

## **Kebaowek First Nation (KFN) Comments on Onshore Pipeline Review**

### **1. How can the OPR contribute to the advancement of Reconciliation with Indigenous peoples?**

First adopted by the UN General Assembly in 2007, The UN Declaration enshrines the rights that “*constitute the minimum standards for the survival, dignity, and well-being of the Indigenous Peoples of the World*”. This means that inclusion of the UN Declaration must be understood as the floor, not the ceiling, with which to begin crafting a process that respects and reaffirms the inherent or pre-existing collective human rights of First Nations’ as well as the human rights of First Nation individuals.

We understand the Government of Canada is committed to achieving reconciliation with Indigenous Peoples through a legislative framework that recognizes their societies, and legal traditions, consistent with universal declarations of human rights and the core international human rights instruments adopted by Canada (for example, the UN Declaration on the Rights of Indigenous Peoples - UN Declaration)

First Nations are rights holders, who hold inherent and constitutionally protected rights set out in their own governance and legal systems, as well as under *Section 35* of the *Constitution*. In practice, this means that First Nations rights cannot be undermined by colonial interpretation of their rights (i.e. s. 35). Instead, First Nations must first interpret and describe their inherent rights, grounded in Indigenous law, Indigenous legal traditions, and customary law. These legal orders, which lay the foundation for First Nations’ concepts of self-determination and sovereignty, are essential to starting true “Nation-to-Nation” dialogues and expressing the respect for our rights and title.

Kebaowek First Nation are proud Aboriginal titleholders, but CER does not currently as per UNDRIP (2007) address the impact of pipeline development undertaken without our free, prior, informed, consent or recognize our governance ability to make decisions about development within our title area. When Canada enacted the Impact Assessment Act in 2019, it included new provisions to increase Indigenous rights protection by enhancing Indigenous participation in the assessment process. Unfortunately, these provisions have not been fully acted upon to date, and the necessary regulation protecting Indigenous jurisdiction has not been made.

As informed by the UN Declaration, Indigenous Peoples’ have a unique connection to and constitutionally protected interest in their lands, including decision-making, governance, jurisdiction, legal traditions, and fiscal relations associated with those lands.

Section 114 of the Act enables the Environment Minister to enter into agreements with Indigenous governments so they can exercise certain powers or functions under the Act in relation to the assessment of major projects, which could impact their rights and traditional territory. However, a regulation designating Indigenous-governing bodies like Kebaowek First Nation as a jurisdiction under the Act must be passed before these agreements can be made.

## Recommendations

KFN recommends that the CER strengthen the provisions for Indigenous jurisdiction through supporting regulations within the *Act*. This recognizes that Indigenous nations are self-determining, self-governing, increasingly self-sufficient, and rightfully aspire to no longer be marginalized, regulated, and administered under the Indian Act and similar instruments.

A purpose of the CER should be to promote cooperation and coordination between all jurisdictions, including Indigenous Governing Bodies.

For greater certainty, all OPR regulations shall be construed so as to uphold existing Aboriginal and treaty rights recognized and affirmed under section 35 of the *Constitution Act, 1982*, the Canada UNDRIP Act, and not to abrogate or derogate from UNDRIP (2007) Articles. In this line of thinking, no matter the procedural strength of a consultation process, the objectives of reconciliation cannot be achieved if the final decision to approve a project can be made unilaterally by government and without confirmation from the affected First Nation that its free, prior, informed consent and concerns have been addressed.<sup>1</sup>

Regulatory provisions must be created to include Indigenous Nation participation, including as Governing Bodies, in the conduct of non-designated projects.

In projects that are subject to an Order under s.214, regulations must consider impacts on inherent and constitutionally protected rights before approving certificates under Section 180 or exempting “non-designated” projects from Section 180(1) using Section 214(1).

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

If the project has the free, prior and informed consent of the Nation the OPR regulation should require project proponents and existing project operators to enter into lifecycle agreements with potentially impacted Indigenous Nations covering all stages of the project lifecycle. These stages should include planning/approval, construction, operation (including integrity digs) and decommissioning. These agreements should include, but not be limited to, the following items:

- Participation in Indigenous-led cultural heritage, environmental and archaeological assessments
- Participation in environmental monitoring
- Participation in facility monitoring (e.g., pipeline or transmission line monitoring)
- Identification and protection of species considered to be at risk by Indigenous communities
- Environmental, cultural heritage and socio---economic mitigation and follow-up programs
- Economic benefits – procurement, supply chain, other
- Linear corridor restoration and maintenance with native species, and with attention to pollinator habitat that benefits Indigenous foods (e.g., wild blueberries)
- Reviews of project infrastructure enhancements and improvements that may be available to improve and provide capacity for regional infrastructure and services (e.g., oil pipeline pump stations require transmission reinforcement and/or additional regional power

---

<sup>1</sup> Morales, S. (2017). Braiding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult. *UNDRIP Implementation: Braiding International, Domestic and Indigenous Law, Special Report*. Retrieved from: <https://www.cigionline.org/sites/default/files/documents/UNDRIP%20Implementation%20Special%20Report%20WEB.pdf>

generation that can benefit rural/remote communities and regions; emergency management resources that can be deployed for emergencies beyond the regulated infrastructure)

- Spill response capacity and resources, including training, equipment and service contracts
- Emergency response capacity and resources, including training, equipment and service contracts
- Regulatory compliance monitoring

### **3. 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 regulation should require a description of how Pipeline operators have engaged with Indigenous Nations in Indigenous-led traditional and contemporary land use and occupancy studies and co-developing the protection plan, including demonstration that those Indigenous Nations that provided Indigenous traditional land use information and traditional ecological knowledge is approved via band council resolution and/or Indigenous Nation signature on the protection plan.

### **4. How can the use of Indigenous knowledge be addressed in the OPR?**

The OPR regulation must provide for full inclusion and protection of Indigenous Knowledge Systems.

#### **Definition Problem**

While the regulatory inclusion of “Indigenous knowledge” is a positive step, the current wording of the narrow and uncertain use of the term is problematic. This creates uncertainty about what will be considered by the government to be “Indigenous knowledge”.

In addition, KFN recommends the term Indigenous Knowledge Systems (IKS), which better captures the nature of Indigenous Knowledge and makes clearer the distinction between “use” and “knowledge”: “use” being data about locations of current or historical resource harvesting etc, vs. “knowledge” which includes principles, e.g. knowledge about sensitivities of animals or plants at particular times of the year.

The study, Factors that support Indigenous involvement in multi-actor environmental stewardship, from Reo et al. (2017) found that eight different forms of Indigenous Knowledge are typically integrated into co-operative environmental protection and stewardship programs:

**Table 2.** Forms of Indigenous knowledge (IK) and how they are enacted in cooperative environmental protection and stewardship initiatives.

Form of IK	Examples of how IK is enacted in partnership settings
Intergenerational knowledge concerning subsistence skills or expertise	Involving IK practitioners (youth and elders) in partnerships, including having them serve on advisory or governing committees
Communal or collective knowledge regarding the dynamics of resources or environmental variables over time	Involving IK practitioners in the development of monitoring protocols, involving community elders who have longer perspectives for observing change, consulting oral histories, and elders' knowledges to make sense of perceived socio-environmental change or dynamics
Knowledge of ceremony and cultural protocol	Beginning and ending aspects of the partnership (including workshops, meetings, milestones) with ceremonies that situate the work in a specific place and that involve spiritual forms of knowledge in the partnership
Indigenous languages	Recognizing that Indigenous languages are integral parts of IK systems. Incorporating Indigenous languages in collaborative work, for example, in meeting proceedings, in ceremony or cultural protocols, in fieldwork, or when communicating with elders
Ancient teachings or prophecies	Using traditional stories about roles, responsibilities and human-animal relationships as a basis for setting priorities within the collaboration
Knowledge concerning stewardship responsibilities	Consulting specific families or community members who have responsibility for different forms of stewardship; recognizing behavioral standards of respect for plants and animals that are being monitored, studied, or affected through the partnership
Human-nonhuman relationships	Using Indigenous understandings of ecological relationships to frame priorities, decisions, hypotheses, and data interpretation
Communally held values	Encompassing familial notions of stewardship (i.e., caring for the land and water is caring for one's relations), hospitality, sharing, and clan relationships and responsibilities

## Protection of Intellectual Property Rights of Indigenous Nations

One of the ongoing problems for First Nations and other Indigenous groups is the appropriation of our knowledge by individuals, companies, and academics for their own gain. This can often lead to significant harm to First Nations. There are many examples of a First Nation disclosing, in the context of a regulatory proceeding, the location of a special medicine for the purposes of protecting that medicine, only to then have an outside entity use that information for profit, to the detriment of the identified medicine and the First Nation.

Indigenous Knowledge belongs to those who are the guardians of it, be it the Nation or individuals within a Nation, and an attempt to include Indigenous Knowledge in regulatory processes should not have the unintended consequence of widespread theft of that knowledge.

## Recommendations

1. Indigenous Knowledge that is disclosed should only be used for the regulatory process

Indigenous Nations have direct experience of disclosing Indigenous Knowledge or use information in the context of a regulatory proceeding only to have that information used against them by the provincial or federal governments. This is completely inappropriate, especially when viewed against the protections for corporate information. Further, the immunity provisions for Crown disclosure create a disincentive for the Crown to use Indigenous Knowledge in a responsible way.

2. The OPR regulation must provide confidentiality provisions.

Governments cannot decide to disclose Indigenous Knowledge without consent. Indigenous Nations require guarantees that the information they provide will be treated respectfully or appropriately. Many, if not all Indigenous Nations, will simply choose not to provide Indigenous

Knowledge if they know there is a significant risk that the information won't be protected.

Use of Indigenous Knowledge in the OPR as well as the ability to make regulations "respecting any processes or protections for the consideration of Indigenous Knowledge, should be on a project to project Nation to Nation basis only after consultation with the each of the Indigenous Nations engaged.

## **Confidentiality Recommendation**

*The OPR regulations must Improve confidentiality and intellectual property protection*

Using the provisions of the *Canadian Navigable Waters Act* as the template, we recommend the following amendments be made to the confidentiality provisions for the OPR regulations.

### **Confidentiality**

26.2 (1) *Any Indigenous Knowledge* of the Indigenous Peoples of Canada that is provided to the Minister under this *Act* in confidence is confidential and shall not knowingly be, or be permitted to be, disclosed without written consent.

### **Exception**

(2) Despite subsection (1), the Indigenous Knowledge referred to in that subsection may be disclosed if

(a) it is publicly available;

(b) the disclosure is necessary for the purposes of procedural fairness and natural justice in a legal proceeding regarding the decision for which the Indigenous Knowledge has been provided to the Minister or for use in legal proceedings; or,

(c) the disclosure is authorized in the circumstances set out in the regulations made under paragraph 28(1)(g.2).

(2.1) *Any disclosure in paragraph (2)(b) shall only be for the minimum amount necessary for the purposes of procedural fairness and natural justice, and only for that purpose.*

(2.2) *Indigenous Knowledge provided to the Minister cannot be used against the entity or person providing that Indigenous Knowledge by any person or entity, including but not limited to any emanation or agency of the provincial or federal Crown.*

(2.3) *The provision of Indigenous Knowledge to the Minister, or any subsequent disclosure under (2) shall not be deemed to be a waiver of any privilege that may exist with respect to the information provided.*

### **Further disclosure**

(3) *The Minister shall impose conditions with respect to the disclosure of Indigenous Knowledge by any person to whom it is disclosed under paragraph (2)(b) for the purposes of procedural fairness and natural justice.*

### **Duty to comply**

(4) *The person referred to in subsection (3) shall comply with any conditions imposed by the Minister under that subsection.*

(4.1) *In the case of a contemplated disclosure under paragraph (2)(b), the Minister, Agency, or the adjudicative body, as the case may be, shall permit the withdrawal of the Indigenous Knowledge if the Indigenous governing body is not satisfied with the conditions placed on the contemplated disclosure and requests the withdrawal in writing.*

### **Protection from civil proceeding or prosecution**

(5) *Despite any other Act of Parliament, civil or criminal proceedings shall not be brought against Her Majesty in right of Canada, the Minister and any person acting on behalf of or under the direction of the Minister for the full or partial disclosure of the traditional knowledge referred to in subsection (1) made in good faith under this Act or for any consequences of the disclosure.*

## **No waiver of Intellectual Property**

*(6) Any Indigenous Knowledge provided to the Minister is and remains the intellectual property of the Indigenous governing body, or persons therein under the laws of that Indigenous governing body.*

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

A key guiding principle essential to successful Indigenous participation in pipeline oversight is taking a lifecycle approach where indigenous participation is happening at every single stage of the project from planning to decommissioning (including post--abandonment monitoring).

### **Pre-Construction Planning**

A key component of pre-construction planning is in the development of monitoring indicators. The following recommendations and key findings from A Cultural Health Index for Streams and Waterways: A tool for nationwide use: A report prepared for the Ministry for the Environment by Tipa and Teirney (2006) below can be incorporated into OPR regulations:

- It is important to ensure Indigenous Nations are involved in developing indicators for monitoring project operations. This means going beyond indicators that are only important to the facility operator, and moving to indicators of facility operation quality and success that are important to Indigenous Nations. Indicators being monitored by the operator, the CER and the Indigenous community must be specific, meaningful and relevant for all parties, and what is being monitored makes sense to the Indigenous Nation and reflects what local Indigenous Peoples' value and deem important.
- The development of culturally-specific indicators for water monitoring, health of valued species, quality of access to harvesting areas, and similar valued local features ensures that Indigenous values are integrated into the monitoring process.
- This approach may result in different thresholds of acceptability of pollutants. Where government may have its thresholds for acceptable levels of contaminants in waterways, local Indigenous Peoples' may develop indicators and thresholds that are different based on risk tolerance/acceptability. Views of the acceptability of pollution and of long---term community sustainability are also often different.
- Indigenous involvement in the development of monitoring and reporting methods (including collection, interpretation, and presentation of data/information) is key to ensure the local individuals are involved in all steps of the process from both a learning and a knowledge dissemination (to the community) perspective.

### **Pipeline Construction and On-Site Operations**

A key component of pipeline construction and on-site operations where Indigenous involvement should be part of the OPR regulations is the opportunity for the implementation of monitoring indicators and monitoring methods. Recommendations and key literature findings are highlighted below:

#### **Indicator Monitoring Implementation**

When Indigenous Peoples' are involved in the development of monitoring indicators, they are best positioned to carry out the monitoring activities because these indicators have the potential to hold cultural significance for them. Because these indicators are based on Indigenous knowledge and values related to lands, waters, and resources, having Indigenous people serve as the monitors

enables them to play a larger stewardship role for both current and future generations.

### **Implementation of Monitoring Methods**

Involvement of Indigenous peoples in the carrying out of the planned environmental monitoring program is essential for ensuring these programs are reflective of Indigenous rights, interests, and values. As indicated in the Kofinas et al study (2001), having Indigenous Peoples', especially those who are land-users, carrying out monitoring programs ensures Indigenous knowledge is better incorporated in the process, ensures land users whose access to lands and resources could be adversely impacted by the project have a greater voice in the process, and increases trust in how the project is monitored and managed.

### **Pipeline Maintenance and Management System**

The pipeline maintenance and management system components required by the CER OPR regulations should be updated to include:

- Indigenous Peoples' opportunities to participate as monitors, including conditions pertaining to adequate training, contracting, and procurement opportunities
- Access to pipeline right a ways for traditional uses
- Indigenous Nation reporting including protection and accountability mechanisms for reporting company instances of non-compliance. Follow-up conducted by the CER to ensure the conditions mandated pertaining to a pipeline company's management system are upheld.

### **Closure and Decommissioning**

OPR regulations should include long-term monitoring provisions for Indigenous Peoples'.

### **Recommendation**

There should be legally-binding closure and decommissioning agreements in place detailing how the community will be involved in monitoring and management. It should be made explicit in these agreements that the communities are entitled to take legal action should the company/proponent not meet requirements (in terms of environmental requirements, and requirements for Indigenous involvement).

### **Risk Management and Emergency Response**

OPR regulations should provide for:

- Emergency response services provided by an Indigenous Nation
- Agreements between proponents and Indigenous Nations regarding participation in environmental monitoring and emergency response, and
- Conditions of approval around environmental monitoring and emergency response all factor into how emergency response services are carried out in relation to linear corridor facility emergencies (Eyford, D., 2013).

## References

Eyford, D. (2013) Forging Partnerships. Building Relationships: Aboriginal Canadians and Energy Development: Report to the Prime Minister. Retrieved from:  
[http://www.fns.bc.ca/pdf/Forging\\_Partnerships\\_Eyford\\_Report\\_12\\_13.pdf](http://www.fns.bc.ca/pdf/Forging_Partnerships_Eyford_Report_12_13.pdf)

Joseph, B. (2016). Indigenous Relations and Emergency Response Planning. Working Effectively with Indigenous Peoples. Retrieved from: <http://www.ictinc.ca/blog/indigenous---relations---and---emergency---response---planning>

Kofinas, G., White, R., Lyver, P., Russell, D., Nelson, A., & Flanders, N. (2001). Towards a protocol for community monitoring of caribou body condition. The Ninth North American Caribou Workshop, Kuujuaq, Québec, Canada, 23---27 April, 2001.

Reo et al. (2017). Factors that support Indigenous involvement in multi---actor environmental stewardship. AlterNative. DOI: 10.1177/1177180117701028

Shared Value Solutions Ltd. (2012). Indigenous Participation in Environmental Monitoring and Management in the Canadian Mining Sector – A Scan for Current Best Practices

Tipa, G. and Teirney, L. (2006). A Cultural Health Index for Streams and Waterways: A tool for nationwide use: A report prepared for the Ministry for the Environment