

REPLY TO: [REDACTED]

Victoria Office

email: [REDACTED]

ASSISTANT: [REDACTED]

Our file: 5303

June 30, 2022

Via email: opr-rpt@cer-rec.gc.ca

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

## ***Re: Response to Onshore Pipeline Regulations Review - Discussion Paper***

We write on behalf of the Nooaitch Indian Band (NIB) in response to the Canada Energy Regulator's (CER) discussion paper seeking input from various parties on the *Onshore Pipeline Regulations* (OPR). We write to provide comments and recommendations to the OPR Review Discussion Paper (the "Discussion Paper").

The Nooaitch Indian Band (NIB) is a member of the Scw'exmx Tribal Council, a group of Nlaka'pamux Nations located in the Southern interior region of the area now known as British Columbia. The NIB has participated in, and been impacted by, decisions made by the CER's predecessor (the National Energy Board). The CER's review of the OPR is very relevant and important to the NIB, especially given the community's location and the impact of climate change has had on this small community.

The NIB is currently in the recovery phase after experiencing two major environmental disasters over the last year: the Lytton fire and the atmospheric flooding in BC in November 2021. As such, the NIB leadership has been focused on those recovery efforts and has been unable to provide their attention to a full response to the Discussion Paper. The NIB expects to partake in future engagement with the CER over changes to the OPR.

### **Summary of Recommendations**

Below we provide a more detailed discussion about our recommendations. In summary, our recommendations for the CER are that changes to the OPR must:

1. Incorporate Canada's obligations under the *United Nations Declaration on the Rights of Indigenous Peoples Act*.
2. Implement the principle of "free, prior, and informed consent" by Indigenous peoples.

{00465692.1}

VICTORIA OFFICE:  
200 - 1022 GOVERNMENT STREET  
VICTORIA, BC V8W 1X7

WHITEHORSE OFFICE:  
201 - 3059 3RD AVENUE  
WHITEHORSE, YT Y1A 1E2

TEL: 250-383-2356; FAX: 250-380-6560  
WEBSITE: [www.woodwardandcompany.com](http://www.woodwardandcompany.com)

TEL: 867-633-5940  
\*DENOTES A LAW CORPORATION

3. Engage Indigenous peoples throughout the life of project (at high levels and throughout all aspects of projects).
4. Educate staff, contractors and others about Indigenous legal orders, governance practices, Indigenous knowledge and decision-making processes.
5. Mandate open communication and engagement with Indigenous communities at all stages of project development.
6. Assess cumulative effects of pipeline activities and make decisions that protect the environment based on that consideration.

Below we provide our comments on each of the questions posed by the CER in the Discussion Paper.

## **SECTION 1. OPR – LESSONS LEARNED**

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

Generally, the main themes from our response are that: UNDRIP needs to be implemented; FPIC must be honored; communication between the CER or company and Indigenous peoples must be at the earliest opportunity, continuous and transparent; and adequate funding or support needs to be provided in order for all Indigenous groups to be able to meaningfully participate.

## **SECTION 2. RECONCILIATION WITH INDIGENOUS PEOPLES**

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

*Undertake UNDRIP-OPR review and ensure implementation of UNDRIP*

In order to work toward reconciliation with Indigenous peoples, the Government of Canada (“Canada”) must first take concrete steps to ensure the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)<sup>1</sup> is fully implemented in Canadian law. The *United Nations Declaration on the Rights of Indigenous Peoples Act* (the “UNDRIP Act”),<sup>2</sup> which came into force in June of 2021, affirms Canada’s intention to implement UNDRIP, stating that “all measures necessary” must be taken to ensure Canadian laws are consistent with UNDRIP.<sup>3</sup>

For the CER to comply with its obligations under the UNDRIP Act and international law, it should undertake a comprehensive assessment of the OPR to determine how to align the regulations, including the legal principles, decision-making processes and legal responses contained within them, with UNDRIP. This will require ongoing consultation and engagement with Indigenous peoples to ensure our feedback is recorded and incorporated. While some of this feedback may be obtained through response papers such as this one, it is our suggestion that a more comprehensive alignment review be undertaken to ensure that each provision within the OPR, and the practical application of

---

<sup>1</sup> *United Nations Declaration on the Rights of Indigenous Peoples*, GA Res 295, UNGAOR, 3rd Sess, Supp No 49, UN Doc A/Res/61/295, 46 ILM 1013 (2007) [UNDRIP].

<sup>2</sup> *United Nations Declaration on the Rights of Indigenous Peoples Act*, SC 2021, c 14.

<sup>3</sup> *Ibid*, s 5.

the OPR, meaningfully reflects Canada's commitment to reconciliation with Indigenous peoples, in accordance with UNDRIP and the UNDRIP Act.

- **Recommendation #1: The CER undertake a comprehensive assessment of the OPR to ensure it, and any other related legislation and policies align with the legal principles, decision-making processes and legal responses in UNDRIP. Ensure UNDRIP is implemented in the application of OPR.**

*Integrate principle of "free, prior & informed consent" within OPR*

One of the foundational principles of UNDRIP is the affirmation that Indigenous peoples have the right to self-determination and, accordingly, the right to take part in decision-making that impacts Indigenous peoples, their lands, and their territories.<sup>4</sup> Associated with these rights is the principle of "free, prior and informed consent" ("FPIC"). UNDRIP requires that states obtain FPIC of Indigenous peoples when taking on such activities as the adoption and implementation of legislative or administrative measures that could impact Indigenous peoples,<sup>5</sup> when planning to store or dispose of hazardous materials on their territories,<sup>6</sup> and when seeking approval for projects that could impact their lands and territories.<sup>7</sup>

According to Dr. Sarah Morales, an Indigenous scholar and Associate Professor of Law at the University of Victoria, the principle of FPIC must be understood to flow directly from the right to self-determination. In this context, self-determination includes Indigenous peoples exercising a measure of control over their lands, territories, and resources. Accordingly, the principle of FPIC mandates that Indigenous peoples be fully informed and engaged in discussions regarding potential developments on their lands and territories, and importantly, that their right to grant or withhold consent be recognized and respected.<sup>8</sup>

The CER should take concrete steps to meaningfully integrate the principle of FPIC within the entire decision-making structure under the OPR, throughout all phases of a project. This would involve the following steps: (1) ensuring the consultation procedure undertaken for each project is a product of consensus (this will look different depending on the Indigenous Nation(s) involved, and their laws and legal processes); (2) ensuring Indigenous peoples have the financial, technical, and other assistance needed to participate and engage fully in discussions surrounding the project; and (3) ensuring Indigenous peoples have full and objective information about any and all aspects of the project that may affect Indigenous peoples and their territories.<sup>9</sup>

- **Recommendation #2: Integrate the principle of FPIC within the entire decision-making structure under the OPR, throughout all phases of a project.**

<sup>4</sup> UNDRIP, *supra* note 1 at Articles 3, 18.

<sup>5</sup> *Ibid*, Article 19.

<sup>6</sup> *Ibid*, Article 29(2).

<sup>7</sup> *Ibid*, Article 32(2).

<sup>8</sup> Sarah Morales, "Braiding the Incommensurable: Indigenous Legal Traditions and the Duty to Consult", in Centre for International Governance Innovation, *UNDRIP Implementation: Braiding International, Domestic and Indigenous Laws*, (Waterloo ON: Centre for International Governance Innovation, 2017) 63 at 69.

<sup>9</sup> Sarah Morales, "Indigenous-led Assessment Processes as a Way Forward" (4 July 2019), online: *Centre for International Governance Innovation* <<https://www.cigionline.org/articles/indigenous-led-assessment-processes-way-forward/>>.

*Develop and implement a plan to meaningfully engage Indigenous peoples throughout the life of a project*

Currently, Indigenous peoples are not often involved in projects at the earliest stages before plans have been made. Various Indigenous Nations have publicly expressed a feeling that project planning and design decisions had been made before they were engaged in discussions, leaving them little recourse to ensure their laws, cultures, and perspectives were respected and reflected in the design for the project moving forward.<sup>10</sup> For example, NIB has engaged in many consultation discussions wherein the outcome or decisions appeared to be made and consultation discussions were merely a formality to check a box. Further, NIB has struggled with insufficient capacity and has been inadequately supported in participating in environmental decisions because they have not been provided funding early enough to obtain the information/evidence they needed from experts, including their own traditional knowledge keepers, for that information to then be useful and inform consultation and accommodation measures.

➤ ***Recommendation #3: The CER ensure that Indigenous groups have sufficient capacity and are provided with adequate support to meaningfully engage throughout the life of a project.***

We recommend that the CER proactively set out a plan to meaningfully engage with Indigenous peoples throughout the life of project from its conception, throughout the design and planning stage, during construction, operation, and maintenance, and in the decommissioning phase of the project. This would require Indigenous peoples to be actively involved in decision-making regarding the location and placement of pipelines on their territories, the environmental protection and mitigation measures carried out throughout the life of each project, and the responses necessary if an accident or other harm occurs in the process of carrying out these projects.

➤ ***Recommendation #4: The CER proactively plan to meaningfully engage with Indigenous peoples throughout the life of project.***

*Acknowledge that Indigenous groups are experts in their traditional territory*

Indigenous groups have been living in their traditional territory since time immemorial. The CER needs to shift how it thinks about science and acknowledge that Indigenous peoples are the experts in the lands on which they have lived since time immemorial. They have been living off of and surviving on these lands for much longer than they have been studied by any scientist. They have significant information about the environment and impacts thereon as they depend on the environment in their traditional territory for survival. The CER needs to acknowledge the unique and special relationship they have to their land makes them experts and that they have valuable information to share. An example we can share in this regard is that the NIB community has been reliant on fisheries as a main source of food. However, they have seen a number of species depleted to an extent that they no

---

<sup>10</sup> For example, in relation to consultations with the National Energy Board on the Trans Mountain pipeline expansion, Tsleil-Waututh Chief Maureen Thomas shared that the process felt like “window-dressing”, in that there was a sense the decision had been made before her people were consulted – see Judith Lavoie, “The death of Trans Mountain pipeline signals future of Indigenous rights: Chiefs” (30 August 2018), online: *The Narwhal* <<https://thenarwhal.ca/death-trans-mountain-pipeline-signals-future-indigenous-rights-chiefs/>>.

longer have those fish in their traditional territory. They attempted to raise the alarm with Canada and have the species added to the *Species at Risk Act*, yet their cries were not heard.

- ***Recommendation #5: The CER must acknowledge Indigenous groups' unique relationship to their traditional territories and honour Indigenous peoples as experts of the land with valuable information to share.***

*Develop and implement a plan to educate staff and workers about Indigenous legal orders, governance practices, and decision-making processes*

It is vitally important that, throughout the process of engaging in discussions with Indigenous peoples, there be a mutual understanding that their perspectives as Indigenous peoples, in relation to their lands and territories, are directly connected to the laws and practices of their communities. Indigenous legal orders operate within their communities, as they have done since time immemorial, to manage interactions and conflict between people and with the natural world around us.<sup>11</sup> Practising and engaging with their own laws is closely tied to the right of self-determination affirmed in UNDRIP.<sup>12</sup> Recognizing Indigenous legal orders is a vital aspect of the work toward reconciliation for Canadian governments. Morales highlights the fact that, in order for meaningful engagement to occur in relation to economic and resource development, Indigenous peoples' own governance practices and decision-making processes must be recognized and respected.<sup>13</sup>

- ***Recommendation #6: The CER develop and implement a plan to educate staff and workers about Indigenous legal orders, and the importance of engaging with Indigenous peoples based on the foundational principle of respect for their legal orders, governance practices, and decision-making processes.***

The CER should then develop a policy for future engagement with Indigenous peoples, based on this principle of respect for Indigenous legal orders, governance practices, and decision-making, and the principle of FPIC. This policy should outline how the CER will go about engaging in discussions with Indigenous Nations during the earliest stages of a project, to mutually determine a process for consultation, principles for engagement, and procedures for dispute resolution.

- ***Recommendation #7: The CER develop a policy for future engagement with Indigenous peoples, based on the principle of respect for Indigenous legal orders, governance practices, and decision-making, and the principle of FPIC.***

*Review role of the Indigenous Advisory Committee (IAC) within the regulatory process*

The IAC is a fundamental component of the CER's current commitment to reconciliation with Indigenous peoples. However, in order to ensure that this body is fulfilling its purposes within the regulatory framework – to “enhance involvement” of Indigenous peoples in regulatory processes by advising on the “integration of Indigenous perspectives, knowledge, teachings, values, use of the land

<sup>11</sup> Val Napoleon, “Thinking About Indigenous Legal Orders”, in René Provost & Colleen Sheppard, eds, *Dialogues on Human Rights and Legal Pluralism*, (Dordrecht: Springer Science + Business Media, 2013) 229 at 239.

<sup>12</sup> *Ibid* at 230.

<sup>13</sup> Morales, *supra* note 9.

and water, oral traditions, and worldviews, throughout the regulatory lifecycle”<sup>14</sup> – the operation of the IAC must be reviewed in relation to its actual impact on decision-making within the regulatory process.

- **Recommendation #8: The CER review the findings and recommendations of the IAC since its inception. The CER evaluate the weight accorded to IAC contributions in decision-making to determine whether, and to what extent, those findings and recommendations have impacted CER decisions. Make improvements based on the results of the CER review.**

### **Question #3: How can the OPR contribute to the protection of heritage resources on a pipeline right-of-way during construction, and operation and maintenance activities?**

*Prioritize protection of Indigenous heritage sites during planning and design phase*

The OPR Review Discussion Paper notes that the identification and protection of heritage resources is a consideration during both the construction phase, and the operation and maintenance phase of a pipeline project. However, it is essential that this factor be considered during the early stages of a project, and any decision must prioritize the protection of Indigenous heritage sites. Measures instituted after the planning and design phase of a pipeline project has already been completed cannot be the only protection afforded to Indigenous communities for the heritage sites that are integral to their cultures and ways of life. In accordance with Articles 3 and 18 of UNDRIP, which affirm the rights to self-determination and decision-making in relation to their lands and territories, respectively, Indigenous peoples must be able to demand alternative locations, routes or designs for the protection of their heritage sites as well. Acting meaningfully on this consideration will require the CER and companies to engage with Indigenous peoples in relation to their heritage sites, providing the resources and support needed for Indigenous Nations to participate in this work, when necessary.

- **Recommendation #9: The CER prioritize the protection of Indigenous heritage sites, which must be considered at the earliest stages of a project – during the planning and design phases.**

*Develop plan to support identification of heritage sites*

In order for discussions about Indigenous heritage sites to be comprehensive and meaningful, identification of these sites will need to be prioritized within, or before, the planning stages of a project. Many Indigenous communities do not have comprehensive written data or maps identifying sites that are of particular importance to their distinct heritages, cultures, and ways of life. This raises many challenges for communities when it comes to engaging with the CER in relation to the protection of these sites – many Indigenous groups, like NIB, do not have adequate staff, funding, or other resources to participate fully in the engagement process. They are consumed with too many referrals; they do not have adequate capacity, neither in terms of personnel or funding to meaningfully respond and participate in all projects in their traditional territory. They often have to triage the most urgent projects because it is impossible to respond to all of them, especially in any meaningful manner. Add to this that they are a community that is very vulnerable to changing environmental conditions. They

<sup>14</sup> Canada Energy Regulator, “Indigenous Advisory Committee” (30 March 2022), online: *Canada Energy Regulator* <<https://www.cer-rec.gc.ca/en/about/who-we-are-what-we-do/organization-structure/indigenous-advisory-committee/>>.

are often dealing with environmental emergencies that threaten their life, health and safety, like forest fires and flooding. In the past year, their community has been on evacuation alert multiple times and even on evacuation order. Their limited resources are often redistributed to these emergencies. The irony is not lost that they do not have capacity to meaningfully participate in the decisions related to projects that are a main cause of climate change and these environmental disasters that impact their community.

- ***Recommendation #10: The CER develop a plan to support Indigenous Nations to identify heritage sites on their territories. This may require the CER to provide funding or other resources that would make such activities possible. However, it should be noted that Indigenous Nations should not be required to share information that may be protected or confidential in order to access these resources.***

**Question 4: How can the OPR contribute to 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?**

*Develop policy for maintenance of traditional resources along pipeline right-of-way*

The CER must have mechanisms in place to ensure that sustenance resources, such as traditionally relevant plants and animals, are preserved and protected within a pipeline right-of-way during the construction, operation and maintenance of pipeline projects.

- ***Recommendation #11: The CER develop a policy to ensure traditionally used resources are maintained in consultation with Indigenous communities, throughout the lifetime of a project. This policy should be shared openly with communities, and reviewable subject to feedback from Indigenous peoples.***

*Develop plan to support data collection related to traditional land and resource use*

- ***Recommendation #12: The CER must ensure adequate funding and other resources are available to support Indigenous Nations to be able to collect data related to traditional land and resource use, and convey areas of significance to the CER and relevant organizations. Again, Indigenous Nations should not be required to share information that may be protected or confidential in order to access these resources.***

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

*Develop policy to ensure there is space and opportunity for oral history to be shared in a culturally appropriate manner*

Indigenous knowledge can come from a variety of sources. A primary source of knowledge – including scientific/technical knowledge, moral or ethical guidance, and the laws and legal processes that govern community conduct – is oral histories. Within many, if not all, Indigenous communities in Canada, oral histories have played a central role in transmitting laws, knowledge, and guidance to new

generations since time immemorial.<sup>15</sup> These oral histories help inform not only the identification of significant or important places, but also the nature of the obligations and responsibilities owed in relation to those places and the environment, and the processes that should be followed when making decisions that affect them.

Sharing and engaging with oral histories is therefore central to the exercise of the right of self-determination, as Indigenous peoples,<sup>16</sup> and the right to participate in decision-making in relation to their lands and territories.<sup>17</sup> Oral histories can help the CER, alongside Indigenous Nations, determine how to act on obligations owed to the territory in meaningful ways. The CER must consider culturally appropriate means of sharing information. For example, some Indigenous legal orders may only allow certain knowledge holders to share certain information and it may not be allowed to be shared publicly. The CER must be flexible in its approach for accepting traditional knowledge.

Additional support, including funding or other resources, may be required in order for Indigenous Nations to be able to participate fully in this process.

➤ ***Recommendation #13: The CER develop a policy to ensure there is space within the engagement process for oral histories and other information to be shared by Indigenous Nations, and that the policy consider flexibility in sharing information in a culturally appropriate manner consistent with each nation's own legal orders.***

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

*There should be Indigenous representation at all levels of the CER*

Not only are Indigenous peoples significantly and adversely impacted by the construction, management, operation and decommissioning of pipelines, but they also have a significant amount of knowledge regarding their lands, waters, and territories, and how those are impacted by these activities. This knowledge can be crucial throughout all stages of pipeline development (construction, management, etc.), and at all levels of pipeline oversight (on-the-ground activities, in higher-level decision-making, within the legislative process, etc.).

It is therefore essential that the CER develop a plan to increase Indigenous representation in pipeline oversight both within the CER, and externally as well, to ensure Indigenous knowledge, interests and concerns are considered at all levels of decision-making, throughout the life of a pipeline project. This will require the CER to revise its hiring and certification practices at all levels, including by developing a plan to support and encourage Indigenous individuals to apply for and take on various roles (for a specific example, see Recommendation #15, below).

---

<sup>15</sup> Val Napoleon & Hadley Friedland, “An Inside Job: Engaging with Indigenous Legal Traditions through Stories” (2016) 61:4 McGill LJ 725 at 739.

<https://lawjournal.mcgill.ca/article/an-inside-job-engaging-with-indigenous-legal-traditions-through-stories/>

<sup>16</sup> UNDRIP, *supra* note 1 at Article 3.

<sup>17</sup> *Ibid* at Article 18.



However, we would like to emphasize that providing space for Indigenous individuals to participate in pipeline oversight within the CER is not sufficient on its own to ensure knowledge, interests and concerns are reflected within the regulatory process. As has been reflected throughout this response paper, Indigenous groups and nations must also be free to participate and engage throughout all stages of pipeline development. This will include having opportunities to share oral histories, knowledge, and legal principles and practices that apply to the territory in question for a specific pipeline, and it will include having the ability to provide free, prior and informed consent to various aspects of a project. These decisions may occur outside of the CER (within the decision-making structures of Indigenous Nations themselves), but they are still a crucial aspect of pipeline oversight, the importance of which must be reflected within the OPR framework.

➤ **Recommendation #14: The CER must have Indigenous representation at all levels of the CER, including at the level of decision-making.**

*Expedite Inspection Officer certification program for Indigenous Monitors*

The Indigenous Monitoring Program (IMP) has at times allowed Indigenous Monitors to take a leadership role in scoping and executing monitoring activities for pipeline projects, alongside CER Inspection Officers. A program is also being developed to help Indigenous Monitors become certified as CER Inspection Officers. While the IMP is a good start, supporting Indigenous individuals in working toward certification as Inspection Officers will continue to improve the inclusion of Indigenous perspectives within pipeline oversight.

➤ **Recommendation #15: The program to increase the number of Indigenous CER Inspection Officers must be expedited.**

### **SECTION 3. ENGAGEMENT AND INCLUSIVE PARTICIPATION**

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

*Mandate open communication and engagement with Indigenous communities at all stages of project development – including planning and design stage*

The Discussion Paper notes that Indigenous peoples have asked for more opportunities to participate in planning for operation and maintenance, and emergency response planning. It also notes that municipalities would like to see proactive, two-way communication with companies during the planning and design stages of a project. However, it is important to consider that Indigenous groups should be included in communications at these earlier stages as well. This engagement should be specifically targeted toward Indigenous communities (i.e., Indigenous Nations should not be grouped with other parties, or with the broader public, for the purposes of engagement at any stage of a project). Companies should be required to be fully transparent with Indigenous Nations from the outset of the project planning stage, providing details regarding the purpose and scope of the proposed project, the various alternatives being considered, and any other information relevant to determining the pipeline's location and how it will impact the surrounding territory and Indigenous communities.

With this information, Indigenous peoples can assess the potential impacts of a project on their people and territories, make informed decisions regarding consent or approval of the project plan, and take further steps to engage with companies and other relevant parties.<sup>18</sup> This level of communication and information-sharing will help provide certainty to companies and Canadian governments that Indigenous Nations have thoroughly considered the impacts and benefits of a project and that they have provided their consent to move forward.

The CER and companies must also be open to receiving and considering the knowledge and recommendations shared by Indigenous peoples throughout the process. It is important that open, two-way communication be established from the outset, and that companies have the capacity and willingness to hear and meaningfully consider and address Indigenous Nations' concerns and suggestions for improvement.

The CER may also consider establishing guidelines for companies to follow when communicating and engaging with Indigenous communities. These guidelines could provide timelines for communications, and suggest best practices for engagement (e.g., having early conversations about each party's expectations for communication).

➤ ***Recommendation #16: The CER mandate open communication and engagement with Indigenous communities at all stages of project development. This mandate should apply equally to the CER and the companies with projects.***

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

*Communicate early – establish mutual expectations regarding communication and engagement*

Lack of clarity and transparency in communications with Indigenous peoples has resulted in a lack of trust amongst many Indigenous communities as to whether the CER and Canada has Indigenous peoples' best interests in mind.

Communicating openly with Indigenous Nations needs to be prioritized throughout the regulatory process. Each Nation may prefer different practices and procedures for engaging in discussions with companies and with the CER. Companies should be required to open the lines of communication with Indigenous communities at the earliest possible stage, so that the parties can come to a mutual agreement in terms of their expectations about what communication practices and procedures will look like.

Once these terms have been established, it is imperative that both companies and the CER continue to communicate in line with the community's expectations throughout the life of a pipeline project.

---

<sup>18</sup> For an example of an Indigenous-led assessment and decision-making process, see the Squamish Nation Process – Aaron Bruce & Emma Hume, "The Squamish Nation Assessment Process: Getting to Consent" (November 2015), online (pdf): *Ratcliff & Company LLP* <<https://www.ratcliff.com/wp-content/uploads/2020/10/The-Squamish-Nation-Assessment-Process-Getting-To-Consent-Ratcliff.pdf>>. The Squamish Nation designed and published its own assessment process to review major projects proposed within its territories. This process requires companies to engage with the community early on to provide their reasoning and any other supplemental information that would enable the Nation to make a decision regarding the suitability of the project.

Accidents or other potentially harm-inducing events must be communicated to Nations as soon as possible – guidelines for this type of communication can be established between Indigenous Nations and companies during early conversations surrounding communication and engagement.

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

*Review REGDOCS System*

Currently, regulatory documents relating to projects and proposals are posted through the CER's REGDOCS system. This system can be difficult to navigate for Indigenous Nations, especially if they do not have the staff, time, funds, or other resources to do so. For Indigenous groups, this may also require the CER to provide additional support, including funding, for this purpose. For example, the CER could consider providing free consultation sessions with system experts to help Indigenous groups find the information they need, or the CER could offer support for Indigenous groups to outsource information-gathering for this purpose. Further, there is no easy way for Indigenous groups to be notified of contraventions to the OCR through this system.

- ***Recommendation #17: The CER review the REGDOCS system to ensure it is completely accessible and can be navigated quickly and efficiently to identify the most relevant information for a particular user. The CER should also consider whether there is a better information-sharing system.***

*Allow Indigenous groups to determine their own participation groups and provide relevant information to all Indigenous groups*

Ensuring transparency requires ensuring that all Indigenous groups have access to the same information as early as possible, not simply the information that is requested. Also, Indigenous groups should be able to form their own groups, including coalitions, and should not be deterred to do so by confidentiality agreements that are forced upon Indigenous groups and which seem to be a means to increase the gap between Indigenous parties that have capacity and resources and those who do not.

- ***Recommendation #18: Provide all Indigenous groups with the same information at the same time, as early as possible. Unless a particular Indigenous group otherwise requests, all relevant information should be shared by the CER or companies, no information should be withheld based on the reasoning that a particular Indigenous group has not yet requested that information.***

**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?**

*Prioritize hiring Indigenous and local workers; review reporting and consultation requirements in relation to workforce*

The Final Report of the Inquiry into Missing and Murdered Indigenous Women and Girls highlights the impact of temporary “man camps”, established for construction relating to resource extraction projects, on Indigenous women and girls.<sup>19</sup> These impacts have been associated with factors such as the transient nature of the work, with workers brought into small communities and surrounding areas from other locations, and inherent racist or sexist attitudes and behaviours.<sup>20</sup>

The Final Report emphasizes that there is an “urgent need” for the safety of Indigenous women to be considered at *all* stages in the life of a project, including during planning, assessment, management, and monitoring.<sup>21</sup> We suggest that the CER mandate prioritizing local workers for projects, rather than bringing temporary workers into these sites. The CER could also consider implementing measures that impose additional reporting and consultation requirements at sites where the workforce exceeds 250 members at its peak, similar to the British Columbia *Environmental Assessment Act* regime.<sup>22</sup>

➤ ***Recommendation #18: Prioritize hiring Indigenous and local workers and require the same of companies and their contractors. Revise reporting and consultation requirements in relation to workforce to ensure higher targets of Indigenous and local workers are met.***

#### SECTION 4. GLOBAL COMPETITIVENESS

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

For companies to have certainty regarding Indigenous consent to pipeline projects, both the companies and the CER must be willing to support FPIC, Indigenous assessment and decision-making processes. This will require companies to be open and transparent in their communications with Indigenous communities as early as possible in the planning process, so that their communities can make their own fully informed decisions about the project and communicate those decisions to companies.

We repeat our recommendations #1-4 and #16 in response to this question.

---

<sup>19</sup> National Inquiry into Missing and Murdered Indigenous Women and Girls, *Reclaiming Power and Place: The Final Report of the National Inquiry into Missing and Murdered Indigenous Women and Girls*, vol 1a (2019) at 584-594.

<sup>20</sup> *Ibid* at 584-587.

<sup>21</sup> *Ibid* at 592.

<sup>22</sup> SBC 2018, c 51; see also *Reviewable Projects Regulation*, BC Reg 243/2019, s 5(c).

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

*Prioritize and incentivize incorporation of Indigenous knowledge and technologies*

Indigenous knowledge is an important source of information for the design and development of pipeline projects. Indigenous knowledge and technologies have been used in numerous ways across the world to sustainably manage lands and waters and respond to crises with mitigation strategies.<sup>23</sup> However, it is important to keep in mind that engaging with Indigenous knowledge and technologies are not sufficient – companies and governments must also continue to work with Indigenous peoples.<sup>24</sup>

➤ ***Recommendation #19: The CER prioritize and incentivize technologies that incorporate Indigenous knowledge and/or are owned and operated by Indigenous peoples. This may require the CER to contribute resources toward identifying Indigenous-led companies, Indigenous technologies, or other sources of Indigenous knowledge that may contribute to sustainable and effective pipeline design, management, and oversight.***

We had no comments or suggestions for questions 13-15.

**SECTION 5. SAFETY AND ENVIRONMENTAL PROTECTION**

We had no comments or suggestions for question 16.

***Question #17: How should information about human and organizational factors, including how they can be integrated into a company's management system, for both employees and contractors, be provided in the OPR, and/or described in related guidance?***

*Ensure Indigenous peoples are involved in hiring and management processes*

Indigenous peoples should be involved as much as possible in every aspect of pipeline planning, management, and oversight. This will include not only engaging with Indigenous groups in relation to particular projects, but also providing more agency, authority and priority to Indigenous peoples in hiring and management decision-making.

➤ ***Recommendation #20: The CER provide guidance for companies to engage with Indigenous communities when making decisions, and prioritize hiring local Indigenous staff and workers.***

i. *Provide cultural competency training*

<sup>23</sup> For example, in Ontario, Anishinaabe land and resource management practices have been recognized as a source of guidance for responding to the effects of climate change on the natural world – see Charnel Anderson, “What are Indigenous knowledge systems – and how can they help fight climate change?” (30 September 2021), online: *TVO Today* <<https://www.tvonews.com/news/indigenous-knowledge-systems-and-how-can-they-help-fight-climate-change/>>.

<sup>24</sup> *Ibid.*

It is also very important that government employees and company employees be able and willing to understand Indigenous perspectives, and knowledgeable about Canada's obligations toward Indigenous peoples.

- ***Recommendation #21: The CER mandate and provide extensive cultural competency training, including training about legal requirements required by the Crown in relation to Indigenous peoples, be provided to all government employees, company employees and company contractors.***

We have no comments or suggestions for question 18.

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

As mentioned previously, the Final Report of the Inquiry into Missing and Murdered Indigenous Women and Girls highlights substantial concerns for the safety of Indigenous women in connection with resource extraction projects. These concerns extend beyond specific work sites. When these temporary work sites are established, they have the potential to impact all of the surrounding areas and have implications for the safety of Indigenous women and girls in all of the surrounding communities.

- ***Recommendation #22: The CER implement responses and recommendations more broadly than at specific work sites, so as to account for and mitigate potential harms to Indigenous women and girls in surrounding communities as well. Implementing suggestions such as the prioritization of training and hiring local workers may help to mitigate some of these impacts.***

We have no additional comments or suggestions for questions 20-21.

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

#### *Mandate assessment of cumulative effects of pipeline activities*

Within the traditional territories of many Indigenous Nations, multiple projects with implications for the environment, and for Indigenous communities, are often operating at the same time. However, these projects are often managed in a siloed manner that fails to give sufficient, if any, weight to the cumulative effects of each project, not only on the environment, but on Indigenous communities' capacity to meaningfully engage.

- ***Recommendation #23: The CER mandate assessment of the cumulative effects of all activities associated with the construction, operation and maintenance, and decommissioning of pipeline projects on Indigenous peoples and their territories. Addressing the impact of cumulative effects on Indigenous Nations will also require funding and other support, to ensure Nations have the means to substantially address and respond to issues raised within each project.***

*Institute a requirement during decommissioning for land to be returned to the same, or better, state than it was in when the project started*

During the decommissioning phase of a pipeline project, specific considerations are required in order to ensure impacts to the environment, and to Indigenous peoples and their territories, are not overlooked or neglected once the pipeline project has shut down.

We suggest the CER address this by instituting a general requirement for land to be returned to the same, or better, state than it was in before a project started. This will require companies to take at least two key actions: 1) develop a broad understanding of the state of the environment from the outset of the project – this will involve environmental monitoring and engagement with Indigenous Nations, but it will also be helpful for other aspects of project development, such as design; and 2) assess the impacts of project activities on the state of the environment during the decommissioning phase, including by engaging with Indigenous groups to gain an understanding of any ongoing impacts of the pipeline to their territories and their people, and how those impacts can be remedied.

➤ ***Recommendation #24: The CER institute a requirement for companies to return the land to the same, or better, state than it was in when the project started, in conversation with Indigenous peoples.***

*Require companies to provide up-front emergency funding for site cleaning and remediation*

The current regulatory framework does not adequately address the NIB's concerns, and the concerns of other Indigenous peoples,<sup>25</sup> in relation to financial accountability for site clean-up and remediation when companies become insolvent. Indigenous peoples are disproportionately impacted by accidents and disasters on their territories. When companies are not held accountable for clean-up and remediation, this also disproportionately affects Indigenous peoples, and their ways of life.

The CER can address our concerns by instituting a requirement for companies to contribute funds toward potential site clean-up and remediation needs, throughout the life of a project. This can be done in various ways. For example, the CER could adopt an approach similar to its own method for ensuring funds are available for decommissioning and abandonment. Currently, companies are required to set aside money for decommissioning and abandonment – many have done so through

---

<sup>25</sup> Indigenous peoples from various Nations have highlighted the importance of establishing emergency funds in various industries – mining, oil and gas, etc. – to ensure companies are held financially responsible for accidents and disasters that occur as a result of their operations. For example, the B.C. First Nations Energy and Mining Council called for companies to provide up-front funding to respond to mining disasters in 2015 (The Canadian Press, “First Nations’ report calls for ‘super fund’ to cover mine disasters” (3 June 2015), online: *Canada’s National Observer* <<https://www.nationalobserver.com/2015/06/03/news/first-nations-report-calls-super-fund-cover-mine-disasters>>), and again in 2019 (BC First Nations Energy and Mining Council, “Using financial assurance to reduce the risk of mine non-remediation: Considerations for British Columbia and Indigenous governments” (November 2019), online (pdf): *BC First Nations Energy and Mining Council* <<https://fnemc.ca/wp-content/uploads/2015/07/Using-FA-to-reduce-the-risk-of-mine-non-remediation.pdf>>).

the establishment of trust funds for this purpose.<sup>26</sup> Similarly, the CER could require companies to either establish their own funds for emergencies, or to contribute to a generic fund for this purpose.

Additionally, the CER may consider instituting a requirement for security to be provided up front. Québec has already implemented this type of system in relation to mining. Mining companies in Québec are required to provide “hard” forms of assurance – cash deposits, government bonds, etc. – in-full, within two years of commencing operations. Not only does this type of policy ensure compensation for remediation costs in the event of an accident or disaster, it also incentivizes companies to structure their operations in a way that minimizes environmental impact.<sup>27</sup>

➤ **Recommendation #25: The CER institute a requirement for companies to provide up-front funding for potential accidents or disasters relating to pipeline projects.**

**Question #23: How can the connection between the Environment Protection Plan, specific to an individual pipeline, and the company’s Environmental Protection Program, designed for a company’s pipeline system, be improved?**

*Review link between Environmental Protection Program & Environmental Protection Plan*

The higher-level Environmental Protection Program should consider factors such as cumulative impacts on the environment and Indigenous peoples, and the protection of key ecosystem indicators. These indicators may be informed by Indigenous knowledge – for example, a certain fish species may be particularly important to an Indigenous community because the health of that species may be an indicator for the overall health of the river in which it resides, and all the plants, animals and other beings contained within it.

➤ **Recommendation #26: The CER analyze the link between the Environmental Protection Program and Environmental Protection Plan to determine how key ecosystem indicators can best be monitored and protected between these two mechanisms.**

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

*Investigate role of solvency in contaminated site management*

It would be helpful to understand whether the existing Remediation Process Guide relies on companies being solvent to maintain their management requirements for contaminated sites. If so,

<sup>26</sup> For example, TC Energy has established its End of Life Cycle Program to finance future decommissioning and abandonment for its projects (TC Energy, “CER – End of Life Cycle Program”, online: [TC Energy <https://www.tcenergy.com/operations/oil-and-liquids/CER-end-of-life-cycle-program/>](https://www.tcenergy.com/operations/oil-and-liquids/CER-end-of-life-cycle-program/)).

<sup>27</sup> BC First Nations Energy and Mining Council, *supra* note 25 at 13. A similar assurance structure is set up in the United States in relation to offshore oil and gas development (United States, Bureau of Ocean Energy Management, *BOEM Expands Financial Assurance Efforts* (18 August 2021), online: [Bureau of Ocean Energy Management < https://www.boem.gov/newsroom/notes-stakeholders/boem-expands-financial-assurance-efforts>](https://www.boem.gov/newsroom/notes-stakeholders/boem-expands-financial-assurance-efforts)).



this may lead to unacceptable long-term outcomes for Indigenous peoples and should be an area for further review.

*Prioritize incorporating Indigenous knowledge and protection of culturally relevant sites in contaminated site management*

It would also be helpful to know whether management strategies that incorporate Indigenous knowledge and target protection of culturally relevant sites and resources are prioritized within contaminated site management. If they are not, measures should be taken to ensure companies take steps to prioritize these factors in contaminated site management.

**Question #25: Are there any matters related to the Emergency Management Program in the OPR that require clarification? If so, what are they? Are there any matters for which further guidance is required?**

*Prioritize communication with Indigenous communities in Emergency Response Planning*

It is necessary to review whether the standardized CSA Z246.2 *Emergency Preparedness and Response for Petroleum and Natural Gas Industry Systems* includes provisions regarding timelines for mandatory communication with Indigenous communities affected by emergencies. If it does not, incorporating mandatory requirements and timelines for communication with Indigenous communities in case of emergency should be prioritized by the CER.

**Question #26: How could the requirement for a Quality Assurance Program be improved or clarified in the OPR?**

*Evaluate capacity of Quality Assurance Programs to respond to climate change-related stressors*

It would be helpful to understand whether, or in what ways, Quality Assurance Programs can account for impacts to pipeline operations resulting from climate change-related stressors such as extreme heat, flooding, and landslides.

We have no comments or suggestions for question 27.

## **SECTION 6. IMPLEMENTATION OBJECTIVES**

We have no comments or suggestions for question 28.

**QUESTION #29: HOW DO YOU WANT TO BE ENGAGED BY THE CER IN THE DEVELOPMENT OF TECHNICAL GUIDANCE?**

In addition to our discussion above regarding meaningful participation and communication, we think it is crucial that the NIB be communicated with at the earliest opportunity, be provided with all information available and be provided with the resources to fully participate.

**Key Considerations**

*Resourcing/funding Indigenous Nations*

A key aspect of several of the recommendations in this paper involves providing support to Indigenous Nations through funding or other resources. Indigenous communities are often facing many different challenges, some of which may involve more urgent or immediate concerns; however, this does not mean that the participation of Indigenous Nations in matters that may affect their territories and Indigenous people should fall to the wayside. Instead, Indigenous Nations should be provided with support to ensure we can take on this work (personnel, funding, guidance with resources such as REGDOCS, etc.).

We also want to emphasize that, in each context where funding may be required, this funding needs to be accessible. Indigenous Nations should not be required to submit lengthy applications each time funding is required to participate and engage in discussions about matters that affect their territories and people. Instead, funding should be able to be obtained quickly and efficiently when needed, to avoid increasing the burden on Indigenous Nations.

We welcome further engagement with the CER if you have any questions about the above.

Yours truly,

