

Project name: CER OPR and Filing Manual Update Project

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March 31, 2025

Attn: OPR/Filing Manuals  
project team  
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Calgary, AB T2R 0A8  
[REDACTED]

**Subject: Feedback to the CER OPR and Filing Manual Update Project**

Dear OPR/Filing Manuals Project Team,

I have attached some comments regarding the CER OPR and Filing Manual Update Project for your review. I attended many of the information sessions in the fall of 2024 and attended the Heritage Resources information session in spring 2025. Topics include:

- coordination between federal regulators
- CER Assessments are difficult to understand
- Sites of Indigenous Significance
- lack of unified federal heritage legislation in Canada
- reporting harm
- Indigenous rights assessment
- Crown accommodation measures

### **1.1 Coordination Between Federal Regulators**

I recommend that the CER review proposed changes of the OPR and Filing Manual with other federal regulators and agencies. At a minimum these should include:

- Impact Assessment Agency of Canada [IAAC] (Environment and Climate Change Canada)
- Canadian Nuclear Safety Commission (Natural Resource Canada)
- Canadian Transportation Agency (Transport Canada)
- Parks Canada (Environment and Climate Change Canada) – especially staff who conduct Strategic Environmental Assessments
- Innovation, Science and Economic Development Canada - especially staff who contribute policy and strategies on Indigenous intellectual property, traditional knowledge and traditional cultural expressions
- Crown-Indigenous Relations and Northern Affairs Canada
- Justice Canada

I am concerned that the CER update to the OPR and Filing Manual may create inconsistencies between agencies. This is especially relevant for the assessment of Indigenous Rights, and the nature of Crown consultation and accommodation. Further, the Government of Canada has dedicated policy and staff in support of traditional knowledge. This is pertinent, as some sorts of project activities – on a CER regulated scope, such as an access road, electrical transmission lines and

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temporary workspaces – should be subject to the same assessment procedures and processes regardless of federal regulator. This is pertinent when projects shift from one regulator to another (such as the [Gazodug Project](#) – which initiated in the CER, then moved to IAAC). My advice is for the various agencies to develop consistent assessment guidance, methods and policies, rather than divergent regulations and assessment criteria and processes.

## **1.2 CER Assessments are Difficult to Understand: Energy East as a Case Study**

The CER assessment of [Energy East](#) was very difficult for Indigenous peoples, the public and regulators to understand, to provide feedback, and to seek consensus. In fact, the CER requested that the initial impact assessment of Energy East be rewritten as it was too confusing to understand or review. The CER explained “When considering the numerous supplemental reports, project updates, errata and amendments coupled with the sheer volume of information presented in the application, the board is of the view that the application, in its present form, is difficult even for experts to navigate ... The board is concerned that it will be even more difficult for the general public to comprehend and navigate. The board is also concerned about the impact of this on the fairness and efficiency of the hearing process and the potential burdens on all parties” (February 3, 2016, Filing ID [A75430-1](#)).

Setting aside the project, the issue expressed is that CER assessments as per the Filing Manual are highly technical documents and difficult to understand. Knowing that the impact assessments must be accessible to the public and regulators, and delivered in a timely and responsive manner, I support any measure to make applications more accessible to the public, such as applying common sense in plain language, and using more modern techniques – such as digital assessments - and supporting the CER’s outreach Indigenous and stakeholder outreach.

## **1.3 Sites of Indigenous Significance**

I note confusion as a Subject Matter Expert [SME] about the definition, and potential regulations about “Sites of Indigenous Significance.” I understand that this term stems from the Indigenous Advisory and Monitoring Committee [IAMC] of the Trans Mountain Expansion Project and the existing pipeline. It has appeared in the OPR and Filing Manual fact sheets and in [The United Nations Declaration on the Rights of Indigenous Peoples Act Action Plan](#). I requested an explicit definition from the CER to understand how this term is defined – and is applied, which is essentially a circular definition as expressed in the CER's *Filing Manuals - Rights and Interests of Indigenous Peoples Topic Paper* – where the term Sites of Indigenous Significance is defined as “locations that have a special meaning for Indigenous Peoples and archeological sites pertaining to the history of Indigenous People”. The CER also defined “Sites of Indigenous Significance” on [2023-07-12](#): “As the program evolves, one of the biggest areas of focus is on Sites of

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*Indigenous Significance along pipeline routes. These can be spiritually alive, culturally essential, and are all deserving of respect. They can be an identifiable natural or culturally modified features, a site or series of sites or even a territory or area encompassing sites. With each site being unique, there is no simple formula that can be applied.*

*Recognizing the diversity of sites and the wide variety of options to provide each site with respect and appropriate protection, the CER is working on improving the processes that may impact Sites of Indigenous Significance in partnership with the Indigenous Monitoring programs and pipeline companies. We are working together to create better understanding and develop the relationships essential to conducting such specialized work."*

The challenge that is posed from a regulatory perspective is that this term "Sites of Indigenous Significance" is not used anywhere else within the Canada's federal regulatory systems, provincial regulatory systems, nor common in use in the Americas (i.e., North and South America). I understand that the term "Sites of Indigenous Significance" arises from Australia, and is partly related to the Government of Australia's [National Heritage List](#) – specifically reflecting "Australia's list of natural, historic and Indigenous places of outstanding significance to the nation [i.e., Australia]."

I recommend that the CER's definition of Sites of Indigenous Significance, if that term is used, be reviewed by Justice Canada. As a Subject Matter Expert, my question remains - what is being regulated? Are these 'archaeological sites' associated with Indigenous cultural belongings and Indigenous material culture? Are these sacred places – such as ceremonial grounds, areas containing ancestral remains? Are these landscape-scale features such as mountains and rivers of spiritual significance to Indigenous peoples? Are these environmental features with sacred relationships such as salmon spawning grounds, barren land caribou calving groups, and so forth? The current definition does not provide a concise means to understand what these areas are, how to best document them, and what possible mitigation measures and accommodations could be applied. There remains inconsistency and confusion on who are the decision-makers on stewarding such places.

At this time, I have not seen direct alignment of CER's use of the term "Sites of Indigenous Significant" with the Government of Canada's actions with respect to United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). In fact, the term "Sites of Indigenous Significance" is not mentioned in UNDRIP. In UNDRIP, the most pertinent language and terminology are in Articles 11, 25 and 31, in which the terms 'cultural heritage', 'traditional knowledge' and 'traditional cultural expressions' are used:

*Article 11*

1. *Indigenous peoples have the right to practise and revitalize their cultural traditions and customs. This includes the right to maintain, protect and develop the past, present and future*

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*manifestations of their cultures, such as archaeological and historical sites, artefacts, designs, ceremonies, technologies and visual and performing arts and literature.*

2. *States shall provide redress through effective mechanisms, which may include restitution, developed in conjunction with indigenous peoples, with respect to their cultural, intellectual, religious and spiritual property taken without their free, prior and informed consent or in violation of their laws, traditions and customs.*

#### Article 25

1. *Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.*

#### Article 31

1. *Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions.*
2. *In conjunction with indigenous peoples, States shall take effective measures to recognize and protect the exercise of these rights.*

To align a term such as "Sites of Indigenous Significance" to UNDRIP, there is room for confusion and inconsistency of understanding and application. I believe what is meant by "Sites of Indigenous Significance" is better defined as "tangible Indigenous cultural heritage" such as a physical place or cultural belonging, and 'intangible Indigenous cultural heritage' – such as traditional cultural expressions, language, spirituality, and concepts of sacredness, and so forth. Together the tangible and intangible cultural heritage holistically support Indigenous cultures. Providing a definition along the lines of tangible and intangible cultural heritage – allows for better alignment with existing legislation and policies in Canada, and more globally. For instance, [Innovation, Science and Economic Development Canada](#) has a major program within the [Intellectual Property Strategy](#) to build "on the Government of Canada's commitments to implement the United Nations Declaration on the Rights of Indigenous Peoples and to recognize Indigenous rights, the Strategy includes initiatives aimed at making Canada's IP system more inclusive and reflective of the needs and interests of Indigenous peoples." There are a host of

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policy tools that Canada has developed on this matter, that could be reviewed for guidance and alignment. Internationally, the [World Intellectual Property Organization](#) [WIPO], to which Canada is a member of, is a global leader in incorporating frameworks based on UNDRIP to protect “Genetic Resources [GR], Traditional Knowledge [TK] and Traditional Cultural Expressions [TCE]”, and has a host of material in a “[Global Reference Point on IP and GRs, TK and TCEs](#)”. These materials include Canadian case studies, for instance WIPO’s 2020 Report [Intellectual Property and Genetic Resources, Traditional Knowledge and Traditional Cultural Expressions](#) includes a case study about The Nunavut Planning Commission’s holistic approach to incorporate environmental and cultural matters via the inclusion of traditional knowledge and environmental planning.

*“The Nunavut Planning Commission (NPC) has been mapping wildlife populations, human use and areas of archaeological significance while examining land use issues. This mapping work combines the TK of the Inuit with the latest computer mapping technology. The database resulting from this work includes the Nunavut Environmental Database (NED), which is a subset of the Arctic Institute of North America’s Arctic Science and Technology Information System (ASTIS) database). NED has been prepared for the Nunavut Planning Commission by selecting ASTIS records about Nunavut. NPC has made the Nunavut Environmental Database available on the Internet for search and retrieval. Practical information on intellectual property implications and technical modalities of such public disclosure was required in light of the NPC’s plans to develop a comprehensive documentation strategy for all TK in Nunavut and possible incorporation into databases”.*  
PDF p. 42.

My recommendation is to consider using terms consistent with Canada’s actions related to UNDRIP, such as “tangible Indigenous cultural heritage” and “intangible Indigenous cultural heritage”, include a detailed definition vetted by Justice Canada, and limit the use of the term “Sites of Indigenous Significance”. Such an approach better aligns with Canada’s UNDRIP Action Plan.

#### **1.4 Lack of Unified Federal Heritage Legislation in Canada**

Canada is the only G7 country that lacks unified heritage legislation. David Burley in 1994 published an article in the Canadian Journal of Archaeology called “[A Never-Ending Story: Historical Developments in Canadian Archaeology and the Quest for Federal Heritage Legislation](#)”. I recommend that the CER review the article, plus the associated “[Solicited Dialogue](#)” for an outline on why Canada lacks unified federal legislation. Fast forward to 2025, I must acknowledge that the Office of the Independent Special Interlocutor for Missing Children and Unmarked Graves and Burial Sites associated with Indian Residential Schools final report [Upholding Sacred-Obligations Volume 1](#) includes a chapter on “The Lack of Legal Protection for Indigenous Burial Sites under Canadian Law” (PDF pp. 429-556), which outlines how the current patchwork of provincial, territorial heritage legislation and

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federal policy does not effectively protect some of the most sacred places for Indigenous people. Furthermore, [Bill C-23](#), *An Act respecting places, persons and events of national historic significance or national interest, archaeological resources and cultural and natural heritage* did not reach second reading in the House of Commons, and on January 6, 2025, with parliament prorogued can not be forwarded into legislation. For a federal regulator, this means that the legal frameworks to protect heritage resources is a mosaic of provincial, territorial, federal, municipal and Indigenous legislation, bylaws and policies – to which many gaps are present, and inconsistencies of what is considered by each regulator to be a heritage resource, and how to document and protect them. The lessons shared by David Burley in 1994, and articulated by the Independent Special Interlocutor in October of 2024 remain unaddressed. Given this, I anticipate further confusion and diverging viewpoints on how to document, protect and manage heritage resources. Any changes in the OPR and Filing Manual should be informed by the current patchwork, which is an anomaly in the G7.

## **1.5 Reporting Harm**

I agree that harm (or potential of harm) to heritage resources and tangible Indigenous cultural heritage should be reported to Indigenous communities, the CER, and other regulators. Trans Mountain Expansion Project's document *Environmental Field Guide – Traditional Land Use and Heritage Resource Chance Find Communication* should be considered a best practice on communicating incidental discoveries. The process documents the steps of gathering information on a potential site discovery – and how that information is shared to Indigenous communities and organizations and stakeholder. This process was effective, in that – standardized information was shared in a timely manner, via site cards – to many nations to notify about a potential site discovery and seek feedback on what appropriate mitigation measures are needed. This allowed for consistency and transparency. I note that surveillance of encroachment on known heritage resources and tangible Indigenous cultural heritage is commonly done during construction activities (i.e., via active Indigenous and environmental inspectors and monitors, environmental protection plans and so forth). I acknowledge the challenges during the operational phases of projects to understand if/when harm has occurred to known heritage resources and tangible Indigenous cultural heritage – as less specialist resources are generally available. Digital tools may help, including applying project specific databases, as well as coordination with operational staff and Integrity Management Programs. I also acknowledge that some classes of tangible Indigenous cultural heritage, such as culturally modified trees, which can be byproducts of Indigenous use of forests, are actively created over a project's lifespan (i.e., during post-construction and operational phases), and simultaneous can be disturbed by severe weather, wildfire, floods, and so forth.

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## 1.6 Indigenous Rights Assessment

I fully support a variety of ways to assess and accommodate impacts to Indigenous rights. Indigenous-led assessments have substantial value – and support shared decision-making frameworks and outcomes. An ongoing challenge is alignment of CER regulatory schedule with community-led initiatives. The outcomes of community-led assessments are anticipated to be different from conventional assessment via the Filing Manual. The sequencing of Indigenous-led assessments is important, should they occur before a CER Application, can they occur parallel to a CER assessment, or are they stand-alone?

I agree with the CER's *Filing Manuals - Rights and Interests of Indigenous Peoples Topic Paper* that "The ESA section has grown longer and more complex through regular updating, and the CER has heard that it can be difficult to navigate". CER assessments are often long, complex, and difficult to navigate.

I question the achievability that restructuring the ESA will have on readability and understanding. I recognize that during the Crown Consultation phase of Project, community-specific assessments are undertaken.

I disagree that a new category of "Valued Components [VC] focused on the rights and interests of Indigenous Peoples" will make it easier to understand. For instance, the CER's proposed VCs are:

- employment and economy for Indigenous Peoples,
- heritage resources (including cultural, historical, archaeological, and paleontological resources),
- human health of Indigenous Peoples including the accessibility and availability of country foods,
- social and cultural well-being,
- and traditional land and resource use including sites of Indigenous significance

At a glance, there seems too few VCs to adequately address the most pertinent needs of communities. Some Indigenous Groups may place greater emphasis on certain VCs than others. Some communities – who rely on a holistic assessment – may find the valued components selected by the CER to be too narrow. For Nations such as Mohawks of Akwesane, Mohawks of Kahnawá:ke, and Mohawks of Kanasatake, a fundamental VC to support their rights is likely "Soil and Soil Productivity". For communities in the Arctic, the "Effects of the Environment on the Project" VC, is highly relevant to how arctic communities exercise of their rights, specifically factoring in the assessing of risks of the project that also interact with the exercise of their rights, considering how people are adapting to climate change, including adjusting to permafrost thaw, coastal erosion and changing ice-patterns. The relevant VCs important to each Nation likely vary – by community needs, culture, population, policy, decision-making

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frameworks and so forth. I am concerned that rather than the intended consolidation of assessment, instead the outcome will involve duplication and increased complexity of assessment.

I recommend the CER collaborate with Indigenous groups, and other federal regulators, and potentially other provincial and territorial regulators, about the possible consolidation of a Rights of Indigenous Peoples section, minimally including the Impact Assessment Agency of Canada, Canadian Nuclear Safety Commission, Canadian Transportation, Parks Canada, Innovation, Science and Economic Development Canada, Crown-Indigenous Relations and Northern Affairs Canada, and Justice Canada. The Yukon Environmental and Socio-Economic Assessment Board, the Mackenzie Valley Land and Water Board and the Nunavut Impact Review Board can provide CER with helpful advice.

A common-sense solution is that the methods and format of the assessment of Rights of Indigenous Peoples should be common between federal and other regulators. In other words, the guidance, methods, and policy that the CER, the IAAC and others use to assess potential impacts to an Indigenous community should be the same.

## **1.7 Crown Accommodation Measures**

Crown accommodation is an important component of addressing Indigenous issues and concerns. My experience with NRCAN's [Terrestrial Studies Initiative](#) and [Terrestrial Cumulative Effects Initiative](#) has been challenging. For Trans Mountain – these measures were established to address outstanding issues and concerns and were set to inform the project. Through the Government of Canada's Proactive Disclosure, I understand that 138 community-led studies were funded between 2019 and 2024. However, in [2024](#) NRCAN lists funding for 166 community-led studies, of which 67 were completed, and 95 remain incomplete. This is a 40% completion rate – over a period of 5 years. The proposed outcomes of these initiatives were proposed by Canada in the [Trans Mountain Expansion Project Crown Consultation and Accommodation Report](#) (2019):

### *Terrestrial Cumulative Effects Initiative (PDF pp. 203-204)*

*"The government is proposing the co-development of a cumulative effects initiative, with a focus on understanding the current state of the environment and monitoring changes in response to development and natural processes. Cumulative effects monitoring can be useful in many contexts, such as: providing early warning of unintended or undesired impacts; confirming trends in levels or effects outside natural variation; helping to inform appropriate mitigation options; assessing restoration (or mitigation) effectiveness; and assisting with environment assessment activities.*

*A cumulative effects initiative, co-developed with Indigenous groups, will help continue meaningful dialogue started during Phase III consultations, improve understanding of concerns related to historic and potential increased terrestrial cumulative effects, establish*

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*baselines with a focus on identifying and addressing information gaps, and contribute to a monitoring and analysis system that allows early identification of issues. The initiative would also include work on watershed studies to better understand the stressors and their contribution to cumulative effects on fish and fish habitat. [ ... ]*

*The purpose is to collaborate with Indigenous peoples and co-develop a cumulative effects initiative, which seeks to:*

- *Gather data and information on the state of the environment, or valued components of the environmental, within a region.*
- *Monitor and analyze how the environment, or components of the environment, change in response to development and natural processes; and,*
- ***Make this information publicly available for evidence-based decision-making [emphasis added]***

Terrestrial Studies Initiative (PDF p. 207)

*"In response to the issues raised, Canada is proposing to support **Indigenous-led studies to better understand the potential land-based impacts of the Project [emphasis added]**. The Terrestrial Studies Initiative (TSI) is specifically designed as an accommodation measure to enhance the shared understanding about potential cumulative effects on the land base. The conduct of studies designed and led by Indigenous groups with incorporation of Indigenous Knowledge, will enrich the level of baseline information on the terrestrial environment on which Indigenous groups depend on to exercise their rights and interests related to harvesting of wildlife, fish and plants. It is anticipated that, once put in place, the TSI would complement the Terrestrial Cumulative Effects Initiative led by ECCC (described above)."*

In 2025, the result of the studies has not been made public, nor in my understanding has most studies have been shared with the proponent. This questions how accommodation measures whose purpose is to inform a project or regional-decision-making, can inform a project when the outcomes are not shared. I recommend that when Crown Accommodation measures are proposed that a basic level of transparency, including public tracking and information sharing with regulators, proponents and Indigenous communities is conducted. This would allow all parties an opportunity to understand the specific matters being accommodated by the Crown.

Yours sincerely,

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