



May 12, 2022

Dan Barghshoon  
Email: opr-rpt@cer-rec.gc.ca

Dear Dan Barghshoon,

**RE: Michel First Nation Review and Comments on the Onshore Pipeline Regulations**

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I am writing as the elected Chief, on behalf of the Council and Membership of the Michel First Nation. Michel First Nation ("MFN" or "Michel") has been governed since 1985 through a democratic election every three years. At minimum, Michel First Nation Chief and Council represent approximately 1093<sup>1</sup> people currently registered as Indians, under the *Indian Act* on the Alberta General List; as well as many non-status descendants.

Michel First Nation has the following rights protected by Section 35 of the Canadian Constitution ("s. 35"), 1982:

- a. Michel First Nation are "Indians" within the meaning of Section 91(24) of the Constitution Act, 1867.
- b. Michel First Nation are therefore "Aboriginal Peoples" within the meaning of s. 35,
- c. Michel First Nation are signatories to Treaty 6 by adhesion on September 18, 1878, and
- d. Michel First Nation have rights identified and described in the *Natural Resources Transfer Agreement, 1930*

Michel First Nation members receive their Treaty annuity payments under Treaty 6; a payment of \$5.00 each year from the Government of Canada. According to Indigenous Services Canada:

*"Every year the Government of Canada makes treaty annuity payments to status Indians who are entitled to them through registration to First Nations that signed specific historic treaties with the Crown"*

*"The fulfillment of treaty provisions is a legal obligation of the Government of Canada".<sup>2</sup>*

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<sup>1</sup> As of December 31, 2021

<sup>2</sup> <https://sac-isc.gc.ca/eng/1100100032294/1581869772685>

MFN's s. 35 rights include hunting and fishing, as laid out in Treaty 6; as well as trapping and gathering, which is implied through the right to pursue avocations.<sup>3</sup> Further, MFN's s. 35 rights include aspects not explicitly addressed in Treaty 6, including land and resource rights, as well as rights to self-govern, practice our culture, and speak our language, among other rights.

We understand that the Canadian Energy Regulator ("CER") is undertaking a review of the Onshore Pipeline Regulations ("OPR") to ensure the regulation supports Reconciliation with Indigenous peoples as well as:

- Supports the highest level of safety, security and environmental protection,
- Addresses transparency and inclusive participation,
- Provide predictable and timely oversight, and
- Encourage innovation.

We further understand that the OPR review will incorporate and seek to understand feedback from Indigenous peoples and that review is not limited to the OPR, but where input is valuable, changes could be made to other regulatory documents and guidance such as the CER's Filing Manual.

With those understandings in mind, please accept our comments on the OPR review and dealings with the CER in general. We hope to meet with you following review of our submission to touch on key details and clarify any points.

### **Context**

Michel First Nation has previously been involved in CER hearing processes for the NGTL 2021 Expansion Project and the NGTL Edson Mainline Project. While involvement in such processes is necessary for protecting Michel First Nation's s. 35 rights, our Nation has experienced severe capacity and funding constraints that prove detrimental to the Nation in these processes.

Within these hearing processes, the main documentation used by proponents to identify and predict impacts resulting from the project is through the completion of an Environmental and Socio-Economic Assessment or "ESA". These documents are prepared by experts on a variety of subjects including air quality, noise, wildlife, vegetation, and human health. ESAs also typically contain conclusions regarding impacts to Aboriginal and Treaty rights. In order to allow Michel First Nation to understand the level of impact a given Project may have on our s. 35 rights, Michel First Nation must be given the opportunity to assess the potential impacts in partnership with project proponents. This has not been the case. Our requests for capacity to undertake even a simplistic assessment has been met with lack of approval and undue requirements on the Nation to provide this information on its own.

This lack of meaningful involvement, and justifiable capacity funding, is likely due to the absence of formal recognition by the federal and provincial Crown of Michel First Nation as a band/governing entity; and is further unfairly justified by the band's collective enfranchisement on March 31, 1958, as per the recommendations made by a Committee of Inquiry appointed by the Minister of Indian Affairs. At this time, Michel First Nation was dissolved as a band and members lost their status. It was not until the implementation of Bill C-31, R.S.C. c. I-5 in 1985 that Michel First Nation members were able to regain their

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<sup>3</sup> Treaty 6 (1876)

status. However, this Bill did not restore the governing entity of Michel First Nation, and as such our rights as a collective are not recognized or protected under colonial law.

Today, this means that project proponents do not feel compelled to treat Michel First Nation as an Indigenous group with collective rights, and instead categorize the Nation for a lesser degree of involvement; what is unclear is the Crown's direction in this regard. As such, while Michel First Nation must participate in engagement activities the same as other Indigenous groups, we are simultaneously met with sizable capacity deficits and unaddressed impacts to our s. 35 rights.

### **Response to Onshore Pipeline Regulations Review Discussion Paper**

The Onshore Pipeline Regulations Review Discussion Paper includes sections with associated questions whereby Nation input was requested. The below input responds to those questions applicable to Michel First Nation and our desired future state of involvement with the CER. While the questions are, in some cases, specific to the OPR, some of our responses are broader in context.

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

The OPR requires regulated companies to establish, implement, and maintain management systems and protection programs in order to manage/mitigate conditions that may affect the safety and security of the company's pipeline, employees, public and the environment. These management systems are a closed loop within the company, often with the company implementing a "Plan, Do, Check, Act"<sup>4</sup> framework for continual internal improvement with no opportunity for Indigenous involvement or insight.

In order to foster greater Indigenous involvement within management systems, particularly in relation to statutory responsibilities related to the Duty to Consult, the results of monitoring, corrective actions, and compliance evaluations must be effectively communicated to Indigenous Nations, more specifically, to Michel First Nation.

Additionally, the CER conducts inspections and audits to confirm compliance with the *CER Act*. One of the Factors to Consider in relation to certificates, issuance of certificate, and authorizations under the *CER Act* is "...the effects on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*...". Indigenous nations such as Michel First Nation are best placed to understand our rights which may have continued interaction with a given project; we are best placed to contextualize those rights and are also best placed to understand how aspects to address impacts to those rights may be or may not be in compliance.

Therefore, similar to the *Impact Assessment Act* Paragraph 156(2)(e), which refers to a monitoring committee, the OPR should provide for the establishment of a committee on a project-by-project basis of CER and Indigenous representatives to specifically ensure inspections and audits are in compliance and sufficiently address the effects identified on the rights of Indigenous peoples of Canada. This would be an important tool to provide oversight and involvement of Indigenous nations and work towards a nation-to-nation relationship.

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<sup>4</sup> <https://www.epa.gov/ems/guide-developing-environmental-management-system-plan>

**Question #2: How can the OPR contribute to the advancement of Reconciliation with Indigenous peoples?**

Within the preamble for this section it states that “Reconciliation is a strategic priority for the CER with a focus on enhancing involvement of Indigenous peoples in decisions and oversight; enhancing relationships; building CER cultural competency and humility; and driving meaningful change in the CER’s requirements and expectations of regulated industry.” In order to move forward with these concepts, there must be agreement on the definition of Reconciliation as a starting point.

While the Discussion Paper acknowledges the United Nations Declaration on the Rights of Indigenous Peoples, the definition provided by the Truth and Reconciliation Commission must also be accounted for. The Truth and Reconciliation Commission defines reconciliation as “...establishing and maintaining a mutually respectful relationship between Aboriginal and non-Aboriginal peoples in this country. In order for this to happen, there has to be awareness of the past, an acknowledgement of the harm that has been inflicted, atonement for the causes, and action to change behavior.” This is resonant for Michel First Nation’s ongoing relationship with Canada and the CER.

A key consideration that contributes to an understanding of Reconciliation is that it is not “someone else’s” responsibility. Time and time again, moving towards Reconciliation with Michel is deferred to other bodies (e.g., Indigenous Services Canada, Crown-Indigenous Relations and Northern Affairs Canada). Michel First Nation views the government of Canada as a homogenous entity and dealing with the CER is dealing with Canada. Therefore, in executing the strategic priority of Reconciliation, the CER must have:

- an awareness of Canada’s past harms against Michel First Nation;
- an acknowledgement of those harms; and
- work with all other departments within the governmental apparatus to atone.

Michel First Nation has filed numerous documents with Canada and the CER through regulatory processes outlining the timeline of forcible enfranchisement and the harms this has caused and is open to increasing awareness further to enforce changed behaviors.

Additionally noted within the preamble is that “The CER has an Indigenous Advisory Committee which advises the CER on how to build a new relationship with Indigenous peoples and how best to enhance the involvement of Indigenous peoples and organizations with respect to CER-regulated infrastructure.” However, to be clear, Michel is not part of the Indigenous Advisory Committee and has not been invited to participate. As MFN is particularly vulnerable to positive and negative actions by the CER in related to their involvement in decisions and oversight (i.e., impact inequity), largely due to an existing capacity deficit (in terms of staff and funding), MFN involvement in the future, subject to capacity, should be revisited continually.

**Question #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?**

In order to explore this topic there must be acknowledgment of both tangible aspects of heritage resources, as well as intangible aspects. While it is acknowledged that the OPR and its contribution to the protection of heritage resources on pipeline right-of-way relates to tangible aspects; key

intangible aspects such as Michel First Nation practices, expressions and knowledge in relation to objects, places and cultural spaces should be integrated and understood by the CER as well.

To this end, the CER should require more in-depth engagement with Nations where a company had identified a discovery of heritage resources; and where *“The company is expected to identify mitigation approaches and must develop heritage resource discovery contingency plans for the possible discovery of heritage resources once construction is underway”* - Indigenous nation oversight is required in tandem with CER oversight. Additionally, as part of the overall review, consideration of timing (i.e., when Indigenous nations are notified and involved) in relation to Indigenous oversight must be considered to ensure adequate involvement in the treatment of resources as well as sufficient input in potential intangible aspects.

There must also be consideration by the CER of jurisdictional control and how this interaction between the federal and provincial governments may result in circumvention of Michel First Nation authority. In most provinces, discovered resources (i.e., artifacts) belong to the provincial Crown or its agents. This concept of ownership is incongruent with Michel First Nation worldview, and can lead to conflict where artifacts are identified. This must be acknowledged by the CER and explored to ensure a relationship built on Reconciliation is extended to all dealings.

***Question #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 focus on traditional land and resource use and the equivalence of that with rights within the preamble is a fundamental issue that is ongoing.

Traditional land and resource use is not representative of all Indigenous rights. Instead, it is generally used to characterize the baseline of the exercise of harvesting rights. The wording in this section, which equates the CER Act with a requirement to consider the rights, interests and concerns of Indigenous Peoples minimizes nations’ rights and minimizes the requirement of the *CER Act* to assess impacts to those rights.

For greater clarity, Indigenous rights can include governance rights, language rights, cultural rights including the right to cultural wellbeing, land and resource rights which are independent of harvesting rights, harvesting rights themselves, and economic rights, among others.

The OPR can contribute to the protection of these rights by first working with Indigenous nations to understand what these rights are more broadly; and contextualize specific rights in relation to pipeline rights-of-way which may require joint oversight by the CER and Indigenous nations.

***Question #5: How can the use of Indigenous knowledge be addressed in the OPR?***

This section indicates that *“...Indigenous knowledge should be considered and ***included in decision-making throughout the lifecycle of the pipeline***”* [emphasis added]. Instead of being considered and included in the decision-making, Indigenous knowledge should be foundational to that process.

Indigenous knowledge is a basis; a starting point from which all other knowledge flows. It provides a connection to the environment holistically and can provide insight into previously overlooked interconnections.

Western science processes such as Environmental Assessments seek to compartmentalize the environment into easily considered pieces (e.g., air, noise, wildlife). While necessary for assessment, it can result in a lack of understanding of tangible connections between those environmental components and how the ecosystem functions on a broader level.

In order to restore those connections, Indigenous knowledge should be thought of as a **framework** for assessment rather than a **component** of assessment; whereby ecosystem level information, based in principles of sustainability and stewardship, are consistently applied to link the aspects of assessment together. For example, how water quality is connected to a network of other aspects including governance of resources through stewardship, wildlife sustainability, subsistence harvesting and overall ecosystem health.

This is a necessary step in decolonizing assessment methodology and ensuring true Reconciliation.

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

Uneven participation due to capacity constraints will continue to impair participation of Michel First Nation in pipeline oversight. Michel First Nation does not receive core capacity from either the provincial or federal Crown due to the enfranchisement of the Nation and continued lack of reparations or recognition. This means that the Chief and Council of Michel operate wholly on a volunteer basis and do not have funding available to hire staff or retain expertise. Only through targeted regulatory projects, does Michel receive the meagre funding to participate.

This capacity deficit means that while Michel First Nation may want to exert the governance and jurisdictional authority of our Nation through participation in pipeline oversight, there are too many competing priorities, with too little capacity to undertake this.

Therefore, Michel First Nation is further penalized for the lack of capacity created by the government of Canada's continued lack of recognition. For example, the CER Feature Article on the Indigenous Monitoring within CER regulated projects<sup>5</sup> indicates that some Indigenous Monitors have taken on leadership roles within their monitoring programs. – this benefit is unevenly disbursed between Nations and is not an opportunity typically provided to Michel First Nation, nor could Michel First Nation consistently access this opportunity if offered.

The best way for CER to address the participation of Indigenous peoples in pipeline oversight, who are not already involved, is through attentive Reconciliation as noted above, on a case-by-case basis. For Michel First Nation, this means the CER having an awareness of Canada's past harms against Michel First Nation, the government of Canada broadly acknowledging those harms, and the CER and all other departments within the government of Canada atoning for those wrongs through recognition of Michel First Nation as a band/governing entity and reparations for this long overdue action.

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<sup>5</sup> <https://www.cer-rec.gc.ca/en/about/news-room/feature-articles/indigenous-monitors-enhance-cer-activities.html>

**Question #7: How can the OPR support collaborative interaction between companies and those who live and work near pipelines?**

This section specifies that *“Indigenous peoples and others have provided feedback that the ability to participate in company planning for operations and maintenance activities, and in emergency planning and response exercises, is important.”* In order to uphold a nation-to-nation relationship, participation in these activities is not only important, but essential. Nations should be viewed as an oversight body similar to the CER, requiring regular reporting, approvals and, where necessary, enforcement.

Additionally, the OPR should require proponents to explore options for emergency response beyond what is detailed in standard practices and policies, in consultation with Indigenous groups, to ensure the unique needs of nations are understood, incorporated and accounted for.

**Question #8: How could communication and engagement requirements in the OPR be improved?**

In the experience of Michel First Nation, post approval communication and engagement with companies is limited and lacks necessary capacity funding to allow MFN to engage. Further, Michel’s capacity deficit means that our Nation lacks the necessary expertise to critique management systems or be involved in safety, security, emergency management, damage prevention and environmental protection matters. This shortfall in capacity could be addressed through the OPR formally requiring a post approval engagement program with impacted Indigenous nations.

Additionally, this section specifies that *“The OPR does not currently require a company to have an engagement program in place but in some recent pipeline authorizations the Commission has added incremental engagement responsibilities as conditions.”* Conditions often require the proponent to provide various types of documentation to Indigenous groups for review, typically 30-45 days before submission to the CER. However, there is often no condition compelling the proponent to incorporate any feedback received, and engagement of this kind is limited to comment. Additionally, the documentation provided to nations post-approval is immense and often comes in addition to other referrals and project applications. This creates severe capacity burdens. Michel First Nation is aware of some conditions of approval, particularly the National Energy Board (now the CER) Crown Consultation and Accommodation Report for the Nova Gas Transmission Ltd. 2021 System Expansion Project (GH-003-2018), where Condition 14 was amended to include the following provision:

*“Should Indigenous groups express a requirement for funding to review NGTL’s filings related to conditions, NGTL must offer Indigenous groups a reasonable amount of capacity funding to support their review.”*

It is still left up to the proponent to determine what is “reasonable”, and in the case of Michel First Nation, this is often much less than is required to facilitate meaningful involvement. This must be revisited by the CER in partnership with Indigenous nations to identify adequate language for future conditions which will compel proponents to provide sufficient time and funding.

***Question #9: How could the CER improve transparency through the OPR?***

The CER can improve transparency through greater Indigenous involvement in a nation-to-nation relationship which places Indigenous nations impacted by projects as equals in oversight and management. This can be accomplished by strengthening the language within the OPR to reflect this nation-to-nation relationship.

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

- a) those people implementing the OPR; or***
- b) those people who are impacted by the operational activities addressed in the OPR?***

With respect to GBA+, there are many historical and current power structures in place that impact Michel First Nation. Most salient is the continued lack of recognition of Michel First Nation as a band/governing body. These colonial power structures continue to frustrate and undermine Michel First Nation as a self-determining nation which leads to cascading impacts on our members economically, emotionally, culturally, spiritually, through their sense of belonging, and through their self-actualization.

The people implementing the OPR must be aware of these unique circumstances and the distinctive conditions of other nations to ensure those people are aware of why impacts of a project may be different for Indigenous nations; and how the approval and operation of project may reinforce existing inequalities or unequal power balances. This should be undertaken through targeting educational learning for nations involved in projects in various parts of the country. Understanding unique intersectional challenges of each nation in proximity to a project will be a long-term goal and cannot be completed without engagement with the affected nations.

Less is required of the people impacted by the operational activities, and more is required by the CER and Project proponent. Operational activities can exacerbate structural barriers for Michel First Nation members that are rarely considered and have yet to be assessed by any project proponent or regulator.

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

In order to improve predictability and timely regulatory approvals, the CER and project proponents must fulfill the duty to consult and must work towards shared jurisdiction with Indigenous nations. Once this is achieved, the regulatory system can work towards efficiencies. The regulatory system must adequately assess impacts to rights before it can be streamlined.

***Question #12: How can the OPR support innovation, and the development and use of new technologies or best practices?***

To date, Michel First Nation has not been involved in the most basic management processes through the CER and regulated by the OPR. The Canadian Standards Association does not engage with Michel on standards currently under development or approved for aspects impacting Michel First Nation rights; further, some standards are behind a pay wall and cannot be accessed by Michel First Nation for consideration. While, ideally, Michel First Nation would like to contribute to



innovation, until the barest capacity requirements are met and the basic consultation and engagement requirements are fulfilled, this is not feasible.

***Question #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?***

Further clarification of Indigenous involvement through a committee (see response to Question #1) within the OPR or within supporting guidance would improve implementation of a robust management system requirement.

***Question #19: How can respect and personal workplace safety be assured at CER regulated sites?***

Through a greater awareness and understanding of GBA+ factors, Indigenous rights, and the overall duty to consult, discrimination may be reduced. However, many companies have little control over the understanding or policies of their contractors. Binding conditions of approval related to reduction of discrimination, increased awareness through targeted learnings with impacted nations, and education can be applied to incentivize companies to ensure contractors work towards safe spaces and places for Indigenous monitors, and members of the Indigenous Advisory and Monitoring Committees.

***Question #20: How should the CER be more explicit about requirements for contractor management?***

See Response to Question #19.

***Question #22: How can the OPR drive further improvement to the environmental performance of regulated companies?***

The OPR can drive further improvement of environmental performance by better using a framework of foundational Indigenous knowledge as a basis and incorporating key aspects of Indigenous rights. This will ensure an ecosystem level view of environmental outcomes and help proactively identify areas where risks intersect. See response to Question #5 for additional context.

***Question #24: How can contaminated site management requirements be further clarified, in the OPR or in guidance?***

Contaminated site management should also include provisions for reporting contamination to relevant Indigenous nations. Particularly in the event of contamination that cannot be remediated within 12 weeks of the Incident being reported.<sup>6</sup> This will allow Indigenous nations the opportunity to identify their own interests in the site for follow-up documentation and consideration by the CER. Engagement must not be a judgement call by companies, and instead should be detailed as a requirement by the CER. This will help achieve the goal of transparent engagement and ensure all rights holders potentially further impacted by contamination are fully informed and can disseminate this information to their members.

Further, potentially impacted Indigenous nations must also be provided a summary of the extent of contamination and the potential for adverse effects related to their Indigenous rights, as identified

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<sup>6</sup> As per the Remediation Process Guide

and assessed in collaboration with the nations during the initial project application and approval process.

While the Remediation Process Guide refers to communications when contamination occurs on reserve lands, Michel First Nation are signatories to Treaty 6 and hold s. 35 rights throughout that treaty area, as well as s. 35 rights throughout MFN's traditional territory. Whenever contamination occurs within these areas, Michel First Nation requires communication and sufficient capacity to participate.

**Question #29: How do you want to be engaged by the CER in the development of technical guidance?**

Similar to this process of reviewing OPR regulations and Discussion Paper, if sufficient time is granted and capacity funding is available, then Michel First Nation can evaluate their level of interest in the technical guidance and signal their interest in participating in the review/engagement process. This will be on a case-by-case basis and is limited by the capacity of Michel (both in terms of staff/contractor capacity and funding).

We hope that the CER will consider the above input and that it will be incorporated in the OPR as well as the operations of the CER more broadly. To ensure understanding of our issues, Michel First Nation requests a point-by-point response for our consideration. This will ensure the engagement process is structured to facilitate the most involvement possible. We look forward to meeting to discuss the outcomes of our review and next steps in this process.

Yours Truly,

[Redacted Signature]

[Redacted Name]

Michel First Nation

CC: [Redacted]

Michel First Nation

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