

**Trans Mountain Pipeline ULC (Trans Mountain)
Onshore Pipeline Regulations and Filing Manuals Update
Phase 2 – Engagement Overview
Due Date: March 31, 2025**

M. Filing Manuals – Rights and Interests of Indigenous Peoples Topic Paper

As noted in the [Backgrounder](#) document, the CER is seeking your feedback on possible changes to the “Environmental and Socio-Economic Assessment” (ESA) section in the Filing Manuals (i.e., section A.2 of the [Filing Manual](#), and chapter 6 of the [Electricity Filing Manual](#)). Any suggestions for improvement with regard to these sections are welcome, and in particular, the CER seeks your comments on the following topics.

Subtopic 1: Restructuring the Filing Manual

As described in the [Backgrounder](#) document, the Commission has been focused on improving the assessment of project effects on the rights and interests of Indigenous Peoples in recent application assessments. The CER has heard that increasing the emphasis, robustness, and detail of its consideration of potential effects on the rights and interests of Indigenous Peoples is a key part of reconciliation.

The ESA section has grown longer and more complex through regular updating, and the CER has heard that it can be difficult to navigate in some cases. For example, general guidance (e.g., the need for incorporation of Indigenous knowledge, the need to provide evidence and rationales, etc.) is spread throughout the section, rather than being consolidated in one place.

Note: this restructuring section is similar to the restructuring section found in “Filing Manual – Environmental and Socio-economic Assessment” Topic Paper (see paper for more details).

Objectives for improvement

The CER seeks to improve the overall structure and layout of the existing ESA section in the Filing Manuals by:

- seeking more detail about potential effects of proposed projects on the rights and interests of Indigenous Peoples; and
- improving the clarity and readability of the ESA section.

Proposed options The CER is considering:

- splitting the current ESA section into two sections — an amended ESA section and a new “Rights and Interests of Indigenous Peoples” section; and
- consolidating general or common guidance into an initial sub-section, and specifying that these topics be addressed wherever they are relevant in the ESA and the new section for “Rights and Interests of Indigenous Peoples”. Such topics could include engagement results, Indigenous knowledge, and climate change resilience.

Discussion questions:

- m.1) Does the proposed split into two sections (i.e., an amended ESA section and a new “Rights and Interests of Indigenous Peoples” section) improve clarity?

Response:

Please see the response to Paper K, request k.1).

- m.2) What overarching topics are important to highlight as applying throughout the applicant's ESA and "Rights and Interests of Indigenous Peoples" sections?

Response:

Please see the response to Paper K, request k.1).

- m.3) What other restructuring of the "Rights and Interests of Indigenous Peoples" section might improve clarity, readability, and better highlight important issues?

Response:

Please see the response to Paper K, requests k.1) and k.3).

Subtopic 2: Rights and Interests of Indigenous Peoples

The preamble to the CER Act sets out the broad and underlying purposes of the legislation, which includes Canada's commitments to Reconciliation and implementation of the UN Declaration. The CER is committed to advancing Reconciliation with Indigenous Peoples and the implementation of the [UN Declaration on the Rights of Indigenous Peoples Act \(UNDA\)](#), including the supporting [Action Plan](#), most specifically Action Plan Measure 34 (APM 34). In support of these commitments, the CER has identified Reconciliation as a Strategic Priority¹, issued a Statement on Reconciliation, and is continuing to find ways to implement the UN Declaration in its work. When Indigenous Peoples are meaningfully involved in the CER's work, collective perspectives on Indigenous knowledge and world views, and Western knowledge and approaches, can be brought together to help ensure Canada's federally-regulated projects are safe, the environment is protected and impacts to the rights and interests of Indigenous Peoples are prevented.

The CER has received feedback and recommendations for additional guidance regarding the assessment of potential effects of projects on the rights and interests of Indigenous Peoples, including suggestions for more specific guidance with respect to methodologies, and interest in developing pathways for collaborative and Indigenous-led assessments. The update to the Filing Manuals presents an important opportunity to provide additional filing guidance to proponents regarding the assessment of a project's potential effects on the rights and interests of Indigenous Peoples. For additional information on proposed measures to prevent and address impacts to the rights and interests of Indigenous Peoples in the OPR, please see the Rights and Interests of Indigenous Peoples, Socio-economic Effects, and Engagement Topic Paper.

2.1 Valued components focused on the rights and interests of Indigenous Peoples

The CER Act requires the Commission to consider the effects of the project on the rights and interests of Indigenous Peoples. The CER's Filing Manuals describe the valued components (VCs) to be considered by the applicant. Currently, applicants identify the VCs for which effects are predicted and provide specific details in the assessment when circumstances and interactions necessitate detailed information.

¹ The CER's Strategic Priorities provided on the CER website at: [CER – Who we are and what we do - Our Strategic Plan \(cer-rec.gc.ca\)](#)

Objective for improvement

The CER wants to clarify its guidance relating to the rights and interests of Indigenous Peoples, which requires consideration of what stays in the ESA section and what is moved into the proposed “Rights and Interests of Indigenous Peoples” section, and avoiding duplication between the two.

Proposed options

The CER is considering:

- consolidating and expanding a new category of “Valued Components focused on the rights and interests of Indigenous Peoples”;
- focusing the new category of VCs on the rights and interests of Indigenous Peoples such as: 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; and
- modifying the Assessment part of the Filing Manual to specify that applications should describe enhancement measures in addition to mitigation measures.

Discussion questions

m.4) Would having separate sections in the Filing Manual (e.g., one describing VCs focused on the rights and interests of Indigenous Peoples and another describing biophysical and socio-economic VCs) improve clarity?

Response:

Please see the response to Paper K, request k.8).

m.5) How would such a split impact the assessment of biophysical and socio-economic VCs, and VCs focused on the rights and interests of Indigenous Peoples?

Response:

Please see the response to Paper K, request k.9).

m.6) What VCs should be included in the “Rights and Interests of Indigenous Peoples” section and which should stay in or also be included in the ESA section?

Response:

Please see the response to Paper K, request k.10).

m.7) What is the best way to document, monitor, manage, and report on protection and enhancement measures for VCs focused on the rights and interests of Indigenous Peoples?

Response:

Please see the response to Paper K, request k.14).

m.8) How can information relevant to the rights and interests of Indigenous Peoples best be documented to ensure site-specific information and relevant commitments are maintained and implemented during construction and operations?

Response:

Please see the response to Paper K request k.16).

Systems that have worked well for Trans Mountain to document information relevant to the rights and interests of Indigenous Peoples include both GIS and compliance tracking tools. Site-specific information such as TLU or cultural sites are logged geospatially. Any planned construction or operations activities are assessed against this database to determine if the planned activity will overlap with any sites of significance that may impact the rights and interests of Indigenous Peoples. This allows for identification of potential impacts up front to support pre-engagement and avoidance or mitigation. Relevant commitments are tracked using a compliance database and tracked according to their required timeline, or verified annually if they are ongoing commitments, to maintain compliance.

In all cases, companies should consider procedures to prevent unauthorized disclosure of confidential IK. Please see the response to Paper I request i.1) Objective 3.

2.2 Integrating the applicant's assessment and Indigenous-led assessments and studies

The CER performs its duties and functions in a manner that is consistent with treaties, section 35 of the Constitution Act, 1982, Canada's United Nations Declaration on the Rights of Indigenous Peoples Act, and a commitment to reconciliation with Indigenous Peoples.

In recent years, a lot of work on Indigenous-led assessments and studies has been done across Canada, including:

- independent Indigenous-led assessments (e.g., [Tsleil-Waututh – Trans Mountain Pipeline Expansion Project](#), [Squamish Nation – Woodfibre LNG](#), [Stk'emlupsemc Te Secwepemc Nation – KGHM Ajax Mine Project](#)),
- co-developed assessments with an applicant (e.g., Ktunaxa Nation – BC Hydro Revelstoke Unit 6 Project, Keeyask Cree Nations – Manitoba Hydro Keeyask Hydroelectric Project, Nunavik Inuit – Raglan Nickel Mine Sivumut Project, Cheslatta First Nation – Rio Tinto Alcan Ne Too Hydroelectric Project), and
- Indigenous-led studies as part of environmental and socio-economic assessments (e.g., Indigenous knowledge studies, Traditional Land and Resource Use studies).

The CER recognizes the potential benefits associated with Indigenous-led assessments and studies because Indigenous Peoples are best placed to understand how their rights and interests may be affected by a project. The CER also recognizes that the timing of Indigenous-led assessments and studies may not coordinate perfectly with the applicant's planned timing.

Objective for improvement

The CER wants to be more explicit about how and when applicants are expected to support Indigenous led assessments and studies where Indigenous communities wish to do so, and how to integrate the results of Indigenous-led assessments and studies into their own assessments.

Proposed option

The CER is considering clarifying expectations for applicants about Indigenous-led assessments and Indigenous-led studies that can form part of an assessment (e.g., Indigenous knowledge studies, Traditional Land and Resource Use studies).

Discussion questions

- m.9) What are the opportunities and challenges of Indigenous-led assessments and studies for Indigenous Peoples (e.g., timing, funding, scoping, integration)?

Response:

Trans Mountain would prefer not to speak on behalf of Indigenous Peoples.

- m.10) What are the opportunities and challenges of Indigenous-led assessments and studies for applicants (e.g., timing, funding, scoping, integration)?

Response:

Companies will benefit from Indigenous-led assessments and studies by obtaining relevant information from the community, that if robust and timely, can add to the quality of the assessment of the potential impacts and therefore avoidance, mitigation or enhancement measures.

Conversely, challenges of Indigenous-led assessments and studies exist when a company receives incomplete information from an Indigenous community and may have to invest further time to evaluate whether the information is complete. This situation may arise when Indigenous communities do not have the capacity to support the study or to validate results of a previous study, or certain knowledge holders are required to provide such information who are not available in specific timeframes. Further, timelines for Indigenous-led studies may not lend to the timing of regulatory applications, or commencement of construction activity, for which the proponent may be looking to advance sooner than the Indigenous-led study would be available, which could lead to delays in regulatory approvals for needed projects for pipeline maintenance.

- m.11) How can Indigenous-led assessments and studies be integrated with the applicant's assessment and still support the objective of "one project, one assessment"?

Response:

Indigenous-led assessments and a proponent's assessment can be integrated on a project-specific basis, depending on extent of the impact to and the level of collaboration desired by the Indigenous group. How studies can be integrated will be the result of engagement and information sharing between both parties.

- m.12) When the timing does not match, how can Indigenous-led assessments and studies be integrated with the applicant's assessment and still meet the CER's legislated time limits of 450 days for pipeline and power line certificate applications?

Response:

The proponent should, as a part of its early engagement and pre-application processes, reach out to Indigenous communities whose core traditional territory interest intersects with the project footprint, to minimize the likelihood of delays in receiving Indigenous-led assessments. However, the timelines of the proponent and the Indigenous community may differ, with those of the Indigenous community typically being longer. In that case, and to ensure that the assessment of the application takes place within the legislative limit, the CER should consider a TLU contingency plan process that recognizes that the findings of TLU at time of application may be preliminary, and that further assessment is being undertaken. If new information is presented after the application is submitted, the company would consider it in relation to project footprint, access, etc., and if relevant, incorporate information into the table of mitigation. If there is a material impact, which requires the proponent to submit a technical update to the CER during the adjudication process, the CER's role is to expedite that assessment to the extent reasonably practicable to meet the service standard for adjudication.

In relation to timelines, it is important for the CER to differentiate a proposed project required for maintenance of the pipeline such as a pipeline replacement to address a seismic, depth of cover, or scour hazard, versus a project that is driven by commercial interests such as twinning or looping of the pipeline. Typically, the former is required to be completed within a set time period and required to ensure the safe

continued operation of the pipeline, whereas the latter would typically not. In the case of a maintenance project, an Indigenous-led study would need to be undertaken on an expedited manner to ensure that the maintenance project is completed in a timely manner.

2.3 Clarifying the CER's guidance for assessing effects on the rights of Indigenous Peoples

The CER Act requires the Commission to consider “the effects [of the project] on the rights of the Indigenous Peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982” (paragraph 183(2)(e)). The Filing Manuals provide guidance for applicants to follow when assessing project effects on the rights of Indigenous Peoples. This guidance is similar to other approaches in Canada, including the guidance from the Impact Assessment Agency of Canada for the “Assessment of Potential Impacts on the Rights of Indigenous Peoples”.

The CER's guidance is described in the Filing Manuals (see the “Rights of Indigenous Peoples” sections in [Table A-3](#) and [Table 6-3 of the Filing Manual and Electricity Filing Manual respectively](#)):

- Describe the Indigenous and Treaty rights of the potentially affected Indigenous Peoples in the project area.
- Describe how Indigenous and Treaty rights are exercised or practiced in the project area.
- Describe the context in which the Indigenous and Treaty rights are exercised or practiced in the project area.
- Describe the project's potential effects on the exercise or practice of Indigenous and Treaty rights in the project area.
- Describe the measures to be implemented by the applicant to avoid, reduce, or eliminate potential adverse effects of the project on the exercise of Indigenous and Treaty rights. Also describe any measures that would enhance or support the exercise or practice of Indigenous and Treaty rights in the project area.
- Where there may be any residual effects, after mitigation measures are implemented and that are related to the project, describe the nature and extent of these, including their contribution to any potential cumulative effects

When following this guidance, applicants are expected to engage with potentially impacted Indigenous communities as soon as is practicable in the project's development in order to allow adequate time to discuss and understand each community's understandings, practices, and assertions related to their rights. This guidance is meant to allow a flexible and iterative process, which typically requires cooperation between rights-holding Indigenous communities, the applicant, the CER, and other federal departments and agencies. The Commission is responsible for determinations about the severity of potential effects on the rights of Indigenous Peoples; however, the Commission's determinations are informed by information provided by the applicant and Indigenous Peoples.

In recent hearings, the Commission has evolved its approach to determining the severity of effects on the rights of Indigenous Peoples, adopting a sliding scale as a continuum to indicate the degree to which the rights of Indigenous Peoples may be affected by a project. The levels of low, medium, and high provide a relative approximation of the degree of severity. However, the Filing Manuals currently do not describe this approach.

Objective for improvement

The CER wants to modify and clarify its expectations of applicants regarding assessment of the effects of a project on the rights of Indigenous Peoples to support a robust interpretation of Indigenous rights.

Proposed options

The CER is considering:

- consolidating and expanding a new “Rights and Interests of Indigenous Peoples” section; and
- including a templated framework, similar to the sliding scale and the criteria and ratings from the Commission’s NEBC Recommendation report, resulting in a severity determination for the effects on the rights of Indigenous Peoples (see [C26744-1](#) “Table 6.1: Determination on the degree of severity of the effects on the rights of Indigenous Peoples” and Appendix 6).

Discussion questions

m.13) What are the opportunities and challenges for Indigenous Peoples with the CER’s existing guidance?

Response:

Trans Mountain would prefer not to speak on behalf of Indigenous Peoples.

m.14) What are the opportunities and challenges for applicants with the CER’s existing guidance?

Response:

In Trans Mountain’s view, the existing guidance is appropriate in helping guide proponents to incorporate the assessment of impact to the rights and interests of Indigenous Peoples. The current *Filing Manual* allows for flexibility in the proponent’s approach given the level of the interface within Indigenous communities.

As described in Paper I, response to request i.1), there needs to be a relationship between the pipeline company and the Indigenous community in order for the company to understand how the community may be impacted by a proposed project, and how to implement avoidance or mitigation measures. If a company has not established a relationship with the community, it will be challenging for the company to determine potential impact to that community.

m.15) What additional guidance, if any, should the Filing Manuals provide to applicants to identify the potential effects of the project on the exercise and practice of the rights of Indigenous Peoples?

Response:

Trans Mountain recommends the CER to encourage relationship building between companies and Indigenous communities, and to the extent that companies have experienced challenges in establishing relationships with Indigenous groups, to help educate companies and facilitate where appropriate. The development of positive relationships with Indigenous communities creates the foundation to understand the rights and interest of a community in relation to a given project.

m.16) Would a framework similar to the severity table used in the Commission’s NEBC Recommendation Report be appropriate for inclusion in the Filing Manual?

Response:

Trans Mountain does not support splitting ESA into Indigenous and non-Indigenous valued components. Please see Paper K, response k.1. For reasons described in response to request k.1., Trans Mountain also does not support the framework shown in Appendix 6.1 to the NEBC Recommendation Report.

- m.17) Should applicants submit a draft determination of the severity of the project effects on the rights of Indigenous Peoples? This would be similar to the CER's expectations that applicants submit draft determinations of the significance of valued components in the applicants' ESA, which helps inform the Commission's determinations about significance in the Commission's ESA.

Response:

As a part of the ESA, a proponent undertakes an assessment of impact to all VCs defined in the assessment, whether biophysical, socio-economic, Indigenous or combined. As discussed in Trans Mountain's response to Paper K, request k.1), meaningful engagement with Indigenous communities is necessary to define the VCs for the community and to understand how those VCs are impacted by the project. A VC may have both biophysical and rights and interest attributes, which then creates the potential for duplication of impact if separated between a draft determination of severity of project effects on the rights of Indigenous peoples, and the ESA.

Trans Mountain appreciates the intent of the CER to introduce rigor and specificity to the assessment of project effects to the rights and interests of Indigenous Peoples, however, in Trans Mountain's view, the robustness of the assessment as informed by meaningful engagement with Indigenous communities, and environmental and socio-economic study should remain the focus.

Trans Mountain notes that guidance on assessing the potential effects of a proposed project on Indigenous rights is already, and in its view appropriately, covered in the *Filing Manual*. The valued components that underscore the exercise of, and potential impacts to, Indigenous rights should be considered in the applicant's assessment of effects through the characterization framework established by the professional assessment team considering the engagement feedback from Indigenous groups.

- m.18) How should applicants integrate their assessment of the potential effects of a project on the rights of Indigenous Peoples with their VC-based assessments? For example, how should applicants demonstrate the overlaps and interconnections between the potential effects of a project on the rights of Indigenous Peoples and VC-based assessments (i.e., the assessment of biophysical and socio-economic VCs, and VCs focused on the rights and interests of Indigenous Peoples)?

Response:

Please see the response to Paper K, request k.1.

2.4 Clarifying the CER's guidance for monitoring and oversight by Indigenous Peoples

The CER Act requires the Commission to consider "any adverse effects that the decision, order or recommendation may have on the rights of the Indigenous Peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982" (paragraph 56(1)). The Filing Manuals provide guidance for applicants to follow for inspection, monitoring and follow-up plans and programs. When following this guidance, applicants are expected to consider any particular project elements that are of greater concern and evaluate the need for a more in-depth monitoring program for those elements.

In recent hearings, the Commission has required applicants to develop plans for the participation of Indigenous Peoples in construction monitoring, and post-construction and operations monitoring (for example, see [C26744-1](#) "Condition 14" and "Condition 41").

Objective for improvement

The CER wants to modify and clarify its expectations of applicants regarding monitoring and oversight by Indigenous Peoples during construction and operation to support a robust assessment of a project's potential effects on the rights and interests of Indigenous Peoples.

Proposed options

The CER is considering clarifying expectations for applicants about monitoring and oversight by Indigenous Peoples that can form part of an assessment (e.g., plans for participation of Indigenous Peoples in construction monitoring, plans for participation of Indigenous Peoples in post-construction and operations monitoring).

Discussion questions

- m.19) What are the opportunities and challenges for Indigenous Peoples of being involved in the applicant's inspection, monitoring and follow-up plans and programs (e.g., timing, funding, scoping, integration)?

Response:

Trans Mountain would prefer not to speak on behalf of Indigenous Peoples.

- m.20) What are the opportunities and challenges for applicants of involving Indigenous Peoples in their inspection, monitoring and follow-up plans and programs (e.g., timing, funding, scoping, integration)?

Response:

The volume of opportunities available to Indigenous Peoples will vary depending on where the proponent is in the asset lifecycle. During the planning for an execution of a construction project, where there is physical disturbance, and for larger projects, a generous spatial extent, there will be many opportunities for Indigenous communities for inspectors, monitors and environmental resource specialists. However, when the execution of the project and reclamation is complete, the opportunities for inspection or monitoring for Indigenous communities are commensurately limited as there is little disturbance.

Trans Mountain has observed that during times where opportunities are available, some Indigenous communities may not have the capacity to participate. Community members may be employed elsewhere resulting in lack of availability, or that there are no resources in the community to support establishment of contracts or undertake billing. Further if community members are available to participate, they typically prefer to take a limited observer role, providing more informal information and input to the process and keeping their community apprised of the work. The CER should recognize the value of different levels of participation based on the individual communities' level of interest and needs.

- m.21) How should applicants involve Indigenous Peoples in monitoring and managing the effects of the project on the rights and interests of Indigenous Peoples during construction and operation?

Response:

Through the establishment of relationships with Indigenous communities, a proponent should have a baseline knowledge of the level of interest in relation to a given activity to inform the decision of Indigenous involvement. Rights-bearing people should be prioritized for Indigenous monitoring, and in the case where there are Indigenous monitors from other organizations (such as the CER or the Indigenous Advisory Monitoring Committee (IAMC)), the observations of the Indigenous monitor with core territory

interest should prevail. In all cases, the involvement of Indigenous Peoples in monitoring and managing effects should be scalable given the extent of impact, fit for purpose, and in the spirit of fostering relationships.

2.5 Clarifying the CER's guidance for Sites of Indigenous significance

The CER Act requires the Commission to consider the effects of the project on the rights and interests of Indigenous Peoples. The CER's Filing Manuals describe the VCs to be considered by the applicant, including heritage resources (i.e., cultural, historic, archaeological, and paleontological resources) and traditional land and resource use.

On recent projects, the CER has received feedback regarding the ability of applicants to properly identify and protect sites of Indigenous significance (e.g., locations that have a special meaning for Indigenous Peoples and archeological sites pertaining to the history of Indigenous Peoples).

Objective for improvement

The CER wants to modify and clarify its expectations of applicants regarding heritage and cultural resources, which could include sites of Indigenous significance during construction and operation to support a robust assessment of a project's potential effects on the rights and interests of Indigenous Peoples.

Proposed options

The CER is considering clarifying expectations for applicants about sites of Indigenous significance, heritage resources, and traditional land and resource use that can form part of an assessment.

Discussion questions

m.22) How does the concept of "sites of Indigenous significance" compare with heritage resources and traditional land and resource use? Where might there be overlap (including with existing legislative responsibilities by jurisdictions)?

Response:

Trans Mountain interprets "sites of Indigenous significance" to be a broader term that incorporates archeology (heritage resources), TLU and IK. Through engagement, an Indigenous community may inform a proponent of a spiritually important location, for which the proponent would protect, in the similar manner that it would an archeological artifact. Legislatively, archeological resources are protected under provincial law whereas, TLU or IK are not. Regardless, Trans Mountain is of the view that all sites of Indigenous significances should be afforded the same degree of protection by the proponent regardless of the legal jurisdiction.

m.23) What are the opportunities and challenges for Indigenous Peoples of integrating the concept of "sites of Indigenous significance" into the applicant's assessment?

Response:

Trans Mountain would prefer not to speak on behalf of Indigenous Peoples.

m.24) What are the opportunities and challenges for applicants of integrating the concept of "sites of Indigenous significance" into their assessment?

Response:

Trans Mountain stresses the importance of relationship building with Indigenous communities over the lifecycle of a pipeline and associated facilities. It is through this relationship that companies can understand where and what sites of Indigenous significance are of value to the community, and how to protect them in relation to construction and operational activities.

A challenge faced by proponents is the presence of overlapping interests between various Indigenous communities and conflicting TLU. A further challenge exists when Indigenous communities may not choose to share this information, rendering it difficult for a proponent to protect the site of Indigenous significance.