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VIA EMAIL: opr-rpt@cer-rec.gc.ca

Canada Energy Regulator
210-517 10 Ave SW
Calgary, AB T2R 0A8

Dear Sirs/Mesdames:

Re: Onshore Pipeline Regulations ("OPR") Review (the "Review")
Driftpile Cree Nation: Submission on the Discussion Paper

We write on behalf of Driftpile Cree Nation ("**Driftpile**") in response to the Canada Energy Regulator's ("**CER**") request for input on the Discussion Paper for the Review.

We attach as Appendix "A" to this correspondence the submission of Driftpile on the Discussion Paper, which is the result of collaboration amongst Driftpile staff and its professional advisors.

We thank you for your consideration of the attached submission.

Sincerely,

MLT AIKINS LLP

Per: [redacted]
Partner

AL:kab

cc: [redacted] Consultation Director, Driftpile Cree Nation (consultation@dpcn.ca)

Appendix "A"
Driftpile's Comments on the Discussion Paper for the Review

General Comments on the Review Process

As an overarching comment on the Review process, it is imperative that the OPR be amended to reflect the CER's new mandate and commitment to furthering Reconciliation with Indigenous peoples, and Canada's commitments to the principles of the *United Nations Declaration on the Rights of Indigenous Peoples* ("**UNDRIP**") and its obligations under the *United Nations Declaration on the Rights of Indigenous Peoples Act* (the "**UNDRIP Act**"). These require updating the OPR, the CER's Filing Manual as it pertains to the OPR, and any associated guidance documents, to identify how Indigenous peoples will be consulted and engaged through the OPR planning and decision-making processes.

Currently, the OPR does not make a single reference to Indigenous peoples or contemplate planning and decision making based on the consideration of valuable information from Indigenous peoples. The tone and substance of the OPR must be modernized to reflect the CER's new mandate, in the spirit of Reconciliation. In order to be consistent with the principles of UNDRIP, the UNDRIP Act and the CER's mandate, the OPR must be amended to include explicit and specific integration of Indigenous knowledge and consideration of direct and cumulative impacts on the rights of Indigenous peoples. The OPR should be amended to include express provisions that allow for joint-decision making between the federal government and Indigenous Nations.

The Discussion Paper explains that the CER "will work to develop regulatory tools responsive to issues raised during engagement with Indigenous peoples" (see page 2). It is suggested that regulatory tools, such as issuing new guidance or a change in process, could be an efficient alternative to changing the OPR. While regulatory tools may be helpful to address some issues, material amendments to the OPR are necessary because:

1. integration of Indigenous peoples and their perspectives in the OPR is currently non-existent;

2. since the OPR were enacted, there have been substantial developments in areas of regulatory law which require that Indigenous perspectives be incorporated, specifically with respect to direct and cumulative impacts of development on Aboriginal and Treaty rights;

3. without amendments to the OPR, the OPR will remain inconsistent with developments in Canadian law, specifically the UNDRIP Act, and the federal government's commitments to advance Reconciliation;

4. the modernization of the OPR will be necessary for Indigenous peoples to have confidence that CER-regulated and approved projects will proceed in a manner that fully integrates the consideration of impacts to Indigenous rights as part of its public interest assessment; and

5. which gives confidence to proponents that approved projects will not be subject to review due to regulations or a process that do not properly integrate consideration of impacts of a project to the constitutionally-protected rights of Indigenous peoples, and related avoidance, mitigation and accommodation measures.

Driftpile's comments on specific portions of the Discussion Paper are set out below according to the sections of the Discussion Paper. We conclude this submission by highlighting specific sections and provisions of the OPR that can be amended in order to reflect the principles of UNDRIP, to incorporate the Indigenous perspective and to minimize and account for impacts to Indigenous peoples' rights and territories arising from onshore pipeline activities. While we have provided commentary on the themes of each section which relate to the corresponding questions in the Discussion Paper, we have not organized our commentary to only respond to the specific questions in the Discussion Paper.

Section 1. OPR – Lessons Learned

Below are Driftpile's comments on specific issues raised in Section 1:

- **Enhanced requirements for management systems and protection programs:** The OPR should be amended to require management systems and protection programs that expressly anticipate, prevent, manage and mitigate conditions that may adversely impact Indigenous rights and territories. These management systems should be informed by and incorporate Indigenous Knowledge and should ensure compliance with Indigenous standards.

- **Risk based compliance verification approach:** The Discussion Paper does not elaborate on what is required under a risk based compliance verification approach or how risk is gauged and assessed. Driftpile seeks that any risk based approach must be informed by Indigenous Knowledge and worldviews and Indigenous involvement in assessing and monitoring risk. How the CER assesses risk of harm to people and the environment is critical in assessing the potential risk of a pipeline activity. As such, any assessment must be informed by integrated processes which allow for information, evidence and involvement of potentially-impacted Indigenous Nations and communities to be incorporated into all assessments of risk. It is unclear how the CER determines factors that are used in assessing "the high risk to people and the environment". As part of the process of modernizing the OPR we recommend that the CER consult with Driftpile on factors relevant to it when assessing risk to people and the environment.

Section 2. Reconciliation with Indigenous Peoples

As a general comment, amendments to the OPR should be made in a manner consistent with UNDRIP – this is not something that is aspirational, but rather is legislatively required under the UNDRIP Act. The OPR should be amended according to the principles of UNDRIP, specifically the principle of free, prior and informed consent. This requires amendments to the OPR that allow for Indigenous involvement in decision-making relating to the OPR, not simply Indigenous-involvement in providing advice or being consulted on decisions under the OPR.

Below are Driftpile's comments on specific issues raised in Section 2:

- **The CER "expects" regulated companies to honour Reconciliation and work with Indigenous peoples:** Driftpile is concerned that the Discussion Paper repeatedly states throughout Section 2 that the CER "***expects***" regulated companies to support Reconciliation, or engage with Indigenous peoples on potential impacts of regulated activities. Rather than expecting companies to conduct themselves in keeping with Reconciliation, the OPR needs to place express legal obligations on regulated companies and establish clear standards that they must abide by with respect to Indigenous peoples and their rights and interests. For example, companies should be *required* to identify mitigation approaches and the development of heritage resource contingency plans with respect to Indigenous resources and sites, rather than only be "expected" to do so.

- **Limitations to Indigenous Advisory and Monitoring Committee ("IAMC")**: Driftpile is pleased that the CER has been working more closely with Indigenous Nations and communities through the IAMCs since 2017 and sees this as a positive development in the CER's process. Nonetheless, IAMC participants have provided feedback that Indigenous working group members have been limited in their ability to affect change with respect to monitoring practices. Additionally, the IAMCs' main purpose is only to provide advice to proponents and the Crown – all decision-making authority remains with the Crown and its agents under the terms of reference for the IAMCs. This necessarily limits the ability of IAMCs to effect material change in the CER's processes and monitoring practices and limits the degree to which Indigenous Knowledge and perspectives are meaningfully incorporated into monitoring practices. Modernized versions of the original IAMCs should be integrated as an oversight mechanism for all approved CER-regulated projects, and the terms of reference for such IAMCs should allow for shared decision-making with Indigenous peoples.

- **Agreements between regulated companies and Indigenous Nations or communities:** The OPR should require companies to seek and, where possible, complete agreements with potentially-impacted Indigenous Nations or communities that allow for the Nation or community to have oversight and involvement with compliance, monitoring and environmental protection with respect to a regulated pipeline. When assessing projects and implementing the OPR, the CER should consider the extent regulated companies can demonstrate they have collaborative agreements with Indigenous Nations or communities on joint planning and decision-making for project implementation, construction, operations and reclamation. Such agreements can facilitate the confidence of Indigenous peoples in the avoidance, mitigation and accommodation measures of proponents and the proponents' desire for project certainty.

- **Heritage resources:** In many Indigenous peoples' territories, multiple types of industrial development and activity contribute to the ongoing destruction of heritage resources. Given the varying landscapes and development across the different territories of Indigenous peoples, the OPR should not enforce a generic or blanket approach to issues

relating to heritage resources. Identification and protection of heritage resources must be based on specific engagement with impacted Indigenous Nations and communities and informed by Indigenous perspectives and worldviews. Indigenous monitors from these impacted Nations and communities must be consulted during all phases of a project on the existence and protection of heritage resources, including on proper procedures and protocols that are specific to impacted Indigenous Nations and communities when heritage resources are discovered.

- **Indigenous Knowledge:** Regulated companies in the context of the OPR should be required to engage Indigenous experts in determining relevant Indigenous Knowledge, including traditional land resource use and sites of significance for Indigenous peoples. This can be achieved by close collaboration with impacted Indigenous Nations or communities, including through agreements or established protocols between proponents and impacted Nations or communities to facilitate this important objective.

- **Involvement of Indigenous peoples in pipeline oversight:** The Indigenous Monitoring Program must do more than facilitate the hiring of Indigenous monitors for the oversight of CER-regulated pipelines. Driftpile believes that an improved IAMC model that integrates Indigenous peoples into the decision-making process for the protection of Indigenous resources and monitoring of all CER-regulated activities, as facilitated through the OPR, will be important to facilitate meaningful change to present monitoring processes and to facilitate Reconciliation. Merely hiring Indigenous monitors will not integrate Indigenous Knowledge into CER decision-making processes in a systemic and meaningful way and will not result in the type of change to the current CER processes that Indigenous peoples seek. In order to develop an effective Indigenous Monitoring Program, the CER, in collaboration with Indigenous peoples, should develop a mandate with certain principles that are informed by Indigenous Knowledge and Value Components ("**VC**") which must be considered in the context of monitoring. This mandate should be used by both non-Indigenous and Indigenous monitors when conducting monitoring activities under the OPR.

Section 3. Engagement and Inclusive Participation

Below are Driftpile's comments on specific issues raised in Section 3:

- **The CER "expects" regulated companies to take a proactive approach to engagement and communication with Indigenous communities:** Indigenous peoples and their territories often bear the brunt of pipeline activities and incidents. As such, the OPR must ***require*** proactive engagement and communication with Indigenous communities in order to protect Indigenous peoples rights and territories and mitigate potential adverse impacts to same. Further, dedicated funding and resources must be available to Indigenous Nations and communities to enable them to be actively engaged in dialogue with the CER and regulated companies.

- **Engagement on and incorporation of Indigenous VCs:** Matters relating to environmental protection must be considered in the context of Indigenous values and stewardship of the environment. Specific engagement with Indigenous Nations and communities on environmental protection and Indigenous VCs should be a pre-condition for all CER-regulated projects, and proponents should be required to demonstrate how their management systems and programs reflect the Indigenous Knowledge and perspectives shared by Nations or communities during the engagement process.

- **Engagement and communication and emergency preparedness requirements:** On page 6 of the Discussion Paper, the CER notes that it has received feedback that Indigenous peoples would like clarity on the requirements for regulated companies to engage with Indigenous peoples on planning and implementing activities related to construction, operations and maintenance of pipelines. The CER also explains that it has received feedback from Indigenous peoples that there should be a greater understanding of, and involvement in, companies' emergency management processes. Driftpile recommends that the CER incorporate this feedback into amendments to the OPR, including specifying that emergency response measures must be informed by Indigenous Knowledge.

Section 4. Global Competitiveness

Below are Driftpile's comments on specific issues raised in Section 4:

- **Opportunities for data and digital innovation:** To the extent Indigenous Nations and communities are willing to share geodata and traditional land use information, that information should be integrated into the development of pipeline projects so that the information is available to inform decisions regarding the operation of specific pipelines under the OPR.

- **Change in pipeline use and status:** The OPR should include the ability of Indigenous Nations or communities to oversee and set conditions for a change in a pipeline use or status. At a minimum, the OPR should require that advice from Indigenous peoples be given significant weight and consideration in the decision-making process. Further, regulated companies should be required to develop clear plans for pipeline abandonment or decommissioning at the early stages so that Indigenous Nations and communities, landowners, and others are adequately informed. Currently, enforcement of the OPR relies on monetary penalties to encourage compliance with the regulations. Driftpile recommends that, in consultation with Indigenous peoples and with shared oversight with Indigenous Nations and communities, the CER develop stronger enforcement mechanisms and penalties that reflect Indigenous legal principles to encourage compliance and hold regulated companies accountable.

Section 5: Safety and Environmental Protection

Below are Driftpile's comments on specific issues raised in Section 5:

- **Changing pipeline use and status:** Driftpile recommends that the CER require a new impact assessment be conducted prior to a change in pipeline use or status. Such an assessment is necessary to understand, respond to, and mitigate any adverse impacts arising from potential releases or incidents. Proponents should also be required to provide assurance that the pipeline is equipped to handle any new products.

- **Human and organizational factors:** The CER should implement requirements regarding regulated companies employing Indigenous peoples in their workforces, particularly in management roles. The presence of Indigenous employees in management roles will facilitate decision-making that more fully considers Indigenous worldviews and perspectives. This will promote organizational influences that will lead to greater systemic change in the CER regulatory processes and activities over time.

- **Respect and workplace safety:** On page 10 of the Discussion Paper, the CER explains that it has received feedback from Indigenous monitors that they have experienced discrimination and harassment while conducting their work. In order to confront the systemic racism and discrimination faced by Indigenous peoples, the OPR should require mandatory annual cultural competency training for all regulated companies and their employees, and require regulated companies to have adequate processes and protocols which specifically address discrimination and harassment of Indigenous employees. This may require updating the Work Place Harassment and Violence Prevention Regulations to expressly require that employers develop work place harassment and violence prevention policies which are targeted at preventing and addressing harassment and discrimination against Indigenous employees.

- **Process safety:** Process safety and identification of hazards must be informed by the specific Indigenous Knowledge of impacted Indigenous Nations and communities, whose unique knowledge of their territories is critical to properly identifying hazards and evaluating and managing risks. Driftpile submits that fines from failing to develop or follow proper process safety should be routinely enforced by the CER in order to encourage compliance from regulated companies.

- **Programs and plans for environmental protection:** Driftpile seeks that the CER should engage external and/or independent inspectors, including Indigenous monitors, to undertake random compliance reviews and site inspections of regulated pipeline activities, as well as compliance with Best Management Practices ("**BMPs**"). Currently, there are no mechanisms for Indigenous peoples to provide input on BMPs or to monitor whether companies are complying with BMPs. BMPs could be integrated as conditions of project approvals, however, the CER would need to ensure that there is the requisite flexibility for such conditions to change or adapt if better BMPs become available. Further, the CER should ensure that the same degree of environmental protection and standards are applied to smaller-scale pipelines as are enforced for larger pipeline projects. Finally, remediation standards should integrate Indigenous Knowledge from potentially-impacted Indigenous

Nation and communities, be assessed according to Indigenous standards and consider both past and present Indigenous land use.

- **Emergency Management Program:** Emergency Management Programs should be developed in consultation and collaboration with potentially-impacted Indigenous Nations and communities. Indigenous peoples' unique relationship and their lands and resources, and intimate understanding of the environment provides them with invaluable knowledge that is critical to developing comprehensive and effective Emergency Management Programs to respond to spills and incidents. This includes prioritizing and funding for Indigenous peoples to be trained and hired as first responders.

Section 6. Implementation Objectives

Below are Driftpile's comments on specific issues raised in Section 6:

- **Compliance promotion:** Compliance verification and enforcement processes should integrate specific compliance with the standards and requirements of potentially-impacted Indigenous Nations or communities. The existing compliance and enforcement mechanisms should not be relied on. Rather, the CER should require targeted Indigenous engagement and compliance. Driftpile also recommends the CER consider incentives for those companies who have demonstrated outstanding compliance.

Recommended Amendments to the OPR

Finally, Driftpile has provided the following recommendations for amendments to the OPR, which support Driftpile's above comments on the Discussion Paper and suggest ways in which the CER can amend the OPR to better reflect Canada's commitments and obligations to Indigenous peoples:

- The definition for "**environment**" should be amended to incorporate the Indigenous perspective and understanding of the environment, including the sacrality and interconnectedness of the natural environment.

- The definition for "**incidents**" should be amended in consultation with Indigenous peoples in order to ensure that the thresholds for adverse environmental effects reflect and incorporate Indigenous understandings and thresholds of harm.

- The definition for "**serious injury**" should be amended to include damage to mental health. Amending the definition in such a way would recognize that incidents causing serious adverse environmental effects in the territories of Indigenous peoples, which impact and have the potential to permanently extinguish the ability of Indigenous peoples to practice their rights, can cause serious psychological distress in those communities that have enduring and intergenerational effects.

- A definition for "**Indigenous rights"** should be added. Driftpile recommends the following or similar language could be used for the definition:

"**Indigenous rights"** means Treaty Rights as defined in the treaties between Canada and Indigenous peoples, including both historic and modern treaties, Aboriginal and Treaty rights as defined in sections 25 and 35 of the *Constitution Act*, 1982, being Schedule B to the *Canada Act* 1982 (UK), 1982, c 11, and inherent Indigenous rights and natural laws by which Indigenous peoples have relied upon since time immemorial.

- Section 6 should be amended to include s. 6(d) (amendment identified in bold below):

  6 The purpose of these Regulations is to require and enable a company to design, construct, operate or abandon a pipeline in a manner that ensures:

  > **(d) adverse impacts to Indigenous rights and the territories of Indigenous peoples are limited and where possible, avoided**.

- In the current OPR, section 6.1(e) is discretionary, particularly with respect to a company's authority to assess the hazards and risks associated with its activities under its management plan. Driftpile recommends amending section 6.1(e) so that it integrates Indigenous worldviews and perspectives. This can be done by amending the provision so that a company must incorporate Indigenous Knowledge into its assessment of the hazards and risks associated with its activities in its management plan. Section 6.1(e) should also stipulate that a management plan must be compliant with the standards and thresholds of harm of impacted Indigenous Nations and communities.

- Section 6.5(1)(a) should be amended as follows (amendment in bold):

  6.5 (1) A company shall, as part of its management system and the programs referred to in section 55,

  (a) establish and implement a process for setting the objectives and specific targets that are required to achieve the goals established under subsection 6.3(1) and for ensuring their annual review, **including processes to allow for:**

  (i) Indigenous participation in monitoring and oversight of pipeline activities;

  (ii) consideration of Indigenous perspectives and worldviews; and

  (iii) training for all staff and employees on Indigenous perspectives, principles and standards with respect to monitoring and the environment.

- Section 18 should be amended to include the following as section 18(1)(e) (amendment in bold):

  18 (1) If a company contracts for the provision of services in respect of the construction of a pipeline, the company shall

(e) ensure authorized Indigenous peoples or their representatives are provided reasonable access to the construction sites to monitor construction activities.

- Section 21 should be amended to require regulated companies to engage impacted Indigenous Nations and communities on restoring the right-of-way and temporary work areas following construction of a pipeline and incorporate Indigenous Knowledge into all restoration and reclamation plans. Companies should be required to restore these areas to Indigenous environmental standards and, where applicable, restore the areas to a standard which supports not only current land uses, but former land uses, specifically the practice of Indigenous rights that may have been diminished due to past development. At a minimum, the OPR should require companies to make efforts to restore plant and other species that are native to right-of-way and temporary work sites.

- Section 27 should be amended to require that operation and maintenance manuals be prepared in consultation with Indigenous peoples.

- Sections 47 and 48 should be amended to specifically allow for Indigenous participation in the development, implementation and review of safety management and environmental protection programs and to require companies to integrate the Indigenous Knowledge and perspectives provided during engagement with impacted Indigenous Nations and communities.

- Section 50 should be amended to expressly stipulate that procedures for pipeline abandonment require the integration of information provided by Indigenous peoples and Indigenous Knowledge regarding how lands should be reclaimed, including what reclamation standards must be met in order to comply with the practices and protocols of impacted Indigenous Nations and communities.

- Section 52 should be amended so that incident reports are issued to potentially-impacted Indigenous peoples and that the integration of Indigenous Knowledge and participation into incident responses is prioritized.