

STONEY TRIBAL ADMINISTRATION

Dan Barghshoon
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July 15, 2022

Dear Mr. Barghshoon,

Re: Stoney Nakoda Nations Comments on the CER Onshore Pipeline Regulations Review

This letter is sent on behalf of Bearspaw, Wesley, and Chiniki First Nation - the three unique nations that together form the Stoney Nakoda Nations ("SNN"). SNN holds collective rights and interests as recognized by Treaty 7 and the *Natural Resources Transfer Act*, 1930 and protected by Section 35 of the *Constitution Act*, 1982 ("Section 35 rights").

SNN submits this letter of comment to the Canada Energy Regulator ("CER") in response to the CER's request for input on the Onshore Pipeline Regulation ("OPR") Discussion Paper. It is SNN's understanding that the input provided will be incorporated into the review of the OPR and facilitate further discussions with the CER on other regulatory or guidance documents, such as the CER's *Filing Manual*. Please find SNN's comments detailed below.

Section 1 – Lesson's Learned

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

SNN recognizes that the CER is taking steps to identify gaps in their processes and ensure Indigenous concerns and issues are addressed by way of regulations within the OPR. However, the CER must take an approach that standardizes the incorporation of holistic Indigenous worldviews and knowledge into its regulations and minimum requirements set out in the OPR in a manner that supports self-determination and decision-making, rather than only "addressing" Indigenous issues related to development.

SNN has experienced gaps in the current approach to addressing Indigenous concerns, where SNN's concerns are addressed through a lens of the biophysical environment rather than a rights-based lens. *Clyde River v. Petroleum Geo-Services Inc.*, 2017 SCC 40, [2017] 1 S.C.R. 1069 states that biophysical components cannot be used as proxies for assessing impacts to rights (at para 45). By incorporating Indigenous worldviews and knowledge into the OPR, Indigenous concerns and values will be more accurately reflected and addressed by the OPR's regulations and requirements. Requirements must ensure that Indigenous worldviews are incorporated into the design and implementation of management systems so as to foster safety and environmental protection that also protect Section 35 rights.

For SNN, one of the biggest barriers to reconciliation and meaningful participation in the CER's regulatory processes is the lack of functional capacity. Currently the CER is the only government agency that SNN Consultation Office works with that does not provide capacity funding to support salaried staff time. All other agencies including Natural Resources Canada (NRCAN), Impact Assessment Agency of Canada (IAAC) and Environment and Climate Change Canada (ECCC) allow capacity dollars to cover employee time. Further, CER capacity is project-specific and attends primarily to projects designated under s.183 of the *CER Act*. This contrasts with other federal and provincial regulators and agencies which provide generalized capacity funding. Without properly addressing their significant capacity gaps, the CER will be unable to ensure Indigenous inclusion into pipeline oversight.

Section 2 – Reconciliation with Indigenous Peoples

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

The involvement of Indigenous people in pipeline oversight must go beyond basic monitoring activities. Involvement must be more holistic by integrating Indigenous worldviews and knowledge in the implementation of OPR, which could include more ceremonial recognition throughout post-approval and construction activities. This is one avenue by which the CER can enhance “awareness and understanding of the diversity of Indigenous peoples” (p. 3).

If the “CER expects regulated companies to work differently to support Reconciliation with Indigenous peoples” (p. 3), then this must begin earlier than the operation phase of a Project. While SNN understands the primary objective of the OPR review is to assess the CER's expectations during operation phase activities, there must simultaneously be an appropriate understanding of impacts to rights where a proponent and the CER can begin to understand how to accommodate those impacts. Specifically, in previous CER Hearings SNN has requested that the CER and pipeline companies complete more work to understand the socio-economic impacts to Indigenous groups from pipeline projects and the impacts from an associated influx in workforce presence. Once these impacts are properly understood, then appropriate measures to indigenize post-approval works and create cultural sensitivity and awareness can be developed more effectively.

Recently, in the *Canada Energy Regulator Report* for the NGTL West Path Delivery 2023 Project (the “*Recommendation Report*”) the Commission recommended the implementation of an Indigenous Oversight Cooperative Committee (“IOCC”).¹ This IOCC would apply to the entire NGTL system and create more effective participation for potentially impacted Indigenous groups in monitoring and follow-up activities on a broader system-wide level. However, this is only a recommendation and not a condition of approval, leaving the final decision to the Governor in Council (“GIC”). As such, this cannot be considered to foster reconciliation until such oversight committees become enforceable and standardized in the CER's requirements for operation activities and process.

¹ See NOVA Gas Transmission Ltd. GH-002-2020, CER Filing No. C19229-1, Section 1.4.1

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?

“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” (p. 4). Chance finds and disturbance to heritage resources is a significant concern for SNN. This is particularly prudent given many pipeline projects transect SNN’s traditional territory², however consultation and engagement on chance finds and the development of heritage resource protection plans is always lacking. Often, these plans involve very invasive procedures and protocols that are conducted before Indigenous groups are even notified of the find. This creates significant, and often irreversible cultural impacts. In order to develop effective approaches to mitigation, stronger engagement with Indigenous groups is required to develop better chance find protocols. This should include the incorporation of any necessary cultural protocols and notification requirements in heritage resource discovery contingency plans and be standardized within the OPR to be applied to all onshore pipeline projects. This could also include the employment of Indigenous archaeological monitors, who would report any chance finds to communities and leadership and communicate any necessary protocol. Additionally, the CER should coordinate with provincial jurisdictions to better understand provincial requirements relating to heritage resources and sites of significance, and work to apply these requirements to the OPR. This would set a stronger minimum standard for the protection of heritage resources in CER regulated projects.

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?

As stated previously in SNN’s response to Questions #2 and #3, stronger engagement and the incorporation of Indigenous worldviews into Project applications is necessary for contextualizing and understanding impacts to Section 35 rights. Additionally, the OPR must standardize the holistic and meaningful involvement of Indigenous peoples in projects’ monitoring and follow-up activities. For example, this can include an IOCC, similar to that which was recommended in the Commission’s Report for the NGTL WestPath 2023 project. However, given that this was only a recommendation and not a condition of approval, and given that this recommendation did not provide any details surrounding the scope of the IOCC, this would need to be further developed in collaboration with Indigenous groups.

With respect to the protection of SNN traditional land and resource use, SNN is concerned with the distinction between s. 183 and s. 214 designated projects under the *Canada Energy Regulator Act* (S.C. 2019, c.28, s. 10). Projects designated under s. 214 of the *CER Act* are exempt from an application if the pipeline is under 40km in length. Consequently, pipelines that fall short of this threshold bypass a spectrum of capacity and engagement activities with Indigenous nations, where biophysical and socio-economic changes from these activities still create impacts to SNN Section 35 rights. SNN has experienced this situation with the NGTL WestPath 2022 project and the Grand Prairie Mainline McLeod River North 2 Project.³ The rapid regulatory approvals and

² For example, the West Path 2023 project comes within 270 meters of the Stoney Nakoda Eden Valley Ranch. No mention or accommodation for this made in the Commission’s *Recommendation Report*.

³ See SNN’s Letter of Comment on the WestPath 2022 Project Application, CER Filing No. C07735-1.

lack of capacity provide little opportunity to Indigenous governments to identify impacts to Section 35 rights and interests. This in turn provides little reason to engage Indigenous governments in the post-approval activities and operations phases of the project. It is hard not to see this as the constructive dismissal of the protection of traditional land and resource use.

In order to support the CER's goal of fostering reconciliation, and to support the protection of traditional land and resource use, the CER must implement requirements for assessing impacts to rights resulting from smaller pipeline projects.

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

The inclusion of Indigenous knowledge must go beyond “taking into account Indigenous knowledge in decision-making” (p. 4). Indigenous knowledge cannot be “used” in the OPR but must instead be integrated in a manner that promotes self-determination and decision-making of Indigenous groups. This will support the CER's commitments to advancing reconciliation consistent with the United Declaration on the Rights of Indigenous Peoples, by directly upholding Articles 3, 10, 11, 13, and 25. Further, the bias towards western values and knowledge occurs throughout the life cycle of a pipeline when western knowledge is held at higher value over Indigenous knowledge. SNN has experienced this through repeatedly witnessing proponents and regulators undervalue SNN's concerns and perspective by failing to incorporate SNN's written and oral evidence and/or making a false comparison between the value of economic growth and public good to Indigenous rights and interests.

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

See SNN responses to Question #2 and 4. Where possible, the inclusion of Indigenous people in pipeline oversight must be broadened to system-wide oversight, rather than a project-by-project basis. Additionally, Indigenous oversight must be more independent to support the self-determination and decision-making in Indigenous communities. This must be supported by the provision of adequate capacity funding that is designed to effectively support the needs of Indigenous governments by including staff time and other unaddressed needs.

Additionally, for SNN one of the most significant barriers to meaningful participation in the CER's pipeline oversight activities is the lack of functional capacity. See SNN's response to Question #1.

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?

“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” (p. 5). Emergency response and planning for pipelines is very important to SNN. It is SNN's experience that during project applications and planning stages, emergencies

and malfunctions are considered unlikely, and the risks associated with these emergencies are underrepresented. However, SNN has experienced pipeline malfunctions in 2009 and 2010 that had serious consequences for members on reserve. The emergency response protocol for these incidents was lacking from the responsible pipeline companies, and SNN was not equipped with any appropriate contact information to notify the pipeline company of the malfunction. Additionally, there was no protocol developed by the company to communicate with and mobilize SNN members off reserve to safe muster points. On recent projects such as the NGTL WestPath 2023 project, SNN has advocated for the development of a community-specific emergency response plan that fosters communication with appropriate company contacts and information sharing with SNN members so that the community as a whole can be prepared during an emergency. Such level of engagement for emergency planning and response should be incorporated into the OPR and standardized as a minimum requirement for pipeline companies.

Additionally, in order to foster reconciliation and support the Articles in UNDRIP, Indigenous involvement in planning and operation and maintenance activities for pipelines should go beyond participation and should be reflective of a true a nation-to-nation relationship. This would involve SNN having true oversight capabilities represented through decision-making and enforcement.

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

“The OPR requires a company to have processes in its management system and programs for communication of all safety, security, emergency management, damage prevention and environmental protection matters with those who may be affected” (p. 5). For SNN, communication of emergency management between pipeline companies and SNN members is another significant concern. On SNN’s reserves many members do not have access to internet, cell phones, or reliable cellular reception. Further, many members do not speak English. This creates barriers to communication of emergency management and response and is another reason why SNN has advocated for community-specific emergency response planning to enable better communication with community members.

“For emergency preparedness and response, the CER has received feedback from Indigenous peoples...that there is a desire for greater understanding of, and involvement in, a company’s emergency management process” (p. 6). See response to Question #7.

In general, SNN’s ability to participate in post-approval activities of pipeline projects is limited by capacity funding. While this is starting to be addressed in some CER Commission conditions of approval (i.e., “...in some recent pipeline authorizations the Commission has added incremental engagement responsibilities as conditions” (p. 5)), the provision of capacity funding for post-approval engagement must become a standardized requirement within the OPR. Additionally, in conditions where proponents are required to seek feedback from Indigenous groups on various post-approval filings, this feedback is often limited to commentary without proper incorporation into proponent filings. As such, there is no opportunity for Indigenous groups to comment on the accuracy of how their feedback was depicted in the proponent’s post-approval filings. These gaps relate to the self-determination of Indigenous groups and must be taken into consideration if the CER is committed to advancing reconciliation while upholding the articles in UNDRIP.

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

With respect to reporting on operations and maintenance activities from pipeline activities, there must be more independence in the monitoring activities conducted by participating Indigenous monitors. This would include the ability for Indigenous monitors to report back to their communities and leaders rather than only to the company or company supervisors, where community leadership could then make compliance determinations and report to the CER on any compliance or engagement issues.

Additionally, the OPR must include mandates surrounding confidentiality of information belonging to participating Indigenous groups, particularly in relation to culturally sensitive sites (such as burial sites, etc.). Pipeline companies must consult with relevant Indigenous communities on any reporting relating to culturally sensitive areas in order to ensure important information belonging to the community is protected and utilized only to protect community values and priorities.

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?*

See SNN's response to Question #2. Most important to SNN is addressing discrimination and racism on project sites and in proximity to project sites, particularly with Indigenous employees or monitors and with SNN members exercising their rights in their traditional territories. An influx in workforce presence when pipeline construction begins creates socio-economic impacts to SNN and impacts the health and wellbeing of SNN members. However, there has never been work completed by the CER or pipeline companies to assess these impacts and how to address them.

Similarly, the CER must create measures in the OPR that ensure accountability to pipeline companies and contractors for anti-racism and GBA+. Enforceable requirements for pipeline companies should be informed by community-specific socio-economic impact studies, and Indigenous knowledge. This will ensure the enforced requirements approach solutions and accommodations to socio-economic impacts in an effective and respectful way. Ultimately, the objective of increased accountability to pipeline companies for anti-racism measures must ensure the inclusion of community traditions, increase Indigenous representation in workforce and oversight, create safe and respectful work environments for Indigenous employees and contractors, and foster respect for Indigenous diversity and worldviews.

Section 4 – Global Competitiveness

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

While the CER seeks efficiency in their process, it is SNN's experience that this often results in advancing applications through a linear process designed to reach a decision phase as quickly as possible. Instead, any environmental and socio-economic assessments completed as part of

pipeline project applications and the subsequent commentary and impact assessments from participating Indigenous groups should inform an iterative process. This ensures that applications for projects regulated by the CER are developed responsibly using best available knowledge to protect the biophysical and socio-economic environments surrounding the project. As such, while one of the CER's objectives is to create a "timely" regulatory process, SNN cautions that this cannot compromise the quality of a project's assessment.

Similarly, predictability and timely approvals in the regulatory system cannot be improved until gaps are addressed in the CER's assessments of impacts to rights. This can be achieved through working towards shared jurisdiction and decision-making with Indigenous groups.

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

"Several Canadian Standards Association standards for matters such as pipeline design, storage, transport, and security are incorporated by reference in the OPR to provide specific technical rules that companies must follow. These standards allow for the use of up-to-date processes and technologies" (p. 7). The Canadian Standards Association does not engage with SNN on standards that are essential to the protection SNN Section 35 rights and interests, and concerns such as safety and emergency management. The OPR can support technological innovation by incorporating Indigenous worldviews into the processes and procedures developed during the operation and monitoring activities of a project.

Question #15 – How can the OPR be improved to address changing pipeline use and pipeline status?

"The CER has seen an increase in instances where companies are seeking to change the type of product being carried or the direction of flow of the product that was initially approved for the pipeline... For these situations, the OPR contains requirements that a company must follow to ensure safety and protection of the environment" (p. 8). If the context changes from what was initially approved for the pipeline project, then potentially impacted Indigenous groups must be consulted again on any changes from the original application. This promotes transparency within the CER's processes and promotes self-determination for Indigenous groups. With respect to safety and environmental protection, this must also include consultation on any updated company emergency response plans, and consultation on updated community-specific emergency response plans.

"The company must follow the requirements of the OPR and the Commission's conditions on the authorization to ensure that the pipeline is properly cleaned, removed if appropriate, and that required environmental remediation and reclamation is completed" (p. 8). Any remediation and reclamation efforts mandated under the OPR must involve Indigenous groups, and provision of adequate capacity that allows for staff time for this involvement.

Section 5 – Safety and Environmental Protection

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 to SNN's response to Question #2, amendments to the OPR can add clarification surrounding Indigenous involvement and participation in the interpretation and implementation of management systems and oversight.

Question #18 – How can the OPR improve the connection between company safety manuals and the overarching Safety Management Program, for both employees and contractors?

Within the OPR, the CER must provision the coordination of safety requirements with provincial jurisdictions in order to build relationships with provincial regulators, and to determine how CER regulated Safety Management Program requirements can be improved.

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

See SNN responses to Questions # 2 and #10 on addressing racism and creating more effective cultural awareness and sensitivity on pipeline work sites. The CER and OPR must require pipeline companies to develop and maintain safe work environments for Indigenous employees across all CER regulated companies; this includes the development of strict protocols to respond to incidents of racism and harassment and cultivate company and employee accountability. As many companies lack control over contractor policies, the CER must implement these requirements through conditions of approval that target discrimination against Indigenous monitors and employees.

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

Similar to SNN response to Question #19, the CER can explicitly outline requirements for contractor management through enforceable conditions of approval.

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

See SNN response to Question #5. The OPR can further improvement to environmental performance by wholly integrating Indigenous knowledge frameworks and ways of knowing into its process requirements.

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

The OPR can provision requirements to involve Indigenous groups and the incorporation of Indigenous worldviews into the development of Environmental Protection Plans, including reclamation specifications and any Indigenous monitoring during operation and maintenance activities in all post-construction phases. Additionally, these requirements should connect to an Indigenous oversight committee, developed, and scoped in consultation with Indigenous groups, for the oversight of system-wide environmental protection programs.

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

Engagement and reporting for management of contaminated sites should not be left to the pipeline companies’ discretion and should be an enforceable requirement in the OPR. Engagement on contaminated sites will enable SNN to identify how their Section 35 rights have been impacted, and any impacted interests for consideration by the pipeline company and the CER. This will also foster transparency by ensuring all Indigenous groups with interests in the contaminated area are fully informed.

Additionally, Section 7(4) of the Remediation Process Guide indicates that:

4. When contamination occurs on reserve lands, Metis settlement lands, or is suspected to have migrated onto these lands...Indigenous Peoples and communities must:
 - a. Be adequately engaged, which includes opportunities to participate in the development and implementation of the RAP [Remedial Action Plan] and/or RMP [Risk Management Plan], and opportunities to participate in the development and implementation of the Reclamation Plan.

These opportunities for engagement and participation in the event of contamination cannot be limited to occurrences on reserve lands. SNN members exercise their Section 35 rights in their traditional territories, which expand far beyond the boundaries of SNN reserves. Instances of contamination in SNN traditional territory can severely impact Section 35 rights, and SNN must be adequately engaged and consulted on any related remediation, reclamation, and risk management. If the impacts cannot be immediately remediated, then consideration for how such impacts will be accommodated and, potentially compensated, should be an aspect of the OPR and associated guidelines

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?

The OPR can add clarification surrounding requirements and expectations for Indigenous involvement and engagement on the development of emergency management programs for pipeline projects and systems. See SNN response to Question #3.

Section 6 – Implementation Objectives

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

Given the limited physical capacity and consultation fatigue SNN encounters with the numerous regulatory filings (during application and post-approval regulatory phases), it is SNN's preference to be notified of any engagement opportunities regarding technical guidance and documents. If the topic is of interest or importance to SNN, SNN can signal an intent to participate. Functional capacity funding that includes a provision for staff time is also required to participate in these engagement activities.

Conclusion

A significant barrier to SNN's participation in the CER's regulatory and post-approval processes is capacity. The limits on use of capacity provided by the CER is restrictive, and inhibits meaningful participation for SNN. Without addressing such gaps in capacity, then the CER cannot ensure the inclusion and engagement of Indigenous groups in a manner that upholds its objectives of achieving reconciliation and upholding the articles in UNDRIP.


Additionally, it is SNN's experience that the "consideration" or "use" of Indigenous worldviews and knowledge in the CER's lifecycle processes is ineffective in addressing impacts to Section 35 rights. These ways of knowing must be integrated into the application and post-approval processes and regulations. Similarly, SNN questions why the CER is beginning their modernization and alignment of their CER's regulations and guidelines with operations. The CER would be better informed by beginning with regulations and guidelines applicable to the application and assessment phases. Many of SNN's issues and concerns in the operation phases are residual issues that go unaddressed from the application and assessment phases. This ranges from the inadequate assessment and accommodation of impacts to Section 35 rights to the erroneous tendency established in the public interest framework to weigh adverse impacts to Section 35 rights against western values and interests such as economic benefit.

It is SNN's expectation that the above input will be incorporated into the OPR and used to facilitate further discussions with the CER. We look forward to meeting in the future to discuss next steps and opportunities for further engagement.

Sincerely,



Acting Director of Consultation
Stoney Tribal Administration

Cc:  – Rae and Company via Email