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# ENVIRONMENTAL REGULATIONS REVIEW REPORT



Indigenous/Western Assessments & Monitoring (Kubiski 2013)

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## 1.0 INTRODUCTION

Karen Kubiski (the Ecologist) was contracted by Kapawe’no First Nation (the KFN) to conduct an environmental regulations review (the Review) for the *Canadian Energy Regulators Onshore Pipeline Regulations - SOR/99-294 (OPR 2022)*.

The Canadian Energy Regulator (CER) is conducting a review of the Onshore Pipeline Regulations (the Regulations) which are the main regulations used to oversee pipelines in Canada. The CER’s states their objective for this review as to deliver a regulation that supports the highest level of safety, security and environmental protection, advances Reconciliation with Indigenous peoples, addresses transparency and inclusive participation, provides for predictable and timely oversight and encourages innovation. The CER is committed to advancing Reconciliation, therefore, seeks input from Indigenous peoples based on their unique cultures, knowledge and histories.

The CER’s review is split into two phases. The Ecologist’s Review report (this Report) falls under Phase I –which provides responses to certain question(s) posed by the CER in the *Onshore Pipeline Regulations Discussion Paper (2020)* (the OPR) about the *Onshore Pipeline Regulations (2022)*. The CER’s Phase I review addresses all areas of the OPR and may result in changes to other parts of the CER’s regulatory framework including regulatory documents and guidance such as the CER’s Filing Manual. Nevertheless, the answers provided in this Report preemptively took into consideration the *Canadian Energy Regulator Act (2019)*, and CER’s *Filing Manual (2020)* because both formed the foundation for development of the OPR, and the OPR must remain consistent with the *Act (2019)*.

## 2.0 BACKGROUND

This section provides some background information on the Ecologist’s role, the Indigenous group for whom the Review is completed, the Canadian Energy Regulator who is proposing the Regulation, and finally, Canada’s *United Nations Declaration on the Rights of Indigenous People’s Act (UNDRIP Act 2021)* which provided the impetus for the CER’s regulations review.



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## 2.1 The Ecologist's Role

The Ecologist, Karen Kubiski, is a registered professional vegetation ecologist (the Ecologist) who specializes in ethnoecology and ethnobotany. Her expertise includes Vegetation and Wetlands Environmental Impact Assessments (EIAs), Vegetation and Wetlands Monitoring Programs, Landscape Ecology Planning, and Ethnobotanical Species Conservation Planning.

The Ecologist provides information and recommendations about the impacts of proposed or existing (e.g., cumulative) human disturbance on native ecosystems (including wetlands) that support Rights-based species. The Ecologist focuses on impacts to the native ecosystems that support ethnobotanical species (i.e., plant species valued and used for medicine, food and other purposes) and biodiversity. The Ecologist also conducts environmental legislation reviews and provides services as an expert witness in regulatory hearings.

There is an inextricably linked relationship between biodiversity, ecosystem composition, structure and functioning (i.e., ecosystem integrity) and an Indigenous group's Rights-based species (Carpenter et al. 2006; Salafsky and Wollenberg 2000; Robinson 1993). As such, amassing and reporting on species condition, populations, distribution and abundance, and species sensitivities, native plant communities (including wetlands) condition, abundance, distribution and sensitivities, and human disturbance impacts to ethnobotanical species and their habitats is the Ecologist's primary role. In addition, the Ecologist provides recommendations for the preservation of a group's Rights-based species habitats (i.e., native ecosystems) and offers her professional opinion on proposed environmental legislation.

## 2.2 The Consultation Manager's Role

The Consultation Manager, Michelle Knibb, is a Kapawe'no First Nation member and has managed the Kapawe'no First Nation Consultation and Environment Division for over a decade.

As Consultation Manager, Michelle has been the project manager and community liaison (including communications) for over one hundred land and resource related projects. During her project management role, Michelle ensures all deliverables and reporting requirements are met and delivered to both funders and her Chief and Council.

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Michelle has worked tirelessly with external partners (including governments and industry) to assist with designing and implementing impact assessments, monitoring programs and land and resource planning initiatives. Finally, Michelle has working knowledge of ARC GIS and excel and she is the lead of Indigenous Scientist monitoring and impact assessment programs.

Michelle, with the Ecologist is tasked with providing information and recommendations about the impacts of proposed or existing (e.g., cumulative) human disturbance (i.e., projects, initiatives and incidents) on native ecosystems that support Rights-based species. In this manner, Indigenous science and Western science is fused and thus better informs Chief and Council and the community on impacts to the native ecosystems that support Rights-based species.

The Consultation Manager also conducts environmental legislation reviews in conjunction with the Ecologist.

## 2.3 Kapawe’no First Nation

Kapawe’no First Nation (KFN) is a First Nation government and is headquartered in Grouard, Alberta near High Prairie (Wikipedia 2016). The First Nation has 270 registered members (as of March 2003) and its six reserves comprise 1562 hectares of land. The KFN is administered by tribal custom and is best known for its stable government that results from a hereditary Chief and Council. The mission of the Kapawe’no First Nation Chief and Council is “to develop constructive opportunities for present and future generations, and to enable all First Nation members to grow and to progress spiritually, economically and socially. Kapawe’no First Nation is a member of the Lesser Slave Lake Indian Regional Council (KFN 2016).

KFN’s traditional territory (the Territory) is Treaty No. 8 (1899) (INAC 2013) the Alberta boundaries are shown in **(Figure 2.3.1)**. However, the Territory extends into parts of NWT, Saskatchewan and British Columbia.

The KFN uses waters and terrestrial areas (lands) within the Lesser Slave Lake Watershed most intensively (Core Area), and have several ‘Areas of Concern’ within the Territory. The waters and lands within the Territory are the aquatic and terrestrial ecosystems that support the species that KFN hunts, fishes, traps and gathers (i.e., collectively KFN’s Rights-based species).

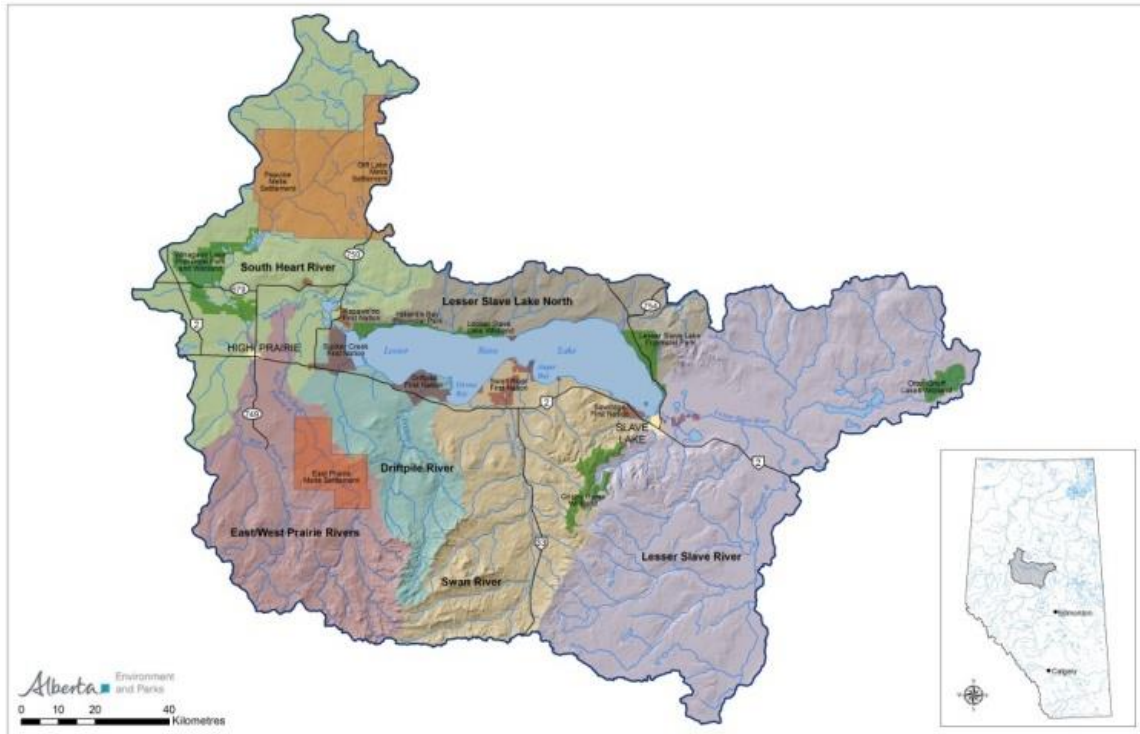
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KFNs hunting, fishing, trapping and gathering Rights derived from section 35 of Canada's *Constitution Act* (1982) and Treaty No. 8 (1999) should be upheld through the protection of terrestrial and aquatic ecosystems within the Territory (see Section 2.3, United Nations Declaration on the rights of Indigenous peoples).



Figure 2.3.1: Kapawe'no First Nation Territory (Treaty 8 Alberta Area) (KFN 2022)

Lesser Slave Lake is the third largest lake in Alberta and is a recognized biologically significant area for birds. Communities located on the shores of the lake include the Town of Slave Lake, the village of Kinuso, the hamlets of Grouard, Jousard, Faust and Canyon Creek and the First Nation communities of Kapawe’no, Sucker Creek, Driftpile, Swan River, and Sawridge (**Figure 2.3.2**).



**Figure 2.2.2: Lesser Slave Lake Watershed (LSLWC 2014)**

Lesser Slave Lake has a surface area of approximately 1,150km<sup>2</sup> and has a drainage area of approximately 12,700 km<sup>2</sup> (LSLWC 2014). Much of the inflow water enters the western end of the lake at Buffalo Bay, adjacent to Kapawe’no First Nation reserve lands, via the South Heart River and the East and West Prairie Rivers. On the southern shore of Lesser Slave Lake, the three largest tributaries are the Driftpile, Swan and Assineau Rivers, which drain the southern part of the watershed. Many small creeks and intermittent streams also flow into the lake. The outflow to the Lesser Slave River is located at the lake’s east end. The Lesser Slave River joins the Athabasca River about 75 km downstream of the outlet (LSLWC 2014).



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## 2.3 The Canadian Energy Regulator

The Canada Energy Regulator (CER) implements and oversees a regulatory framework focused on the safe and efficient delivery of energy to Canada and the world. The CER states in doing so, they are protecting the environment and recognizing and respecting the rights of the Indigenous peoples of Canada.

With the introduction of the 2019 Canadian Energy Regulator Act (CER 2019), the CER aims to be a regulator that has the confidence of all Canadians, is dedicated to ensuring safety and environmental protection, builds strong relationships with Indigenous peoples, and enhances Canada's global competitiveness. The CER's Strategic Plan provides a road map of what Canadians can expect from the CER in the years ahead.

Through the CER Act (2019) the CER is responsible for ensuring that pipelines crossing provincial and international borders are constructed, operated, and abandoned in a safe and secure manner that protects people, property and the environment. The CER's regulatory framework to accomplish this includes regulations, regulatory documents and guidance.

The CER's Onshore Pipeline Regulations (the Regulations) provide the rules that companies with authorizations to build and operate pipelines must follow. The Regulations were initially issued under the National Energy Board Act and has been in place since 1999. Currently, the CER is conducting a comprehensive review of the Regulations under the CER Act (2019) to update the Regulations. The purpose of this Review is to provide input, which may assist Kapawe'no First Nation with a comprehensive review of the Regulations under Phase I of consultation (known as the Discussion Paper Review).

## 2.4 United Nations Declaration on the Rights of Indigenous Peoples Act

Canada's United Nations Declaration on the Rights of Indigenous Peoples (the Declaration) Act (2021) states:

Whereas Indigenous peoples have suffered historic injustices as a result of, among other things, colonization and dispossession of their lands, territories and resources (UNDRIP Act 2021:2).

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Whereas all doctrines, policies and practices based on or advocating the superiority of peoples or individuals on the basis of national origin or racial, religious, ethnic or cultural differences, including the doctrines of discovery and terra nullius , are racist, scientifically false, legally invalid, morally condemnable and socially unjust (UNDRIP Act 2021:2).

Whereas the Government of Canada is committed to taking effective measures - including legislative, policy and administrative measures - at the national and international level, in consultation and cooperation with Indigenous peoples, to achieve the objectives of the Declaration (UNDRIP Act 2021:2).

Whereas the implementation of the Declaration can contribute to supporting sustainable development and responding to growing concerns relating to climate change and its impacts on Indigenous peoples (UNDRIP Act 2021:3).

Whereas the Government of Canada acknowledges that provincial, territorial and municipal governments each have the ability to establish their own approaches to contributing to the implementation of the Declaration by taking various measures that fall within their authority (UNDRIP Act 2021:3).

The purposes of this Act are to: (a) affirm the Declaration as a universal international human rights instrument with application in Canadian law; and (b) provide a framework for the Government of Canada's implementation of the Declaration (UNDRIP Act 2021:5).

### **3.0 METHODS**

This Review is a Western science based third party review of legislation conducted for Kapawe'no First Nation. The methodologies, including information sources used for the Review are outlined in **Sections 3.1** through **Sections 3.8**.

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### 3.1 Role of the Third-Party Reviewer

A third-party review is an independent scientific analysis and technical guide for a client. The third-party review is unbiased, scientifically rigorous and provides examinations of information that are regularly used to inform communities, legal teams, governments, industry and review boards about the environmental, socio-cultural and Rights impacts.

The third-party review should be premised on a solutions-oriented approach that assists clients with better understanding the potential impacts resulting from proposed industrial, commercial or resource extraction projects, and proposed regulations and other forms of legislation. It is not uncommon for reviews to be undertaken by a third-party reviewer with technical expertise if the scope and nature of the proposal(s) have the potential to adversely impact Indigenous peoples or stakeholders. As such, the third-party reviewer considers and advises on what details of the proposed legislation are appropriate or inappropriate for their client.

An independent third-party reviewer's role is to provide a review of documents prepared by another party on behalf of the reviewer's client. In order to provide review services, the reviewer must maintain complete independence throughout the review process. The reviewer must also closely follow accepted standards and procedures (**Section 3.2**) for performing a review.

### 3.2 Review Standards and Procedures

The Review performed should conform to the same or better professional standards as those adhered to by other scientific professionals and by the Ecologist's professional organization. When considering who will conduct a third-party review, the client should concomitantly consider their conflict of interest policy and the principle on inclusiveness. The principles of inclusiveness state that advice should be drawn from a variety of scientific sources and from experts in relevant disciplines in order to capture the full diversity of scientific schools of thought and opinion. Inclusiveness enhances the debate by getting conflicting viewpoints on the table, generating a full and open discussion, and drawing in scientific findings that may not otherwise be considered. Sound science thrives on the competition of ideas facilitated by the open publication of data and analyses. The market for science advice is global and the growing body of science knowledge available internationally must be brought to bear on policy issues, proposed legislation and impact

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assessment. Inclusiveness aids in achieving sound science advice by reducing the impacts of conflicts of interest or biases that may exist.

Accordingly, input and advice for reviews, impact assessment and on proposed legislation needs to be sought from a wide range of perspectives, including local knowledge and Indigenous science. Participants must have the relevant expertise required to engage constructively in questioning, commenting on and challenging the information and interpretations presented.

In addition, policies on science integrity encourages “...discussion based on differing interpretations of research and scientific evidence as a legitimate and necessary part of the research and scientific processes and, where appropriate, ensure that these differences are made explicit and accurately represented.” The policy “...applies to all who plan, produce, support or utilize science to make well-informed decisions” (DFO 2019).

### **3.3 Information Sources Used to Inform the Review**

The Review encompassed an analysis of the federal Onshore Pipeline Regulations (OPR 2022) and how it is linked and influenced by other related legislation and processes (e.g., the CER’s Filing Manual). Web-based information included:

- The *Canadian Energy Regulator Act* (CER 2019).
- The *Canadian Energy Regulator Filing Manual* (2020).
- The *Onshore Pipeline Regulations Discussion Paper* (2020).
- The *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP 2008).
- Published papers and reports about federal level legislation relating to pipeline regulation in Canada including from federal government websites and libraries.
- Relevant information received in confidence from the client (i.e., the Indigenous group).

### **3.4 Review Limitations**

The following are the limitation presented by this third party review (the Review):



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- 1) The Review is informed only by available information, and as such, some limitations may apply.
  - 2) The reviewer (the Ecologist) has limited knowledge of pipeline standards and construction processes and procedures (as laid out in the OPR) necessary for the protection of the environment and human health. As such, the Ecologist used the *Onshore Pipeline Regulations Review Discussion Paper* (CER 2022), The *Canadian Energy Regulator Act* (2019) and *CERs Filing Manual* (2020) to expand the review's scope. For Phase II of the work, if KFN desires a comprehensive review of the technical nature of the *Onshore Pipeline Regulations* (2022), the Ecologist recommends KFN seek advice from a technical expert with that knowledge and experience.

## 4.0 DISCUSSION PAPER & RELATED LEGISLATION RESULTS

The CERs Discussion Paper (2022:2) states that “through the OPR Review, the CER is seeking feedback on the OPR and its implementation”.

As such, the results section (**Section 4.0**) preemptively took into consideration the *Canadian Energy Regulator Act* (2019), and CER's *Filing Manual* (2020) when answering the Discussion Paper questions. Our reason for answering the Discussion Paper questions this way is because: 1) The act and the filing manual both formed the foundation for development of the OPR, 2) the OPR must remain consistent with the *Canadian Energy Regulator Act* (2019), and 3) the *Filing Manual* (2020) is inextricably linked to the “implementation” of the OPR because the filing manual process sets the precedence for a pipeline to fall under the OPR.

Hence, this results section provides the preliminary findings where existing and/or proposed Canadian legislation, regulations and guidelines related to the Onshore Pipeline Regulations (2022) “implementation” for each pipeline have the potential to adversely impact Indigenous rights (the Rights). More specifically, the following question from the Discussion Paper is answered under all the sub-sections of Section 4.0 (**Sections 4.1 – 4.4**): **“What’s working well in relation to the OPR, and its implementation, and what could be improved?”** (CER 2020: 2-3).

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## 4.1 The Canadian Energy Regulator Act

This section deals specifically with the CER's *Canadian Energy Regulator Act* (2019).

### *4.1.1: Indigenous Representation on the Commission*

The CER (the Regulator) “is to have a Commission that consists of up to seven full-time commissioners. It may also include a complement of part-time commissioners. At least one of the full-time commissioners must be an Indigenous person” (CER 2019:15).

We contend that the Commission should consist of two full-time Indigenous person commissioners in the interest of promoting a more just and balanced decision-making process.

### *4.1.2: Decision Making Constraint of the Canadian Energy Regulator*

The Canadian Energy Regulator (CER) has new features that the National Energy Board (NEB) did not, including expanded and explicit incorporation of social and environmental considerations, and a new tripartite governance structure. Nevertheless, the CER, like the post-2012 NEB, is still only a recommending body to cabinet on pipeline applications (Thomson 2021:52).

While it is difficult to predict how the CER will proceed, Harrison's (2021) case study suggests a continuation of greater political decision-making on pipeline actions, with cabinet authorized to directly amend project application conditions at the expense of transparency and procedural fairness. This empowered political executive role stands in stark contrast to the NEB's inception in 1959 whereby pipeline decisions were independent and strictly outside of the political sphere (Thomson 2021:52).

The CER does not have decision making power and the CER's Commission can only provide information and recommendations. As such, decisions can be politically influenced which may leave Canadian Indigenous people's skeptical of whether the federal government will actually uphold and/or protect Indigenous rights where pipelines have the potential to impact those rights.

We contend that decision-making power should rest with the CER Commission to attenuate the potential for political interference. Decisions on pipelines should be premised on robust

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and fused Western and Indigenous science, and local knowledge rather than on political/economic interests. Further, consistent with Article 18 of the UNDRIP 2008, Indigenous peoples have the right to participate in decision-making in matters which would affect their rights. As such, the CER Commission (with two Indigenous representatives) should have the decision-making powers rather than the Cabinet.

## 4.2 The Onshore Pipeline Regulations

This section provides the preliminary findings where existing and/or proposed Canadian legislation – related to the Onshore Pipeline Regulations (2022) - has the potential to adversely impact Indigenous rights (the Rights). More specifically, this section deals specifically with the CER’s *Onshore Pipeline Regulations* (2022).

### 4.2.1: *Protection of the Environment*

The purpose of the *Onshore Pipeline Regulations* (OPR 2022) is to “require and enable a company to design, construct, operate or abandon a pipeline in a manner that ensures: (a) the safety and security of persons; (b) the safety and security of pipelines and abandoned pipelines; and (c) the protection of property and the environment”.

Neither the *Canadian Energy Regulator Act* (2019), the *Onshore Pipeline Regulations* (2022) or the *Canadian Energy Regulator Filing Manual* (2019) defines what **‘protection’** means.

We contend that the Canadian Energy Regulator cannot ‘protect’ the environment unless there is specific and consistently applied federal and provincial legislation that outlines exactly where and how the environment will be protected. The dwindling caribou populations in Canada (especially in BC and Alberta) are an excellent example of the how ‘protection’ is not defined nor is it explicit as to how ‘protection’ is carried out - either at a federal or provincial level. In this way, federal and provincial legislation is consistent in its lack of efficacy.

As such, before the federal government continues to create new federal level legislation (e.g., acts, regulations etc.) it should first ensure that federal and provincial level legislation is consistent, including that it clearly defines ‘protection’ and exactly where (i.e., a spatially explicit area) and how (e.g., through legislation) the environment will be protected.

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Further, consistent with Article 26 of UNDRIP which states: “States should give legal recognition and protection to these lands, territories and resources”. Ergo, legal ‘protection’ means developing consistent federal and provincial legislation that protects Indigenous peoples Rights-based species habitat (i.e., native ecosystems). within specific areas over the long term. Currently, the provinces and the federal legislation (including regulations) are insipid in that they do not identify spatially explicit areas, nor time periods for when the protection will extend. We contend this is not conducive to upholding Indigenous peoples Rights, nor is it consistent with the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP 2008).

#### ***4.2.2: Additional Concerns on the Regulations***

In addition to the results under **Section 4.2.1** (above) we provide the additional following concerns related to the Onshore Pipeline Regulations (OPR 2022):

- 1) Reporting section – 6.3.3. policies 7 goals commitment to the employees should also be communicated to the Indigenous peoples whose lands are at stake.
- 2) Design – what are stations? Are they for contamination sites? They should include the wildlife protections to ensure they do not encroach to the site (e.g., fencing).
- 3) ROW & Temporary Work Area – 21. Restored to a similar condition?? That seems like insipid wording. Perhaps it should read: *should model the surrounding area?*
- 4) There is no mention of Indigenous anything in the regulations, we are not to be classified by the word “public”. Indigenous peoples have distinctive rights in Canada.
- 5) #33, #35 do not ever transpire.
- 6) Mitigation is not defined, and as such the reference to it should be linked to a definition. In addition, the definition of ‘mitigation’ should have Indigenous people’s consent.
- 7) Incident reports – are changes to the project as proposed, as such, they should be subject to consultation as well:



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- a. There should be a study done on the new materials being used versus the old steel welded pipe, in relation to the pipeline incidents. In my observations, at certain elevations, throughout wetlands and in rivers, the pipe is not being put deep enough, hence the incident occurs when there is a natural incident such as a weather storm, earthquake, or when the frost hits.
- 8) General Compliance – interval of 3 years is too long and should include provisions on conducting inspections after these natural incidents, as mentioned in 7.a.

## 4.3 The Filing Manual

This section provides the preliminary findings where existing and/or proposed Canadian legislation – related to the Onshore Pipeline Regulations (2022) - has the potential to adversely impact Indigenous rights (the Rights). More specifically, this section deals specifically with the CER’s Filing Manual (2020).

### *4.3.1: Indigenous Knowledge or Indigenous Science?*

The CER’s Filing Manual sets out information requirements and guidance for applicants regarding how lands and resources in relation to a project area are used by Indigenous peoples for traditional purposes, as well as the CER’s expectations for engagement with Indigenous peoples regarding any potential project impacts on their rights and interests (CER 2020).

The *Canadian Energy Regulator Filing Manual* (CER 2020:18) states: “an application should, where relevant, available and applicable to the effects of the Project, include local and **Indigenous knowledge**. This information and knowledge should be integrated, where appropriate, into the design of the project”.

We contend the Filing Manual should state: “an application should, where relevant, available and applicable to the effects of the Project, include local and ‘Indigenous science’ (**Appendix II**). This information and knowledge should be fused into the design of the project”.

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### ***4.3.2: Valued Components or Rights-Based Components?***

The CER's Filing Manual states applicants should identify and incorporate within their effects assessment, preferably beginning at the assessment design phase, those **valued components** that are most relevant for an assessment of the project's potential effects on the exercise of Indigenous rights (refer to section A.2 for additional details) (CER 2020:18).

We contend the Filing Manual should state applicants should identify and incorporate within their effects assessment, preferably beginning at the assessment design phase, those Rights-based components that are most relevant for an assessment of the project's potential effects on the exercise of Indigenous rights. Again, Indigenous peoples have distinctive rights (over and above other stakeholders and Canadians), and therefore the components assessed for impacts should be referred to as Rights-based components rather than "valued components". If referred to as "valued components" the components assessed must compete with the values of other stakeholders in Canada's arena of values.

### ***4.3.3: Traditional Land and Resource Current Use?***

The CER's Filing Manual states applicants should complete:

"An assessment of impacts on **current use** of lands and resources for traditional purposes by Indigenous people is required for the ESA" (CER 2020: 95).

Indigenous peoples Rights in Canada are not restricted to "current use". Rather, the timeline their Rights extend are from the time they first inhabited their lands to a perpetual cycle of at least seven (7) generations into the future. Canada did not grant Indigenous peoples their Rights, they simply recognized them. Further, Canada has expressed that it will respect and honour Indigenous Rights consistent with the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP 2008).

We contend that restricting an impact assessment to "current use" does not capture the true and comprehensive impacts of any project, initiative or incident on Indigenous peoples Rights. Further, we contend that given this gap (and other holes) in the CER's impact assessment process, it would appear that the Government of Canada neither respects nor honours Canada's Indigenous peoples Rights. More specifically, UNDRIP (2008: Article 26 and 29) states: "Indigenous peoples have the right to the conservation and protection of

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the environment and the productive capacity of their lands or territories and resources”. Protection and conservation is not limited to “current use” of Indigenous peoples territories. Conversely, it relates to current and future conservation and/or protection of the resources within Indigenous territories. Ergo, the CER needs to revise the wording within their filing manual and other documents to reflect and be consistent with the intent of all articles within UNDRIP (2008).

#### *4.3.4: Residual Cumulative Effects Assessment*

The CER’s Filing Manual (under Section A.2.7.3) states applicants should: “After taking into account any appropriate mitigation measures for cumulative effects, **identify the remaining residual cumulative effects**”. Further, the applicant is to “Refer to Section A.2.6 for guidance on evaluating the likelihood and significance of adverse residual environmental and socio-economic effects which is found within CER (2020: 39-106).

“A common way for an applicant to assess project effects is to compare the quality of the existing environment with the predicted quality of the environment if the project is approved and built. The direction of change to the environment may be adverse, neutral or beneficial. The following criteria may be useful in assessing the significance of a project’s adverse effects (CER 2020: 64):

- magnitude;
- duration;
- frequency;
- geographic extent;
- ecological context; and
- reversibility or degree of permanence.

In applying these criteria to each residual effect, an applicant must define each criteria and the range considered within each criteria”.

We contend that while the standardized impact assessment methods that CER uses are mostly sound, what is missing is an assessment of the regional scale residual impacts to ecosystems that support Indigenous peoples Rights-based species.

More specifically, while Indigenous peoples have rights to all native species that have historically occurred within their territories, some of those species are naturally less

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abundant and/or sensitive. With existing expanses of human disturbance footprints (and the concomitant removal of large expanses of native ecosystems), some of the naturally less abundant and sensitive species populations have declined and are (according to Indigenous peoples) now at risk. Hence, these at-risk species can be referred to as Indigenous people's 'Species of Concern' which may or may not be federally or provincially listed.

Further, we contend that given there is no impact assessment completed for Indigenous people's 'Species of Concern' habitats (i.e., the plant communities that support the 'species of concern'), at the territory scale, we contend that the impact assessment methodologies used by applicants is insufficient and therefore does not capture the cumulative residual impacts of any project, initiative or incident on Indigenous peoples Rights.

## 4.4 The Onshore Pipeline Regulations Discussion Paper

### *4.4.1: Sites & Traditional OR Ecosystems, Rights-Based Species & Rights-Based Activities*

Under Section 2.0 of the Onshore Pipeline Regulations Review Discussion Paper (CER 2022) it states: "At the project application stage, the Canadian Energy Regulator (CER) Act requires the Commission to consider the rights, interests and concerns of Indigenous peoples, including with respect to their use of lands and resources for traditional purposes" (CER 2022: 4). "The CER has received feedback from Indigenous peoples that the CER can improve its oversight of actions taken by companies to protect sites of significance for Indigenous peoples and lands and resources used for traditional purposes, particularly during a company's operations and maintenance activities" (CER 2022:4).

We contend that the Government of Canada (and the provinces) needs to understand (and respectfully articulate) that Indigenous peoples do not necessarily only have 'sites' – although sites often do relate to cultural and spiritual activities. Impacts of a project on an Indigenous Group's right to hunt, fish, trap and gather extend far beyond a geo-referenced point (e.g., a UTM location or "site"). In fact, any human disturbance to a native ecosystem (e.g., at the plant community level) will have direct and indirect effects (see **Appendix I**) to the composition, structure and functioning of native ecosystems, and concomitantly to Indigenous people's Rights-based species. Ergo, a project will impact the Rights far beyond a "site". In fact, projects will impact Rights-based species, and especially 'Species of Concern' through impacts to species habitat (native plant communities).



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Further, while Canada’s Indigenous peoples do in fact have rights to traditional activities, Indigenous peoples also have distinctive Rights to hunt, fish, trap and gather and the species they hunt, fish, trap and gather should be referred to as Rights-based species. As such, the activities around pursuing and harvesting Rights-based species is not necessarily strictly traditional, but rather a Rights-based activity. Traditional can imply static and based in the past; whereas, articulating the pursuit and harvesting of Rights-based species as a Rights-based activity would not. And certainly, referring to Indigenous species resources as Rights-based species would foster “States to give legal recognition and protection to these lands, territories and resources” consistent with UNDRIP (2008:Article 26).

## 5.0 RECOMMENDATIONS

Based on the results of this Review, the following recommendation(s) are offered:

- The CER should work with Kapawe’no First Nation on revising the *Onshore Pipeline Regulations* (2022), the *CER Filing Manual* (2020), and other legislation and guidance documents until they are consistent with upholding Indigenous Rights as reflected in the *United Nations Declaration on the Rights of Indigenous Peoples* (2008).

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## 6.0 CLOSURE

This report has been prepared by **Kapawe'no First Nation (KFN)**.

The Report may not be relied upon by any other person or entity, other than for its intended purposes and without the express written consent of the authors and KFN Chief and Council.

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# Appendix I

## Direct Effects

Relationships between members of an ecological community can be classified within two broad categories, direct effects and indirect effects. The first of these, direct effects, as the name implies, deals with the direct impact of one individual on another when not mediated or transmitted through a third individual. Some direct effects that can result from human disturbance are:

- pesticide drift into a forest patch or into pesticide runoff into water from agricultural land (Sharpley et al. 1993),
- the invasion of exotic species from surrounding disturbed lands (Harris 1984),
- changes in the microclimate due to increased exposure near the edges of a patch (Chen et al. 1993); or
- increased levels of competition, predation, herbivory or parasitism by open habitat species on forest species (Wilcove et al. 1986).

There are eight main types of direct effects which are classified by the net effect of the relationship on each individual; positive, negative, or neutral.

**Competition:** Competition occurs when two organisms compete for the same resource (food, space, mates, etc.). Both individuals are negatively impacted by competition for the resource because either the resource is limited or, if the resource is not limited, they can physically interfere with competitors attempting to obtain the resource.

**Predation:** Predation takes place when one organism (the predator) consumes another (the prey). Typically, carnivores, such as the cheetah pursuing the gazelle mentioned above, are excellent examples of predation. In its broadest sense, the term predation includes all consumption of another organism for nutrients, including herbivory and parasitism. However, as the latter have some unique characteristics, they are often considered independently of predation.

**Herbivory:** When a plant is eaten by another organism, it is considered herbivory. Unlike predation, in which the whole organism is destroyed, plants often survive grazing by an herbivore. For this reason, herbivory is sometimes referred to as plant parasitism.

**Parasitism:** A parasite is physiologically dependent upon its host for nutrition. While the host is negatively affected by the loss of nutrients to the parasite, parasitism rarely leads directly to the host's death. Unfortunately, humans are hosts to any number of parasites, including liver flukes, tapeworms, lice, pinworms, giardia, and many others.

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**Mutualism:** In a mutualism, both partners benefit from the relationship. Many coral reefs have "cleaning stations" where some species of fish remove parasites from other fish. The cleaner fish get nutrition from the consumed parasites while the cleaned fish enjoy freedom from their parasites.

**Commensalism:** Commensalism occurs when one organism is positively affected by the relationship while the other organism is not affected, either negatively or positively, by the interaction. Cattle egrets who feed on the insects stirred up by domesticated cattle are an example of commensalism. Some birds have even taken advantage of the invention of the lawn mower to extend this relationship to the suburban lawn.

**Amensalism:** Amensalism takes place when one individual is negatively affected by interaction with another individual who is not affected by the relationship. Many molds, including *Penicillium*, secrete chemicals that kill bacteria in their vicinity.

**Neutralism:** Interactions between the two individuals are neutral in regard to both species. Some bacteria may exhibit neutralism as it has been reported that some species of *Lactobacillus* and *Streptococcus* can coexist without affecting each other positively or negatively. However, it has been suggested that true neutralism is probably rare in nature (Moon et al. 2010).

## Indirect Effects

The second major class of interactions, indirect effects, can be defined as the impact of one organism or species on another that is mediated or transmitted by a third. In other words, A (donor) has an effect on B (transmitter), which then affects C (recipient). There are two main ways by which an indirect effect can occur. The first is known as an interaction chain, in which a donor species affect the abundance of a transmitter and has an effect on a recipient. When a bird species (donor) begins to aggressively prey upon a specific caterpillar (transmitter), the reduction in herbivory by the caterpillars can lead to increased growth or numbers of the plants the caterpillar was consuming (recipient).

The second, interaction modification, occurs when the donor species alters some other attribute of the transmitter, such as behavior. When predation threatens a prey species, the prey often modify their behavior in order to reduce the chances of coming under the attention of the predator. Indirect effects consist of a sequence of at least two direct effect steps in nine models:

**Keystone Predation:** A series of classic ecological experiments by Paine in the 1960s helped to elucidate this indirect effect model. In keystone predation, the removal of a prey species by the predator indirectly increases the abundance of a competitor of the prey species. Menge (1995) found that keystone predation was the most common of the indirect effects observed in intertidal studies with 35% of the interactions falling in to this model.

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**Exploitation Competition:** When two predators consume the same prey, the loss of abundance in the prey species can negatively affect the second predator. Menge (1995) found that exploitive competition was the least common interaction, appearing only 2.8% of the time.

**Apparent Competition:** Apparent competition occurs when an increase in the abundance of one species leads to a decrease in the abundance of a second species due to enhanced predation by a shared predator. Apparent competition was the second most common indirect effect category, comprising 25% of the total interactions in intertidal communities (Menge 1995).

**Indirect Mutualism:** An indirect mutualism takes place when positive effects on two consumer species when each negatively impacts a competitor species of the other.

**Indirect Commensalism:** Indirect commensalism is similar to indirect mutualism except that one of the predator species will also consume the main prey of the other predator species.

**Habit Facilitation:** In habitat facilitation, one species indirectly improves the habitat of a third species by its interactions with a second species.

**Trophic Cascade:** The example above of the bird/caterpillar/plant relationship is an example of a trophic cascade. The plant is positively affected by the decrease in herbivory caused by a predator reducing herbivore numbers.

**Indirect Defense:** Indirect defense occurs when a non-prey species leads to the indirect decrease of a consumer species either by reducing the prey species via competition, which leads to a reduction in the consumer species, or when one prey species leads to an increase in its predator abundance, which then preys more heavily on the third species.

**Apparent Predation:** Apparent predation can occur by two avenues: a non-prey individual that has an indirect positive effect on a consumer or the negative effect of a predator on a non-prey species. The detection of indirect effects can be complicated in ecological experiments due to the fact that responses can contain a mix of direct and indirect effects. Do direct or indirect effects have a greater impact in structuring communities? It seems that the relative roles of these factors vary among studies and that under certain circumstances indirect effects could be exerting as strong an influence on community structure as direct effects (Moon et al. 2010).

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## Appendix II

**Indigenous Science:** is the pursuit of knowledge and the approaches (i.e., methods) used to amass that knowledge. The Indigenous scientific method involves Indigenous people's amassing information through random individual and/or community empirical observations over the long term (i.e., many generations/decades), hypotheses formulations via induction, rough measurement-based comparisons, and documentation through language, myth, songs, dance, music and rituals (UBC 2018; Aikenhead and Ogawa 2007; Snively & Corsiglia 2001).

Empirical evidence, when sought widely, forms a plethora of data through which different explanations and understandings may be woven. Identification of evidence is not always obvious and is never divorced from the cultural context of the scientist (UBC 2018; Aikenhead and Ogawa 2007). Western science has been implicated in many of the world's ecological disasters, and because Indigenous science is particularly rich in time-tested approaches that foster sustainability and environmental integrity, it is possible that the universalist "science gatekeeper" of Western science can be seen as increasingly problematic, and even counterproductive (Snively & Corsiglia 2001).