



Chief Robert Chamberlin
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Secretary-Treasurer

CC: Assembly of First Nations
UBCIC Chiefs Council
First Nations Summit