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cc: Tracy Sletto, Canada Energy Regulator representative on the Indigenous Advisory and Monitoring Committee for the Trans Mountain Expansion and Existing Pipeline

Re: Review of the Onshore Pipeline Regulations (OPR) – IAMC-TMX feedback on Discussion Paper

The Indigenous Caucus (the “**Caucus**”) of the Indigenous Advisory & Monitoring Committee for the Trans Mountain Expansion Project, Existing Pipeline, and Marine Shipping (“**IAMC**”) has reviewed the Canada Energy Regulator’s (“**CER**”) Discussion Paper on the Onshore Pipeline Regulations (“**OPR**”) Review. This brief provides a response to questions raised in that Discussion Paper and outlines recommendations to enhance Indigenous inclusion in the oversight of pipeline activities.

As you are aware, the IAMC is an innovative body that aims at providing for the meaningful inclusion of Indigenous perspectives into the post-approval regulation of the Trans Mountain Corporation’s (“**TMC**”) pipelines, including the Trans Mountain Expansion Project (the “**Project**”), and associated marine shipping. The IAMC’s overall objective is to improve the safety of the pipelines and marine shipping and to protect the environment and Indigenous interests in the lands and waters.

Participation in the work of the Caucus and the Committee by Indigenous members and communities is expressly “without prejudice” to the communities’ positions on the Project. The Committee does not represent Indigenous communities with respect to their section 35 rights and it is not a consultative body. Sections 64 and 65 of the Committee’s Terms of Reference are explicit in this regard. That said, the IAMC has proven to be an effective means of soliciting

views from rights holders to advise government on the means of enhancing Indigenous inclusion in the oversight of the Trans Mountain Project.

The OPR review must be situated in context. The Supreme Court of Canada has confirmed that Indigenous laws are part of the constitutional fabric of Canada, and that the purpose underlying section 35 of the *Constitution Act, 1982* is the reconciliation of the prior existence of Indigenous societies with assumed Crown sovereignty. While the *Constitution Act, 1867* allocates certain jurisdictions to the federal Crown and provinces, it also leaves space for the operation of Indigenous self-determination. Very few Canadians and proponents know and appreciate this reality. We are convinced that the CER, through this OPR Review, both has the opportunity to make this reality known, and – through section 35 obligations as well as obligations associated with the *United Nations Declaration on the Rights of Indigenous Peoples Act* – is legally obliged to do so.

Overview

The Caucus responses to the CER's discussion paper reflect some preliminary perspectives heard from its engagements with Indigenous communities affected by the Trans Mountain pipelines and marine shipping. The below responses **do not** reflect the breadth of these discussions and it is fundamental that engagement continues throughout the OPR Review and for other regulations, guidance material and documents the CER intend to amend or develop between 2022 to 2025 as outlined in the CER's Regulatory Framework Plan.¹

We note that the Caucus has an ongoing relationship with the CER through the IAMC. We expect the CER to continue its engagement on the OPR Review at the IAMC table. The IAMC Terms of Reference explicitly contemplate continuous engagement on subject matter such as updating the OPRs. The Caucus expects to work closely with the CER's policy team throughout the OPR Review process (and other processes in the Regulatory Framework Plan) to continue soliciting advice, interpreting feedback, and co-developing draft changes for consideration by Indigenous communities and Indigenous governing bodies.

¹ CER's Regulatory Framework Plan (2022-2025): <https://www.cer-rec.gc.ca/en/about/how-we-regulate/regulatory-framework-plan/regulatory-framework-plan-2022-2025/index.html>

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Since its inception, the Caucus has highlighted the need to transform the IAMC's role from advising government to truly co-managing with government, in a manner consistent with the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). The IAMC is in the process of envisioning its 'post-construction' role and identifying means of further strengthening the voice of Indigenous communities in the oversight of CER's regulated companies. As this vision takes shape, it will be important that updates to regulations (OPR, Filings Manual, etc.) do not unduly restrict any future role Indigenous communities, the IAMC (and/or an Indigenous Governing body) or any future 'Indigenous Energy Regulator' may have in sharing decision-making with the CER on matters affecting their interests.

The Caucus is currently developing a proposed workplan and budget to support continued engagement with BC and Alberta communities on the work between the Caucus and the CER in the next phases of the OPR Review. This work will help inform the CER on how to better reflect the principles of UNDRIP in the OPR and other legislation. Initial considerations for such an engagement process is outlined in the response to question #29 of the Discussion paper below. The Caucus welcomes further discussion with the CER as a proposed engagement strategy is finalized. The intention of this additional engagement work would be to provide deeper analysis and recommendations to the preliminary perspectives outlined in the sections that follow in response to the CER's OPR Discussion Paper.

In putting together its advice, the Caucus has included some recommendations which may be better aligned with other phases of pipeline regulation. Any Caucus suggestions here which more appropriately fit into another aspect of pipeline regulation should not be discarded and set aside. For future CER engagement, it might be useful to identify the many challenges that Indigenous communities have with pipeline regulation, as opposed to narrowing a review towards the CER's current manner of organizing its regulatory framework. As an example, the engagement sessions elicited much constructive feedback, but getting into the weeds of the Onshore Pipeline Regulation versus the Filing Manual can unnecessarily limit the opportunity for constructive feedback.

LESSONS LEARNED

1. What's working well in relation to the OPR, and its implementation, and what could be improved?

The Indigenous Advisory and Monitoring Committee (IAMC) brings together 13 Indigenous and six senior federal representatives to provide advice to regulators, and to monitor the Trans Mountain Expansion Project (TMX) and existing pipeline. Members have a shared goal of safety and protection of environmental and Indigenous interests in the lands and waters. Participation by an Indigenous community does not mean that it supports or opposes the project, nor does it change the government's duty to consult.

- The Canada Energy Regulator, as the entity responsible for the implementation of the OPR, is making concerted attempts at renewing its relationship with Indigenous Peoples. The OPR is best positioned to be effectively implemented and to contribute to the advancement of reconciliation with Indigenous peoples if it is situated within levels of oversight that take into account safety, environmental interests, and the protection of Indigenous rights.
- It is significant that the *Canadian Energy Regulator Act* (“**CER Act**”) contains some early attempts at incorporating elements of UNDRIP. The *CER Act* explicitly contemplates “Indigenous governing bodies” and “Indigenous knowledge”. In order to advance reconciliation with Indigenous peoples, the CER must continue its efforts at mainstreaming the inclusion of Indigenous peoples and perspectives throughout its regulatory processes. This would mean that Indigenous peoples are not merely consulted when a consultation obligation is triggered, but rather that CER staff, committees, decision-makers, and proponents are constantly alive to the inclusion of Indigenous peoples, rights, and interests in all methods of regulatory oversight. The relationship going forward must be conducted on a government-to-government basis and is a primary area for OPR improvement. The Caucus has long been advocating for an Indigenous oversight body (e.g. an Indigenous decision-making institution) which would explicitly be part of the regulatory framework in carrying out these functions.
- The CER should look towards BC as one jurisdiction in Canada where transformational change is underway. In 2019, BC became the first (and to-date only) province in Canada to legislate the implementation of the United Nations Declaration on the Rights of Indigenous Peoples. *The Declaration on the Rights of the Indigenous Peoples Act* (“**BC DRIPA**”) was enacted into legislation and affirms the application of the UN Declaration to the laws of BC². It is important that the CER use the OPR to reflect the principles of UNDRIP to enhance Indigenous oversight in those provinces that have not yet adopted UNDRIP. The Caucus sees significant potential in sections 77 and 78 of the *CER Act*, which contemplates Ministerial arrangements with Indigenous governing bodies for carrying out the purposes of the *CER Act*. There may be elements of the OPR review which lend themselves to arrangements with Indigenous governing bodies enabled by sections 77 and 78 of the *CER Act*.

² BC DRIPA Bill-41 2019 (<https://www.leg.bc.ca/parliamentary-business/legislation-debates-proceedings/41st-parliament/4th-session/bills/first-reading/gov41-1>)

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- In addition to the above, the Indigenous Caucus is of the view that the OPR and its implementation could be improved by requiring greater involvement of Indigenous communities at later stages of the life-cycle regulation of a Project, particularly during pre-construction as Environmental Protection Plan (“EPP”), Environmental Management Plan (“EMP”), and Emergency Response Preparedness (“ERP”) plans are developed. At present, certain proponents are required to provide these plans to Indigenous communities for feedback and consultation, but this largely occurs if conditions are imposed by the CER, rather than as a matter of course as a regulatory requirement.
- The Supreme Court of Canada’s *Clyde River* decision³ illustrated how consideration of impacts to Indigenous rights and interests can be an afterthought to the assessment of environmental concerns. The CER needs to improve the OPR regulation (and other guidance and policy instruments under its regulatory framework) to ensure matters of Indigenous rights and interest are clearly identified, associated mitigation measures developed, and regulated company’s compliance is verified to truly empower Indigenous communities to exercise their rights in the oversight of the energy sector.
- The historic June 29, 2021, B.C. Supreme Court ruling in *Blueberry River First Nations (Yahey) v. Province of British Columbia*⁴ must also be considered when updating the OPR and associated CER regulations in consideration of the cumulative effects of the energy sector. The decision requires the Province of BC and Blueberry First Nation to work together to develop land management processes in Blueberry territory that restore and protect the ability of the land to support Indigenous ways of life, and ensure future development authorizations manage cumulative effects on land and wildlife and their impact on the Nation’s treaty rights. It will be important for the Federal government and the CER to work with affected Indigenous communities to co-develop an approach for reviewing the energy sector’s activities that balance Indigenous rights, the economy and the environment. The IAMC can play an instrumental role in facilitating these discussions and providing advice as CER updates its policies.

RECONCILIATION WITH INDIGENOUS PEOPLES

³ *Clyde River (Hamlet) v. Petroleum Geo-Services*-(<https://www.canlii.org/en/ca/scc/doc/2017/2017scc40/2017scc40.html>)

⁴ *Blueberry*: (<https://www.bccourts.ca/jdb-txt/sc/21/12/2021BCSC1287.htm>)

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2. How can the OPR contribute to the advancement of Reconciliation with Indigenous peoples?

- Indigenous communities in Canada are increasingly frustrated by the Crown’s denial of Indigenous legal and governance structures, and the lack of meaningful decision-making roles in Crown-led natural resource exploration and development processes. The discontent of BC First Nations with the province’s environmental assessment legislation in particular, resulted in the tabling and passage of a new BC environmental assessment act in November 2018 (“**EA Act**”). Since then, similar efforts transpired for the federal *Impact Assessment Act* (“**IAA**”). However, despite the Minister now being required to determine if consent has been achieved through the *IAA* process, consent still remains undefined. The FNEMC’s recent report on “Dispute Resolution and impact assessment” offers the following,

... a working definition of consent in Canada should include the recognition of Indigenous rights and jurisdiction with the objective to make consensus based bi-juridical decisions consistent with both Indigenous and Canadian laws. Without Canada agreeing to such a definition of consent, consensus decision-making in IA cannot be viewed as a legitimate or credible. Although the IAA and Practitioners Guide are clear that Indigenous peoples and the Agency are to collaborate at certain points in IA, there are no clearly identified Indigenous consensus decision points in the IA process.⁵

- To improve on this issue and further advance reconciliation, the OPR review must include a review of both Indigenous consensus decision points and dispute resolution mechanisms. In BC, the current *EA Act* includes the aspect of dispute resolution and the province is currently working with First Nations in BC to develop a dispute resolution process that would form a regulation under the *EA Act*. While no regulation has been passed, earlier this month the Tahltan Central Government and BC made history with the signing of the “Declaration Act Consent Decision-Making Agreement for Eskay Creek Project.”⁶ The consent agreement sets out how the Tahltan Central Government and BC will be accountable and transparent throughout the environmental assessment process for the Eskay Creek Revitalization Project, how the two governments will work together to support their respective decisions and includes provisions for dispute resolution.

⁵ FNEMC Paper on Dispute resolution and Impact assessment, available upon request.

⁶ https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/consulting-with-first-nations/agreements/declaration_act_consent_decision-making_agreement_for_eskay_creek_project.pdf

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- According to a recent press release, the negotiations and the agreement are in keeping with several specific articles of the UN Declaration, including:

Articles 1, 2, 3, 4 and 5 recognize Tahltan’s right to full enjoyment, as a collective or as individuals, of all human rights including equality and self-determination by utilizing Tahltan values, culture, law, policies, processes and decision-making bodies as they exercise their rights as a Nation.

Article 18 by honouring Tahltan’s right to participate in decisions that affect them through their own representative institutions, the Tahltan Central Government.

Articles 19 and 32(1), which honour the consent of Indigenous Peoples in decisions that affect them including free, prior and informed consent.

Article 31, which speaks to the right of Indigenous Peoples to maintain, control, protect and develop their traditional knowledge, by incorporating Tahltan traditional knowledge and manifestations of their sciences, technologies and cultures as part of the assessment process, respecting Tahltan rights that shall be recognized and protected.⁷

- Elsewhere in BC, the Tsilhqot’in National Government, the Stk’emlupsemc te Secwepemc Nation and the Kaska Nation are but three more examples confirming First Nations in BC are on their way to establishing new exploration and resource development process norms. These norms are now informing and inspiring First Nations elsewhere in Canada to exercise their own inherent rights to jurisdictional authority in their territories.
- The Calls for Justice of the National Inquiry into Missing and Murdered Indigenous Women and Girls provides direction on advancing reconciliation by challenging systems and actions that have perpetuated harm to Indigenous women, girls, and 2SLGBTQQIA people through four interrelated pathways for action including:
 - Addressing historical, multigenerational, and intergenerational trauma;
 - Combatting social and economic marginalization;
 - Challenging the status quo and institutional lack of will; and,
 - Honouring and respecting the agency and expertise of Indigenous women, girls, and 2SLGBTQQIA people.

⁷ ibid

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- There are many opportunities to take up these pathways through the process, implementation, and accountability of renewed OPRs. These opportunities are identified throughout this submission.

3. [How can the OPR contribute to the protection of heritage resources on a pipeline right-of-way during construction, and operations and maintenance activities?](#)

- Provincial regulations differ on the requirements for companies to protect heritage and cultural resources. The Caucus has heard many concerns about the inadequacy of these regulatory requirements to effectively protect Indigenous interests. The CER must set the highest standard for protecting heritage and cultural resources.
- Heritage and cultural resources can be impacted outside of the pipeline right-of-way, particularly in the event of a migrating spill. Emergency response plans need to have cultural / heritage information embedded within so responders know those areas to protect and others know what may have been impacted following an event.
- Wise practices exist for enhanced heritage / cultural resource protection that put the affected Indigenous communities in the 'driver seat' of decision-making to protect these interests.
- Many of the concerns regarding the protection of cultural / heritage resources are similar to those relating to traditional land and resource use ("TLRU"), and sites of significance ("SIS") for Indigenous peoples described in Question 4. The Caucus is well placed to work with CER to develop new sections of the OPR, guidance documents, and/or other measures to ensure appropriate protection.

4. [How can the OPR contribute to the protection of traditional land and resource use, and sites of significance for Indigenous peoples on a pipeline right-of-way, during construction, and operations and maintenance activities?](#)

- The OPR has sections dedicated to requiring companies to prepare Emergency Management Programs, Integrity Management Programs, Safety and Security Management Programs, Damage Prevention and Environmental Protection Programs. There are no explicit requirements for companies to develop programs to protect against potential impacts to Indigenous Rights and interests (including heritage

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resources, TLRU, and SIS). This situation continues to perpetuate the errors outlined in the *Clyde River* decision by obscuring those matters of Indigenous interest under other management programs.

- In some cases, the CER makes no requirements of companies to protect against impacts to SIS. For example, while the Trans Mountain Expansion Project had specific Conditions requiring the preparation of a report describing pre-construction TLU investigations, no such investigations are required for the existing pipeline right-of-way. Operations activities (i.e. integrity digs) can impact on cultural / heritage resources and SIS and it is wrong to assume pre-disturbed soils do not contain valuable cultural artifacts in circumstances when excavated materials were placed back in the trench upon construction many years ago. Further, untouched trench walls provide snap-shots of history with strong archaeological and cultural value.
- The Caucus engaged extensively with the CER and Trans Mountain to outline concerns with the inadequate protection and management of impacts to SIS and TLRU. Trans Mountain is in the process of updating their protection plans for construction but more is required and CER's regulatory framework needs to be strengthened to protect against further impacts for the life cycle of the Project.
- The focus on the Caucus' recommendations on Trans Mountain's construction management plans for protection of SIS followed four main themes: prevention, training, reporting and management, and post-construction validation. These are each briefly discussed below. The Caucus welcomes further discussions on how to ensure CER's regulatory framework captures these necessary changes.

Prevention:

- Comprehensive SIS and TLRU studies must be undertaken for all areas that could be potentially impacted by the company's activities, including pipeline right-of-ways, extent of worst-case scenario spills, facility and pump station properties, etc.);
- Prior to undertaking activities that could impact TLRU and/or SIS, companies should be required to conduct pre-construction 'walk throughs' with those

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qualified to identify these sites of interest (as determined by the affected Indigenous communities);

- The CER must be assured sufficient 'baseline' data has been collected to protect against potential impacts to TLRU and SIS. The sufficiency of the 'baseline' work should be validated by the affected Indigenous communities. As the Caucus has seen on the Trans Mountain Project, a company will report a percentage of their pipeline route where data has been gathered, but that reporting does not indicate the extent to which all affected communities have contributed information, the quality of the baseline studies, or the satisfaction that affected communities have that the company is taking the appropriate mitigation measures to protect against impacts.

Training

- Even if companies have Indigenous Monitors overseeing activities (not currently required by the CER for operations), there is no assurance that these monitors have the appropriate skills to identify TLRU and SIS. Companies should be required to retain the appropriate knowledge keepers to undertake this work (as defined by affected communities) and/or enable Indigenous Monitors to access trusted support resources.

Reporting and management

- In the event appropriate baseline studies have been conducted and qualified Indigenous monitors trusted by affected communities are on-site, companies need appropriate chance-find protocols to effectively manage incidents of potential impacts to cultural / heritage resources, TLRU and SIS;
- Chance find protocols need immediate notification to affected communities coupled with decision-making processes that ensure the right decision-makers are engaged and can effectively direct the response. Guidance documents could be produced highlighting wise practices and the OPR should be updated to

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ensure companies are preparing appropriately for these types of potential impacts from their activities.

Validation

- These incidents must be clearly reported (maintaining confidentiality where appropriate) to improve the CER and Indigenous governing body's understanding of a company's impacts to cultural / heritage resources, SIS and TLRU;
 - Increased inspections by CER and Indigenous governing bodies will be required as companies learn of these enhanced regulatory requirements. Inspections should not be reactionary to issues raised but proactive to ensure the management practices are being appropriately implemented.
 - Please see our response to Question 28 below for further thoughts on validation as related to training.
- The posing of Question 4 in a constructive way in Tier 1 engagement through the IAMC may assist with an approach that surfaces strong guidance, particularly if there is a focus on raising the issues separately in a manner that is informed by gender-based considerations (e.g. multiple venues).

5. How can the use of Indigenous knowledge be addressed in the OPR?

In 2019, the IAMC's Indigenous Caucus prepared some initial advice to Natural Resources Canada in response to the discussion paper⁸ to inform the development of the Indigenous Knowledge Policy Framework for proposed project reviews and regulatory decisions and guide the implementation of the Indigenous knowledge provisions in the legislation proposed under Bills [C-68](#) and [C-69](#).

At the time, the Caucus acknowledged the many good principles in Canada's existing guidance⁹ relating to working respectfully with Indigenous communities to collaboratively

⁸ Discussion Paper available here:

<https://www.canada.ca/content/dam/themes/environment/conservation/environmental-reviews/ikdiscussion-paper-en.pdf>

⁹ Reference Guide Considering Aboriginal Traditional Knowledge in Environmental Assessments Conducted under the

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collect traditional knowledge, seeking informed consent for its use, using a community's knowledge sharing protocols and respecting intellectual property rights.

- The Caucus' advice is attached. It focuses primarily on:
 - a) Equitable treatment of Indigenous Knowledge with Western Science
 - b) Consider both 'fact-based' and 'value-based' knowledge
 - c) Provide additional time and resources (i.e. translators, etc) to evaluate these claims through a thoughtful, inclusive and transparent decision-making process.
 - d) Consider 'Invisible losses' (i.e. hard to measure cumulative and indirect impacts)
 - e) Enhance knowledge gathering opportunities
 - f) Ensure effective knowledge management (i.e. improved control, access, possession)

The Caucus made a follow-up submission to the above (shared with the CER in October 2021) that was centered on the following principles:

- a) The *United Nations Declaration on the Rights of Indigenous Peoples Act* has changed the landscape in which decision-makers must engage with Indigenous Knowledge;
- b) Relationships such as those between the Indigenous Caucus and federal departments and regulators are central to the effective implementation of an Indigenous Knowledge Policy Framework;
- c) Indigenous knowledge must be used at all phases of regulatory decision-making and oversight;
- d) Indigenous people must be involved in regulatory decision-making and oversight to support Indigenous Knowledge being used and applied;
- e) Systemic racism affects how Indigenous Knowledge is perceived and used, so decision-making must account for possible bias.

Canadian Environmental Assessment Act, 2012 (March 2015), available here: <https://www.canada.ca/content/dam/iaac-acei/documents/policy-guidance/considering-aboriginal-traditional-knowledge/considering-aboriginal-traditional-knowledge-environmental-assessments-2015.pdf>

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The BC First Nations Energy and Mining Council also provided recommendations to Canada based on BC First Nations leadership input to inform the development of the Indigenous Knowledge Policy Framework, particularly as it relates to the *Navigable Waters Act* (NWA).

- The FNEMC's advice is attached and included the following recommendations:
 - 1) Revise the *Navigable Waters Act* to undo its recent narrowing and embed Indigenous knowledge across the *Act*.
 - 2) Address the clauses within the Framework that enable Ministers to mishandle or exclude Indigenous knowledge unethically and without accountability.
 - 3) Develop clear and actionable guidelines to ensure that regulatory decision-making implements Federal and Provincial commitments to the UN Declaration on the Rights of Indigenous Peoples.
 - 4) Develop cultural protocols and guidelines for respecting and making regulatory decisions in line Indigenous laws (as based on Indigenous knowledges).
 - 5) Establish institutional processes and terms of engagement for shared decision-making
 - 6) Support Indigenous knowledge as the basis of regulatory decision-making.
 - 7) Develop guidelines for seeking First Nations input into regulatory issues, whenever they relate to First Nations territories.
 - 8) Develop guidelines for working with First Nations to collect, develop, and provide data for environmental regulation.
 - 9) Align the Framework with the First Nations Data Governance Strategy.
 - 10) Provide resources and capacity-building for First Nations own data collection, management, and application in environmental regulation and stewardship.

- The Province of BC's more recent "Guide to Indigenous Knowledge in Environmental Assessments" (April 2020) also provides a good summary of principles the IAMC would consider when reviewing the OPR¹⁰.

- While these documents typically focus on Project Assessment methodologies, applying these principles to the OPR are fundamental to ensuring decision-making for pipeline

¹⁰ Province of BC "Guide to Indigenous Knowledge in Environmental Assessments, April 2020", available here: https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/guidance-documents/2018-act/guide_to_indigenous_knowledge_in_eas_v1_-_april_2020.pdf

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operations activities are conducted appropriately and effectively protects against potential impacts to Indigenous rights and interests.

- It is important to note that Indigenous knowledges include distinct and complex understandings of gender and gender roles/responsibilities. For example, within some cultures, women hold distinct roles and responsibilities over cultural transmission and resource protection. Therefore, the potential impact from development may have a different or outsized impact on Indigenous women. These considerations must be accounted for when building space for Indigenous knowledges within the OPRs.

6. How can the OPR address the participation of Indigenous peoples in pipeline oversight?

All regulated aspects of Canada's energy sector must be reviewed with the lens of enhancing Indigenous oversight to better reflect the Principles of UNDRIP and respecting Indigenous peoples rights and interests within their territories. This includes delegation of authorities to Indigenous governing bodies, cultural change within the CER, and enhancing capacities and empowering those overseeing those activities regulated in the OPR.

- For true Indigenous oversight of the energy sector, Canada must act upon authorizing Indigenous governing bodies to exercise powers or perform duties and functions under Section 77(1) of the *Canadian Energy Regulator Act*.
- The Caucus has long sought to exercise regulatory authorities on behalf of affected Nations who may choose to delegate powers to the IAMC. The IAMC is in the process of evolving its governance structure and mandate in a manner that upholds the commitments outlined in the *United Nations Declaration on the Rights of Indigenous Peoples Act* and would be well placed to support Canada in identifying those mechanisms and processes to enhance Indigenous oversight of pipeline companies.
- The Caucus was encouraged that the Commission's first recommendation under the *CER Act* included a recommendation to the Governor in Council (GIC) to establish an NGTL System-wide Indigenous Oversight Cooperative Committee¹¹. The Caucus is

¹¹ CER Commission recommends approval of the West Path Delivery 2023 Project - <https://www.cer-rec.gc.ca/en/about/news-room/news-releases/2022/cer-commission-recommends-approval-west-path-delivery-2023-project.html>

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interested in learning more about the intent of this recommendation, the authorities that would be granted to this Committee, and how its work might align with the work of the IAMC-TMX.

- The empowerment of Indigenous Monitors is crucial to enhancing Indigenous oversight of pipelines. The Caucus prepared advice to the CER (formerly the NEB) in relation to Trans Mountain's Condition filing for "*Indigenous group participation in construction monitoring*"¹². The advice is attached and pertinent to monitoring of pipeline operations, protection of heritage resources and Indigenous sites of significance, and consultation and engagement.
- Specifically, the Caucus advice on Trans Mountain's plan for Indigenous monitoring included:
 - *Increasing independence of on-site Indigenous Monitors*: Enabling affected Indigenous communities (or a representative organization like the IAMC) to select the on-site Indigenous Monitors and define the scope of their responsibilities (rather than the proponent). The Agreement¹³ for Environmental Monitoring on the the Pacific Northwest LNG Project¹⁴ (that Canada signed) was cited as a potential model.
 - *Support to Indigenous Monitors*: Empowering on-site Indigenous Monitors to access the resources they require to effectively undertake their work. This includes financial resources and access to elders, local knowledge keepers, trusted western-science experts, and others as necessary to conduct the work to oversee activities on a community's behalf.
 - *Access for IAMC's Inspectors*: Currently, the IAMC's Indigenous Monitors cannot conduct an on-site inspection on their own without the CER Inspection Officers or

¹² Caucus advice to the NEB on TMC's Indigenous Group participation in Construction Monitoring. Available here: <https://apps.cer-rec.gc.ca/REGDOCS/Item/View/3810461>

¹³ Agreement on Environmental Monitoring of the Pacific NorthWest LNG Project: <https://www.ceaa.gc.ca/050/documents/p80032/117025E.pdf>

¹⁴ CEAA Decision Statement for the Pacific NorthWest LNG Project: <https://www.ceaa.gc.ca/050/evaluations/document/115669?culture=en-CA>

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TMC's expressed consent. The IAMC's ability to oversee activities should not be constrained to the CER's availability or at a regulated company's discretion.

- As a partner in regulating the energy sector, the CER's Inspection Officers and staff need to understand and appreciate the need for increased inclusion of Indigenous oversight. This will require the promotion of sustained workforce cultural change through strong leadership to accompany the necessary changes in the OPR. Without such changes, Indigenous Inspectors and Monitors' work risks being minimized if their words do not result in action.
- At minimum, the CER must ensure that Indigenous peoples are fully represented in Senior Management, Board of Directors, panels and/or other bodies established to enforce pipeline regulation. It would also be useful to see a regulated requirement (and associated funding) for Indigenous Guardians with the jurisdictional authority for enforcement. While it is acknowledged the provincial and federal governments have made strides in recognizing the importance of Indigenous knowledge and monitoring programs, the current ad-hoc and short-term funding models for this are inadequate.
- This updating of the OPR presents an opportunity to regulate permanent financial commitment for Indigenous peoples participation in the industry. A description of potential models for consideration is available in the attached memo.
- The OPR authorizes the Commission to make amendments deemed to be in the public interest. The public interest includes considerations of reconciliation, the honour of the Crown and the duty to consult as well. The CER must undertake a review of all existing CER-regulated pipelines to ensure their compliance with these public interest considerations, and make amendments as necessary.
- The OPR currently requires a proponent to appoint an officer as accountable officer to ensure its management system and required programs are complied with. We recommend that proponents also appoint an Indigenous Compliance Officer to ensure compliance with laws, protocols, and overall condition compliance. Similarly, the OPR currently requires proponent contractors to be properly advised on all safety and emergency protocol. We recommend that companies require all contractors to adhere to standards that involve the implementation of UNDRIP, and be required to demonstrated their ability to do so within their responses to bids or RFPs from proponents.

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- Oil and gas infrastructure has existed on Indigenous lands since prior to the inception of the NEB. At present, the OPR only requires a company to restore the land to a condition similar to the surrounding environment and consistent with the current natural use. UNDRIP will be ineffectively implemented if the OPR remains thus limited in its vision. The historic development of pipeline infrastructure necessarily means that cumulative effects have occurred and the surrounding environment, at present, and their current natural use, cannot support the full expression of Indigenous rights and culture. We are of the view that reclamation activities require returning the land in a state suitable for its traditional use.

ENGAGEMENT AND INCLUSIVE PARTICIPATION

7. [How can the OPR support collaborative interaction between companies and those who live and work near pipelines?](#)
 - Without the appropriate oversight powers and decision-making authority, the IAMC and its Indigenous monitors have had challenges with TMC in providing timely responses to questions raised or implementation of the operational changes expected of them to resolve issues. Companies will not undertake the systemic changes required to enhance Indigenous inclusion into pipeline activities and oversight so long as the OPR relies on good faith voluntary measures to respond to (and collaborate to resolve) Indigenous concerns.
 - Through the delegation of authorities and shared decision-making with Indigenous governing bodies, companies will be incentivized to improve their collaboration with Indigenous groups as they do with other regulators.
 - For decisions affecting Indigenous rights and interests, companies must be held to the standard of enabling free, prior and informed consent. Companies must recognize capacity constrains some Nations face and be guided to ensure early engagement and sufficient funding are provided to integrate Indigenous perspectives into their planning stages. This includes providing capacity building / training opportunities for potential future workers long before shovels hit the ground.

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- In relation to Emergency Response, companies should have pre-established relationships with fully trained Indigenous contractors and those Indigenous representatives who would be expected to participate in an Incident Command Unit for spills at any location along a pipeline route should be known and agreed to by affected Nations prior to operations. Other opportunities for Indigenous communities to participate in Emergency Response should be pre-emptively identified in much the same way the ‘vessels of opportunity’ are connecting responders with Indigenous communities in the marine environment (<http://coastalresponse.ca/vessel/>).
- Guidance documents and training for companies to develop Indigenous Inclusion policies, build their cultural competency, and implement best practices (i.e. employee swaps, secondments, etc) to enhance collaboration should be promoted by the CER.
- Federal and Provincial Regulators also need to collaborate better with Indigenous governments to have a shared understanding of the expectations they have within their territories. The respective regulatory jurisdictions of pipeline oversight can be complicated and confusing and can lead to significant frustrations that impede collaboration.

8. How could communication and engagement requirements in the OPR be improved?

- The Caucus has consistently heard concerns relating to ineffective communications or complete absence of engagement from pipeline operators and the CER.
- While the OPR requires companies to file Incident Reports to the CER (Section 52), there is no mention of duties to notify Indigenous communities of activities occurring within their respective territories.
- The Caucus would like to engage with CER to better understand the current expectations and approach to assessing the effectiveness of a regulated company’s communications and engagement with affected Indigenous communities (outside of specific Conditions tied to an approved project). For example, the CER’s Early Engagement Guide (April 2020, link→ [HERE](#)) provides CER’s expectations for a company’s engagement on non-designated projects, but it’s unclear if there is any process to audit and evaluate how well companies are responding to this guidance.

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- Moreover, it is unclear how activities affected Indigenous communities may wish to be engaged in (i.e. operational integrity digs, emergency response) are covered under this guidance for applications for Orders and Permits.
- The CER should not rely on complaints lines, filed grievances, or other reactive measures to identify an Indigenous community's dissatisfaction with a company's engagement. From the IAMC's experience, these are often un-used or unknown, and provide little assurances concerns would be effectively addressed.
- The affected communities themselves can identify the level of engagement they seek from pipeline companies operating within their territories. The CER should engage directly with the affected communities (and/or work with the IAMC) to capture a qualitative account of a company's engagement plans (i.e. for emergency response) or day-to-day processes (for operational matters) to guide OPR updates on communications and engagement.
- In the IAMC's experience, communications and engagement failings that have been identified are consistent with many projects and industries. The problems are often associated with a failure to engage on matters of interest to Indigenous communities (not adequately defined or covered under CER's regulatory oversight), wrong contact information or wrong decision-makers engaged, insufficient funding and/or time to review large quantities of overly technical materials, culturally ignorant or disrespectful staff unaware of appropriate protocols, etc.
- For the Trans Mountain Expansion Project, Condition 96 requires reports on TMC's engagement with Indigenous Groups every 6-months through construction. Such a reporting mechanism for operations and audit of a company's efforts to build cultural awareness and Indigenous inclusion within their respective organizations may allow the IAMC and CER to better understand which regulated companies are not meeting expectations for communications and engagement.

9. How could the CER improve transparency through the OPR?

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- The Supreme Court’s *Clyde River Decision*¹⁵ illustrated how consideration of impacts to Indigenous rights and interests can be an afterthought to the assessment of environmental concerns. In much the same way, the Caucus has found that matters of Indigenous interest are buried within TMC’s construction progress reports or outright absent because the incident reporting framework approved by CER did not require specific documentation of these impacts. An infringement on a spiritual site may be a checkmark in a “Trespass” column, a fallen culturally modified tree a “Vegetation” issue. There is no means of knowing how important sites are being affected.
- Clear guidance for incident reporting specific to Indigenous interests (adopting appropriate protocols and confidentiality) must be prepared and adopted by affected Indigenous communities.
- Increased notification and documentation of a company’s operations activities is necessary. Currently, there is no duty for pipeline companies to engage with affected communities when integrity digs are conducted. These ground disturbing activities can impact SIS and there are no requirements for preliminary baseline assessments, walk-throughs with qualified Indigenous monitors or other mitigating measures for these activities.
- The Trans Mountain expansion project reporting illustrates the challenges of a lack of transparency when Indigenous Monitors work for the proponent. The company’s Indigenous Monitor’s daily reports are submitted to the company and then are summarized into a monthly Indigenous Monitoring Report Overview ([LINK](#)). These reports are too high-level for other communities to truly benefit and available for too late for any meaningful action to be undertaken. An Independent indigenous monitor would work for (and report to) those communities that identified them to protect their interests. They could also engage directly with the CER (or IAMC). Some company Indigenous monitors may have difficulty knowing what other Indigenous monitors are observing within the same spread because they’re typically directed to only report back to their own community.

10. **Gender and other intersecting identity factors may influence how people experience policies and initiatives. What should the CER consider with respect to:**

¹⁵ *Clyde River (Hamlet) v. Petroleum Geo-Services* (<https://www.canlii.org/en/ca/scc/doc/2017/2017scc40/2017scc40.html>)

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- a. those people implementing the OPR; or
 - b. those people who are impacted by the operational activities addressed in the OPR?
- The OPR must be revised to address the differential impacts of pipeline construction, operation and decommissioning on diverse groups within Indigenous communities, including women, gender diverse folks, those with disabilities, and 2SLGBTQQIA+ people. Currently, the OPR includes language regarding protection of property and the environment and the safety and security of the public and the company's employees. However, the OPR is silent about protection of diverse groups of Indigenous peoples who are connected in different ways to the lands and resources affected by pipeline projects. The OPR must be revised to include language requiring protection of diverse groups of people from environmental changes caused by the project.
- Currently, the OPR includes limited requirements designed to ensure the physical safety of employees. These requirements must be broadened out to address safety and inclusiveness considerations in work environments that are felt to be unsafe for Indigenous women, gender diverse, and 2SLGBTQQIA+ people, including work camps. For example, the OPR must include requirements for the company to establish relevant policies and goals to ensure the safety and security of Indigenous women, gender diverse, and 2SLGBTQQIA+ employees. The OPR must also be revised to enable employees to identify and report any safety and inclusiveness issues encountered during work activities without fear of reprisal.
- In order to ensure the physical, mental, and spiritual safety of Indigenous employees, ongoing training and learning opportunities related to anti-racism and gender-based violence must be required in the OPR. Currently, the OPR requirements are limited to providing employees with training to perform their duties safely, ensure the safety and security of the pipeline, and protect the environment. Training requirements specified in the OPR must go beyond these considerations to aim at a deep culture shift within work cultures towards valuing difference, diversity, and Indigenous ways of knowing, being, and doing. The training program should focus not only on the safety and inclusiveness of Indigenous employees, but also awareness of the differential impacts of pipeline construction, operation and decommissioning on Indigenous peoples who are connected to lands and resources in different ways.

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- Companies' engagement programs and grievance mechanisms must be designed using a GBA+ perspective. Currently, communication requirements in the OPR are limited to information relating to safety, security and protection of the environment. These topics must be broadened out to address the kinds of information that are relevant to diverse groups of Indigenous peoples. The OPR must include requirements to identify relevant groups with whom to engage and determine their engagement expectations. These requirements could be set out in, or linked to, requirements for a stand-alone Engagement Program. Additionally, the OPR must include requirements for transparent reporting and clear accountability mechanisms in relation to identified incidences and grievances.
- As noted under Questions 6, 7 and 15, Indigenous Nations require appropriate oversight and decision-making authority. Any such delegation of authority must be mindful of the diverse groups of people within Indigenous communities and the need to ensure that their knowledges, concerns and interests are adequately incorporated and addressed. In support of this, Indigenous communities require adequate capacity to collect data on differentially impacted groups (including generating community-specific, culturally relevant indicators and establish baseline metrics), identify barriers and other issues relating to training and employment, and identify requirements related to ongoing oversight and monitoring, among other topics.

GLOBAL COMPETITIVENESS

11. How can the OPR support a predictable and timely regulatory system that contributes to Canada's global competitiveness?

- In the Caucus' experience, unpredictability has led to costly delays. The disregard towards Indigenous rights and interests in the energy sector has created much uncertainty, legal challenges, and unpredictable outcomes. The Trans Mountain Expansion Project was first approved despite Indigenous communities identifying a failure to adequately consult on marine shipping matters tied to the Project but outside the CER's regulatory jurisdiction. Empowering Indigenous communities and enhancing Indigenous inclusion in oversight will lead to a shared understanding of expectations and a more timely regulatory system.

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- The CER’s “Event Reporting Guidelines” ([LINK](#)) needs be reviewed with the IAMC and updated to reflect the principles of UNDRIP and the expectations of companies for reporting on matters potentially impacting Indigenous rights and interests.
 - Mandating Indigenous monitoring to be required on all activities to allow issues to be identified and addressed prior to an incident will reduce costly delays. This would include improved baseline studies, walk-throughs with Indigenous Monitors, knowledge keepers and elders, etc.
 - Companies should have pre-established emergency response plans that are regularly updated and effectively integrate affected Indigenous communities along with other regulatory agencies and stakeholders. Following the spill from the M/V Marathassa in Vancouver’s Burrard Inlet, affected Indigenous groups insisted on participation in the Unified Command Post. This incident led to the development of the Greater Vancouver Integrated Response Plan for Marine Pollution Incidents ([LINK](#)). Similar multi-stakeholder coordination and planning should be applied along pipeline routes to ensure Indigenous perspectives are heard and decision-making is shared.
12. [How can the OPR support innovation, and the development and use of new technologies or best practices?](#)
- Through the promotion of Indigenous inclusion into decision-making within the energy sector, new perspectives will lead to innovation and best practices.
 - The Caucus would like to work with the CER to identify opportunities to increase transparency and reporting on incidents affecting Indigenous rights and interests. This awareness will promote comparisons across pipeline operators that will lead to improved regulatory policy and guidance and innovative measures to mitigate against these impacts.
13. [What company-specific or industry-wide performance metrics could the CER consider to support enhanced oversight and transparency for CER-regulated facilities?](#)
- Increased data collection and reporting is required to develop performance metrics for matters associated with protection of Indigenous rights and interests.

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- Performance metrics on the protection of Indigenous Sites of Significance would need to be defined by Indigenous rights-holders themselves and may differ region to region across Canada. A comprehensive engagement process would be necessary.
- The IAMC's Socio-Economic Subcommittee prepared a number of clarification questions to Trans Mountain relating to their Socio-Economic Effects Monitoring Indicators (attached). These questions can provide CER some insight into the challenges non-explicit reporting can present to Indigenous groups.
- The Caucus welcomes further discussion on these matters to help inform the updates to the OPR and proposes a working group be developed to focus on transparency, data collection, and reporting.
- As mentioned in the response to Question 9, supporting community-driven measurement and monitoring that includes the impacts on women, gender diverse and 2SLGBTQQIA+ folks, is important in terms of transparency and accountability.

14. [Are there opportunities within the OPR for data and digital innovation that could be used by the CER and by companies regulated by the CER?](#)

- Many Indigenous communities have referrals management software platforms that integrate mapping with sites of significance, ecologically sensitive areas and project footprints. Ensuring the distribution of data files appropriate for the respective software packages that include, at minimum, information similar to the CER's Interactive Map ([LINK](#)) may prove useful to those without the infrastructure and known historic incidents/spills that had occurred within their territories.
- Ensuring Nations can provide information to CER and/or proponents in a manner that respects the principles of ownership, control, access, and possession (OCAP) ensure they will retain control over data collection processes, and how their information can be used (more info → <https://fnigc.ca/>). The lack of trust in how the proponent would handle the Indigenous knowledge shared led was one factor contributing to the significance deficiencies in the baseline data of sites of significance along the Trans Mountain pipeline route.

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15. How can the OPR be improved to address changing pipeline use and pipeline status?

- When there are applications to change the product in the system or change of product flow direction, Indigenous communities need to understand the new risks and impacts associated with the proposed changes to their communities. Such an assessment would need to consider impacts from Indigenous perspectives and the OPR should enable space for such study to be conducted (i.e. not just safety and protection of the environment). As for all projects, the affected communities (and/or a delegated Indigenous governing body as appropriate) should have shared decision-making with the CER on the proposed application.
- When a company seeks to permanently end the operation of a pipeline, or part of one, this application must also be reviewed by the affected Indigenous communities. It is often the case that a federal regulator's expectations for the degree of restoration of impacted habitats has far lower thresholds than Indigenous communities. As these companies have benefited from past activities on Indigenous lands (with communities not necessarily realizing any meaningful benefits), decommissioning and restoration must be conducted in a way that satisfies the affected Indigenous communities.

SAFETY AND ENVIRONMENTAL PROTECTION

16. What further clarification, in either the OPR (e.g. structure or content), or in guidance, would support company interpretation and implementation of management system requirements?

- The Caucus welcomes further discussions on how to improve the CER's "Management System and Protection Program Audit Protocols" ([LINK](#)) to better reflect how management system practitioners can increase their knowledge of using management system to protect against potential impacts to Indigenous rights and interests. As discussed in the *Clyde River* ruling, these matters cannot be embedded in other management systems (i.e. Environment / Safety / etc.).
- The Caucus believes there were many lessons learned from the IAMC Indigenous Monitoring experiences during the 2021 BC Floods incident that would be valuable in updating emergency preparedness (for climate change) and integrating Indigenous responders and notification systems into emergency response.

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17. How should information about human and organizational factors, including how they can be integrated into a company's management system, for both employees and contractors, be provided in the OPR, and/or described in related guidance?
- An organization's work culture can profoundly impact Indigenous people – positively or negatively – for those either working within or outside of the organization. Cultural safety should be viewed as a required competency for staff at all levels. Further, cultural safety is addressed when there is not a tokenistic approach to Indigenous participation in the workforce – there needs to be deep and long term participation in the organization of Indigenous peoples, and specifically of women and 2SLGBTQQIA+ at all levels.
 - Review of management systems from this perspective and by these perspectives in the review of the OPR through focused attention is required.
 - A fundamental breakdown occurs between the OPR guidance that is issued to contract holders and contractors. While management systems may be expressed through the OPR and then to the contract holder – there needs to be examination of how to carry management systems on these issues throughout the chain, for all employees and contractors.
 - Competencies and integration of women and 2SLGBTQQIA+ folks in these areas will need to be addressed in the CER.
18. How can the OPR improve the connection between company safety manuals and the overarching Safety Management Program, for both employees and contractors?
- The OPR should set high standards for guidance documents on Indigenous inclusion and protection of Indigenous rights and interests within company safety management programs. Many companies do not know how to update these manuals with Indigenous perspectives and do far less to ensure their contractors have considered these interests effectively.
 - To date there have been multiple fatalities on the Trans Mountain Expansion Project (one associated with a contractor's on-site activities and two others associated with contractor's vehicle accidents). This resulted in significant delays as a Safety Manual

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review was undertaken. Requiring companies to proactively conduct rigorous analysis of contractor's safety plans – both on-site and off-site activities (that aren't necessarily considered 'part of the project') is necessary to save lives.

- These manuals need to take into consideration any particular vulnerabilities of Indigenous workers or community members potentially affected by the proponent and contractor's activities.

19. [How can respect and personal workplace safety be assured at CER regulated sites?](#)

- Transparency and regional reporting is essential. The Caucus has heard a number of concerns of Indigenous workers subject to racism or sexism in the workplace that are unreported through the CER's regulatory framework. These may be deemed 'internal matters' of company's employees that are confidential, but simply reporting out on the frequency of incidents (without confidential information) is a practice that would yield in useful indicators to determine if companies are providing respectful and safe workplaces.
- For contractor run workcamps, matters that might otherwise be reported to the local / regional police are not necessarily reported to CER nor the affected Indigenous communities. Similarly, safety matters may be reported to the Provincial Safety Authority (i.e. WorkSafeBC in BC), but these matters aren't shared with the Indigenous communities who are the stewards of the territories these activities are occurring within. There is a need to close the loopholes in reporting on these matters.
- Many complaints are also unreported. While there may be numerous reasons for this, the CER should not solely be reactive to matters that arise on the CER Complaints line (or a company's). Few Indigenous Monitors the IAMC has engaged with knew of opportunities to use these phone lines let alone knew the numbers to call. Enhanced promotion and support for sharing concerns without retribution is essential.
- Companies should be required to identify the extent of annual cultural sensitivity training, anti-racism, and gender-based violence training that is conducted (mandatory) in the workplace.

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- Strong measures to hold companies to account is also necessary (i.e. zero tolerance policies).

20. [How should the CER be more explicit about requirements for contractor management?](#)

- The hiring and operations of sub-contractors to a project needs to be better monitored, evaluated and enforced. Many adaptive management changes that occur post-construction can be either overlooked due to short turnaround timeframes or due to lack of information sharing and understanding.
- The role of Indigenous communities in advising on the EPP and EMP must be expanded so that compliance is better understood by Indigenous communities and that instances of non-compliance are dealt with in a manner that respects Indigenous perspectives. We know that Indigenous communities continue to feel left-out in the post-CER approval stage as related to matters of condition compliance and enforcement, supporting the IAMC's position that Indigenous monitoring programs such as those established under the IAMC should be more adequately resourced to connect with communities.

21. [How should the OPR include more explicit requirements for process safety?](#)

- Based on the Caucus' experience observing the impacts to pipeline infrastructure of the November 2021 Flood Events, the Caucus is concerned that the CER is not adequately holding companies to account for the identification, preparation, mitigation and prevention of increased risks and uncertainty of extreme events associated with climate change.
- Company management system processes need to be updated to explicitly consider potential impacts to Indigenous rights and interests. These should be co-developed and/or audited by the affected Indigenous governing bodies.
- The Caucus would welcome increased discussion with the CER and regulated companies to explore opportunities to improve process management on matters of Indigenous rights and interests.

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22. How can the OPR drive further improvement to the environmental performance of regulated companies?

- Increased oversight and decreased leniency towards infractions should promote improved environmental performance amongst regulated companies. The Caucus has heard concerns the CER is too trusting of their regulated companies and reactive to incidents instead of proactively ensuring environmental protections. The Caucus has also heard concerns of the limited use of monetary penalties for non-compliances (or fine size) is insufficient to incentivize improved behaviour.
- During their inspections, the IAMC's Indigenous Monitors have brought holistic perspectives to environmental protection measures and have often identified infractions CER Inspection Officers might not otherwise have followed-up on. "Fresh eyes" on regulatory oversight through increased Indigenous inspections could ensure any sub-standard industry practices that have become common-place expectations can be revisited and refreshed.
- Ensuring companies are contributing to enhancing the habitats in which they operate is important to increase resiliency of the environment from the impacts of climate change and potential future impacts from spills. Many habitats where pipelines are located are increasingly vulnerable from the cumulative effects of the pipeline and other projects in the region compounded with the threat of climate change. All parties must be contributing to making the environment more resilient to these impacts. Ensuring companies are supporting on-going stewardship of the lands in which they operate will improve their long-term environmental performance.
- Emergency planning and response measures need to be further developed to ensure environmental protections during a response. During the 2021 BC Flood Event, the IAMC Indigenous Monitors noted incidences where the protection of the environment was secondary to response activities (i.e. fording sensitive riverbed habitats multiple times more than the company's environmental plans had committed to). Increased expectations for environmental protection at all times (even when there are competing priorities) is crucial.

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23. How can the connection between the Environmental Protection Plan, specific to an individual pipeline, and the company's Environmental Protection Program, designed for a company's pipeline system, be improved?

- The CER should require companies to update their environmental protection plans more often to reflect best industry practices and regulatory expectations. For example, on the Trans Mountain Expansion Project, one CER Condition that applied to the construction of the expansion project was to have an Indigenous Monitor participate in the field. These same expectations are not required for operations (i.e. the existing pipeline) for activities that could have similar impacts.
- Environmental protection plans should be reviewed and updated at an increased frequency to accommodate for the uncertainty and evolving state of the natural environment resulting from climate change induced extreme weather events.
- Affected Indigenous communities should be involved in the update of these Plans

24. How can contaminated site management requirements be further clarified, in the OPR or in guidance?

- The CER's Remediation Process Guide ([LINK](#)) does not adequately consider the protection of Indigenous rights and interests in managing contamination that occurs on, or has migrated into, an Indigenous community's traditional territory.
- The Guide only requires Indigenous communities to be 'adequately' engaged (including opportunities to participate in the development and implementation of the Remedial Action Plan (RAP), and/or Risk Management Plan (RMP)) when contamination is on reserve lands, not within their territories. These concerns were raised to the IAMC following Trans Mountain's Sumas Pump Station spill in February 2021.
- Ground disturbing activities undertaken to capture contamination can impact cultural and archaeological sites of significance. Many communities expect appropriate screening of contaminated materials prior to removing them off-site and the decision to do so lies with the polluter. The Indigenous community may express their concerns, but the polluter need only document the concerns heard and addressed, "as appropriate",

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prior to submitting a Closure Report. There are no assurances measures to protect Indigenous rights and interests would be taken under the current guidance.

- Similarly, some Indigenous communities want to be informed when contaminated materials are being transported through, or disposed within, their territories (even if the materials are being sent to a previously permitted facility).
- The Caucus would welcome further discussions to improve the CER's Remediation Process Guide and the associated sections of the OPR.

25. [Are there any matters related to the Emergency Management Program in the OPR that require clarification? If so, what are they? Are there any matters for which further guidance is required?](#)

- Generally speaking, Indigenous inclusion in Emergency Management Planning, Preparedness and Response must be enhanced.
- While emergency management specialists, company representatives, and regulators across Canada have worked over the past few years to develop a standard for emergency preparedness and response for petroleum and natural gas industry systems, the IAMC is interested in learning how Indigenous governing bodies contributed to this work. Further, understanding how Indigenous interests and perspectives were adopted within the associated standard is important ([CSA Z246.2 - Emergency preparedness and response for petroleum and natural gas industry systems](#)). The IAMC has an Emergency Management Subcommittee that could contribute to reviewing this work in the context of Indigenous interests.
- Companies are required to post their emergency procedures manuals and emergency management programs online. Emergency management specialists, company representatives, and regulators across Canada have worked over the past few years to develop a standard for emergency preparedness and response for petroleum and natural gas industry systems (CSA Z246.2). It is unclear if there were Indigenous representatives involved in this work.

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- There is a need to ensure Indigenous communities are effectively engaged during an emergency response. This may be achieved through effective integrated response planning, but this is also required for Federal and Provincial regulators as well. The Caucus heard concerns there were many emergency authorizations granted during the 2021 BC Floods without sufficient consultation with Indigenous communities. The Caucus welcomes further discussions to identify opportunities to enhance the expectations for Emergency Management Programs to better include Indigenous communities in decision-making.

26. [How could the requirement for a Quality Assurance Program be improved or clarified in the OPR?](#)

- While the heading of this section focused on Quality Assurance for Pipeline Materials, the Caucus would be interested in exploring quality assurance / quality control measures in an Indigenous context. This may pertain to setting minimum standards and qualifications for Indigenous Monitors and Inspectors overseeing pipeline activities on behalf of affected communities. The IAMC has consistently strived to enhance capacity of the IAMC Indigenous Monitors and the CER Inspectors and there may be opportunities to build on this through guidance documents and OPR updates.
- As Quality Assurance Programs are developed for safety, engineering, pipe-fitting, etc. items within the OPR, ensuring Indigenous knowledge is incorporated will be important and the Caucus would welcome these discussions as appropriate. For example, the Caucus has heard of guidance documents outlining appropriate culvert sizing and pipe thickness which appears to have proven inadequate just a few short years later due to the rapidly changing landscapes and ecosystems attributed to significant climate events. Adopting an holistic and long-term Indigenous worldview on the planning and design criteria may have avoided these deficiencies.

27. [How can the OPR incorporate the key issues identified in the Safety Advisory regarding the strength of steel and the relative strength of the weld area?](#)

- The Caucus would welcome further discussions associated with the development of Safety Advisories in relation to the strength of steel. The Caucus has heard numerous concerns about the integrity of the existing Trans Mountain pipeline and would be

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interested in knowing how the new advisories compare with the welding approaches adopted when the original Trans Mountain pipeline was installed and how well these welds would withstand increased floods, forest fires, ground disturbance, etc.

IMPLEMENTATION

28. What are your recommendations for compliance promotion at the CER?

- Compliance verification on matters affecting Indigenous peoples should be conducted and/or verified by the affected Indigenous communities or their delegated Indigenous governing bodies. The IAMC has played an instrumental role in taking the first steps towards oversight, but regulatory changes are required to enable Indigenous decision-making and compliance verification on regulated companies.
- Those involved in compliance efforts (including those involved in third-party verification) need to be properly trained in issue spotting for Indigenous-specific issues. Currently, those involved in compliance are more familiar with categories such as “fisheries issues”, “environmental issues”, and “health and safety issues”. In order for Indigenous issues to be properly considered in the field, “Indigenous-specific issues” needs to be its own well thought-out category. In order to shape what should be captured in “Indigenous-specific issues”, Indigenous experts must be part of the development of training materials, as well as the carrying out of compliance activities.

29. How do you want to be engaged by the CER in the development of technical guidance?

- The OPR Discussion paper has provided a useful opportunity to begin the discussion improving the existing Onshore Pipeline Regulation. The 29 questions posed provide a foundation to garner feedback in specific areas, however more time and meaningful engagement with the impacted Indigenous Nations themselves is required.
- To exemplify what such a comprehensive process could look like, outlined below are some preliminary considerations for what a parallel Phase 2 engagement could look like

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that is based on the FNEMC's engagement process for their report on Indigenous Sovereignty in the mining sector¹⁶.

Example engagement process to develop an IAMC OPR led report:

A 4-phase engagement process (over the course of approximately 6-10 months):

Engage Expert Research and Conduct Roundtables. Engage regulatory legal and policy experts experienced in Indigenous decision-making processes to write brief papers on issues related to the OPR Discussion Paper; host three roundtable webinars to discuss these issue papers.

Prepare a "Report for Community Feedback". Using the results of the roundtables, prepare a Discussion Paper that will present options, approaches and pragmatic considerations for the CER in the review of the OPR regulation.

Undertake Indigenous Community Engagements. Further engage the 129 impacted communities through social media and online workshops to obtain feedback and practical perspectives on the proposals in the "Report for Community Feedback". The intent is to connect with communities using social media tools such as Facebook, Instagram, and Twitter, as well as by hosting online workshops that will enable Indigenous community members to share first-hand experiences and learnings.

Prepare a CER-OPR Report. Prepare a final report that summarizes the results of the process and makes recommendations as to how the OPR can be improved. This report is intended to support implementation of the UN Declaration.

Respectfully submitted on behalf of the Indigenous Caucus,

Michelle Wilsdon
Chair, Indigenous Caucus

¹⁶ https://fnemc.ca/wp-content/uploads/2022/01/FNEMC_mining_consent_FinalReport.pdf

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ADDENDUM 1: INDIGENOUS GBA+ AND ANTI-RACISM

Caucus Advice on the Canada Energy Regulator's Onshore Pipeline Regulation Discussion Paper: From a Gender Based Analysis Plus (GBA)+ Perspective

Background

Gender Based Analysis Plus (GBA+) is an analytical tool used to assess the potential or actual impacts of policies, programs, and legislation on diverse groups of people. The approach is based on the understanding that identity factors such as sexual orientation, class, location, and disability, among other factors, interact to impact an individual's relationship to power and privilege.

Responding to inequities requires challenging the systems that have produced and benefit from the inequity, including in legislation and policy development and implementation. Indigenous scholars have added that challenging these systems must also centre Indigenous perspectives and traditions on gender, gender-diversity, sexual orientation, understandings of disability, among other identity factors.

What follows brings together the voices of the Indigenous caucus alongside an analysis grounded in GBA+, in responding to questions posed by the Canada Energy Regulator (CER) related to the review and renewal of the onshore pipeline regulations (OPR).

Reconciliation and GBA+

The Calls for Justice of the National Inquiry into Missing and Murdered Indigenous Women and Girls (the National Inquiry) provides direction on advancing reconciliation by challenging systems and actions that have perpetuated harm to Indigenous women, girls, and 2SLGBTQQIA people. The direction, in general, falls within four interrelated pathways for action including:

- Addressing historical, multigenerational, and intergenerational trauma;
- Combatting social and economic marginalization;
- Challenging the status quo and institutional lack of will; and,
- Honouring and respecting the agency and expertise of Indigenous women, girls, and 2SLGBTQQIA people.

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In addition, there are a significant number of relevant Calls for Justice within the National Inquiry Final Report related specifically to industrial development such as that within the purview of the OPR. These include:

13.1 We call upon resource extraction and development industries to consider the safety and security of Indigenous women, girls, and 2SLGBTQQIA people, as well as their equitable benefit from development, at all stages of project planning, assessment, implementation, management, and monitoring.

13.2 We call upon all governments and bodies mandated to evaluate, approve, and/or monitor development projects to complete gender-based socio-economic impact assessments on all proposed projects as part of their decision making and ongoing monitoring of projects. Project proposals must include provisions and plans to mitigate risks and impacts identified in the impact assessments prior to being approved.

13.3 We call upon all parties involved in the negotiations of impact-benefit agreements related to resource-extraction and development projects to include provisions that address the impacts of projects on the safety and security of Indigenous women, girls, and 2SLGBTQQIA people. Provisions must also be included to ensure that Indigenous women and 2SLGBTQQIA people equitably benefit from the projects.

13.5 We call upon resource-extraction and development industries and all governments and service providers to anticipate and recognize increased demand on social infrastructure because of development projects and resource extraction, and for mitigation measures to be identified as part of the planning and approval process. Social infrastructure must be expanded, and service capacity built to meet the anticipated needs of the host communities in advance of the start of projects. This includes but is not limited to ensuring that policing, social services, and health services are adequately staffed and resourced.

Further, the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) give instruction for engagement standards as well as responsibility to protect Indigenous women and girls, including:

Article 19 – Free, Prior and Informed Consent

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them.

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Article 22 (1) - States shall take measures, in conjunction with indigenous peoples, to ensure that indigenous women and children enjoy the full protection and guarantees against all forms of violence and discrimination.

This update to the OPR represents an important opportunity for governments and industry to demonstrate responsiveness and commitment to the National Inquiry, and more importantly, to establish policies, regulations, and practices throughout the OPR development, implementation, and accountability phases that will protect women, girls, and 2SLGBTQQIA+ folks, and create opportunities for individual, community, and Nation-building.

1.1 PROCESS

1.1.1 OPR Renewal

The process that is undertaken to review and renew the OPR in many ways prefigures the future implementation and outcomes of the regulation regime. Generating OPR that are responsive to the diverse needs of Indigenous peoples including women and 2SLGBTQQIA+ folks requires first engaging with diverse groups in the development process. Within the multi-year OPR renewal process, efforts should be made to reduce barriers for the full and meaningful participation of groups such as Indigenous women, 2SLGBTQQIA+, and disabled people, among others.

1.1.2 Consultation and Engagement

In terms of the new OPR themselves, a commitment to GBA+ requires building consultation requirements that explicitly and meaningfully include diverse Indigenous voices. Effective engagement standards include identifying and addressing barriers that marginalized peoples face prevent their full participation. Examples of this could be covering costs for childcare or travel to address barriers for women with children, people who have increased barriers to transportation, or live in remote areas.

Further, it is the experience of the Indigenous Caucus that the current OPR do not meet the requirements of free, prior and informed consent outlined in Article 19 of UNDRIP. This principle should be integrated throughout the project lifecycle. There are jurisdictions within Canada that are advancing UNDRIP implementation in legislation, including in British Columbia. It is critical that the OPR explicitly adhere to UNDRIP to ensure consistency while provincial/territorial legislation are developed at different stages over time.

Currently, any engagements with Indigenous communities on regulations and implementation occur only at the time the review of a project, and then created as conditions on a case-by-case basis. Amending the federal regulations to include clear requirements for engagement

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throughout the lifetime of a project will ensure consistent standards from large to small scale projects and from governance to operations. As described above this must include consideration for engagement which facilitates participation of diverse Indigenous peoples including women and 2SLGBTQQA people.

1.1.3 GBA+ Factors in Impact Assessments

In addition, there is also opportunity for the OPR to expand the monitoring of GBA+ considerations from pipeline operation and environmental conditions to community impacts. Similar to environmental impact assessments, it is critical that diverse Indigenous peoples are represented within impact assessments given the distinct and complex understandings of gender, and gender roles and responsibilities within Indigenous cultures. For example, within some cultures, women hold distinct responsibilities for cultural transmission and resource protection. Therefore, the potential impact from development may have a different or increased impact on Indigenous women. Similarly, within the OPR regime, all opportunities for the inclusion of traditional knowledge should also consider traditional understandings of gender roles/responsibilities. These considerations could be addressed through the inclusion of requirements to monitor the GBA+ factors required by the Impact Assessment Act in the monitoring and evaluation processes outlined in sections 6.5 (1), 39 and or a new section requiring a Social Monitoring Plan.

1.1.4 Baseline Assessments and Indigenous Knowledge

International best practices also advise the use of quantitative and qualitative indicators to support the monitoring process. However, monitoring will only be as strong and inclusive as the impact assessment process and engagement. Indigenous communities should be provided capacity support to research their own indicators and lead the monitoring process using community-generated indicators.

1.2 IMPLEMENTATION

1.2.1 Shifting the Narrative and Culture Change

The Indigenous Caucus is clear that working with CER and industry partners in a good way requires a culture shift towards one grounded in understanding of and respect for Indigenous peoples' rights. This includes shifting the narrative of government and industry partners from seeing women, gender-diverse people, and 2SLGBTQQA+, peoples living with disabilities, among others, not only as vulnerable populations to be protected, but also as active participants throughout project lifecycles. This can be accomplished in part by generating opportunities for Indigenous people throughout the lifespan of projects. For example, as per the National Inquiry's Call for Justice 13.3, the OPR could include the requirement to conduct

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an impact-benefit agreement with neighbouring Indigenous communities. Within these efforts, specific attention should be paid to recruiting and retaining diverse Indigenous staff, including women, gender diverse, 2SLGBTQQIA+, and disabled folks.

In order to ensure a safe and productive workplace for Indigenous staff, OPR regulated work sites should be required to undertake company-wide uptake of comprehensive trainings on anti-racism, gender-based violence, and regionally relevant cultural competency training. Further, requirements to report completion rates and identified impacts to the regulator, the public, and Indigenous Nations should also be required. For example, these training areas could be defined as competency requirements wherein training is provided as outlined in the management system processes outlined in section 6.5 (1) as well as section 46 in the current OPR.

1.2.2 Onsite Input and Communities of Practice

Each OPR regulated site must establish mechanisms to understand and account for the specific needs of Indigenous women, gender diverse, and 2SLGBTQQIA+ folks within their sites. This could mean creating opportunities for impacted staff within sites for feedback and problem solving such as an advisory group. One example of a project that could be undertaken by such an advisory group is the development of standards of practice for responding to security concerns from Indigenous staff. Further, groups like these could also act as a community of practice where diverse Indigenous staff can connect to build relationships and support each other.

1.2.3 Ongoing Evaluation and Monitoring

Global examples of GBA+ implementation include processes to monitor, assess, and evaluate overall impacts of individual projects. This may include:

- measuring against the gender impact factors in assessments throughout the project;
- working with impacted Nations to measure against their community-developed baseline studies; and,
- A fulsome evaluation at the close of each project.

All monitoring and evaluation must involve community leadership and membership, reflecting the diversity within communities, as active partners. International best practices provide examples of opportunities for monitoring and evaluating, including site managed assessments, community diagnostics, and technical evaluation group reviews.

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Currently companies report external data on what complaints emerge from communities, as pertain to GBA+ concerns, racism or harassment. Then they report separately on the concerns that emerge at site, but none of this is reported publicly. There appears to be a disconnect here. What happens at site also comes home, and when not dealt with effectively at site, it tracks home.

In addition to engagement requirements, amendments to the management system processes outlined in section 6.5 (1) and 39 of the OPR, and/or additional requirements for a Social Monitoring Plan, could integrate GBA+ considerations in the monitoring process as well as respond to MMIW Call for Justice 13.5. There is opportunity to include monitoring for community impacts, such as the added demand on social infrastructures that the influx of workers bring such as housing, medical services, food security programs and childcare. For, if there are not regulations that explicitly monitor and respond to the increased demand for these services, minority groups who may already face barriers to access and may rely more heavily on these supports, will be negatively impacted.

There must be Indigenous-led monitoring mechanisms wherein Indigenous communities are provided capacity funds to conduct and lead monitoring processes to the extent that they deem is required to adequately engage with the various people groups within their own communities.

1.3 ACCOUNTABILITY

1.3.1 GBA+ and Serious Injury Reporting within Current OPR

Currently, the OPR define reportable incidents relating to people as a death or serious injury and do not include injuries resulting from mental or psychological harm caused by racism, discrimination, physical or sexual assault. According to the existing OPR definition, an incident involves a serious injury. Therefore, the company is not legally responsible for developing policies to address these harms under the current ORP. The definition of an incident is critical, as this this triggers the responsibility to establish internal reporting policies and alignment with the Canada Labour Code, under which those who report are protected. Simultaneously, it is important to include protections to people who file complaints within the OPR themselves, given that the Canada Labour Code may not protect those who do not hold formal contracts with the company.

In addition, ensuring safety and security of persons is identified as a purpose of the OPR, however safety and security are not explicitly defined. It is the experience of the Indigenous Caucus that the current OPR do not do enough to ensure safety for Indigenous peoples, including women, gender-diverse and 2SLGBTQQA+ peoples, and peoples living with disabilities. Amendments to the definition of safety and security would better meet the Calls for

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Justice in the National Inquiry and Article 22 of UNDRIP, and would also impact audit and inspection processes outlined in the OPR. For example, the definition amendment would bolster the responsibilities outlined section 53 (1) that states companies must conduct audits on safety and security of persons specifically.

1.3.2 Internal Reporting

The Indigenous Caucus believes that establishing mechanisms for meaningful accountability to Indigenous communities is central to generating fair OPR reflecting reconciliation. This includes specific mechanisms towards GBA+. International examples offer guidance on incorporating GBA+ in reporting through gender-responsive mechanisms that require follow up, action and safeguards for people who file internal reports throughout the process. The Indigenous Caucus has expressed that existing OPR regulations around internal reporting do not go far enough to protect community members and resources. Community members indicate that there are little to no mechanisms for reporting incidents, namely of racism, discrimination or assault. Reporting options are limited to a phone-in line, for example, with little no follow up and support.

Within reporting and accountability regimes, safeguards must be in place to protect community members from receiving backlash for reporting and risk losing their positions. Community members recall instances where filing a report put their jobs or ability to participate in the development at risk. This may introduce another layer of instability and risk to Indigenous peoples within an environment that can already be hostile.

As mentioned above, the amendment to the definition of an incident would trigger reporting requirements and regulations under the Canada Labour Code. However, it is critical that the OPR explicitly protects community members from being excluded from project activities after filing a report, as the Canada Labour Code may not extend to community who are consulted with and may not hold formal employment contracts with the company.

Further, amendments to the definition of safety and security would also improve program audit requirements outlined in section 55 and gender impact assessment requirements could also be mandated to utilized throughout reporting, monitoring, and audit processes.

It is recommended that reporting and accountability regimes also include culturally rooted restorative practices, as well as gender-sensitive grievance mechanisms that ensure the safety and security of those making the complaints against the company or contracted staff. Rather than western-centric human resource organizational responses, ceremonies, talking circles, and cultural learning opportunities may be developed with partner communities to resolve complaints in a good way.

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ADDENDUM 2: ADDITIONAL MATERIALS AVAILABLE UPON REQUEST

The Caucus has previously made submissions that may also assist in the CER's OPR review, and is also able to share certain materials from the BC First Nations Energy and Mining Council. These are available by request to Caucus Director Dean Cherkas at caucusdirection@iamc-tmx.com. These materials include but are not limited to:

- Caucus Response to Indigenous Knowledge Discussion Paper (submitted to the Canadian Environmental Assessment Agency on June 28, 2019)
- Caucus Comments on the Indigenous Knowledge Policy Framework for Proposed Project Reviews and Regulatory Decisions (submitted to the Impact Assessment Agency of Canada, Transport Canada, the Canada Energy Regulator, and Fisheries and Oceans Canada on October 8, 2021)
- BC First Nations Energy and Mining Council, Recommendations based on BC First Nations leadership input on the draft Indigenous Knowledge Policy Framework for Project Reviews and Regulatory Decisions (dated November 15, 2021)
- Caucus submission to the National Energy Board on the review of Trans Mountain's updated compliance filing for Condition 98: Plan for Indigenous group participation in construction monitoring, June 2019, and other filings (dated August 6, 2019)
- Caucus submission to Trans Mountain Corporation regarding clarification on socio-economic effects monitoring indicators (dated October 8, 2019)

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