



Canada Energy Regulator
Onshore Pipeline Regulations and Filing Manual Review
Recommendations from McMurray Métis

OPR – RIGHTS AND INTERESTS OF INDIGENOUS PEOPLES, SOCIO-ECONOMIC EFFECTS, AND ENGAGEMENT

Issue 1 – Review Time and Resources

McMurray Métis' position is that the time and resources provided by the Canada Energy Regulator (CER) for Phase 2 of the Onshore Pipeline Regulations (OPR) and Filing Manual (FM) review are inadequate to conduct a thorough review of the quantity of information provided. The input requested requires a considerable familiarity with regulatory and impact assessment processes, both provincially and federally, and thus more time and resources are required to get our participating members familiar enough with the regulatory and impact assessment processes so that they can provide input on the OPRs and FMs.

- **Recommendation 1:** The CER should provide a summary of the input received from McMurray Métis and how, where, and why this input was integrated or not into the recommended changes to the OPRs and FMs. This would render the review process consistent with the CER's own recommendation that proponents develop Management Systems to demonstrate how Indigenous laws, policies, and knowledge are used by proponents;
- **Recommendation 2:** The CER should provide adequate scope and budget for participant Indigenous communities to review and provide input on the recommended changes to the OPRs and FMs that come out of Phase 2;



Issue 2 – Pre-Consultation and Identification of Potentially-Affected Communities

McMurray Métis is concerned about how the CER identifies potentially-affected communities. While we acknowledge there must be a balance between highly restrictive or highly permissive regimes, the lack of publicly-available information on the traditional territories and Indigenous use of resources means that regulators are often unaware of potentially-affected communities, beyond those communities that are adjacent to a proposed project area. This concern is particularly serious for the Métis, whose high levels of historical and current mobility means that members of a Métis community often exercise their constitutionally protected rights to harvest across a large geographic area, including across provincial borders.

- **Recommendation 3:** The CER’s Crown Consultation Coordinator (CCC) should establish a pre-consultation phase, in which it engages with communities at considerable distance from a proposed project, to determine whether any of these communities could be potentially-impacted by a proposed project. We would recommend that the CCC reach out to Indigenous communities with a description of the proposed project and a modest budget to conduct a map review to determine whether the community exercises its Treaty and Aboriginal rights in the project area and its environs. Where most distant communities can provide evidence of potential impacts, they should be included in the consultation list.

Issue 3 – Application of Revised OPRs

McMurray Métis is concerned that revisions to the OPRs will only apply to future pipeline applications to the CER. In our view, there is no reason why improvements in regulatory processes cannot be integrated into already existing projects, particularly when many of these projects have long lifespans and will be permanently left in the environment.



- **Recommendation 4:** that all proponents applying for re-authorizations of existing and approved pipelines regulated by the CER should ensure that their projects align with the revised OPRs prior to the approval of the re-authorization;

Issue 4 – Management System for the Inclusion of Indigenous Knowledge

McMurray Métis is strongly supportive of the requirement that proponents develop a Management System that demonstrates how proponents are incorporating Indigenous knowledge into their programs. However, the Management System needs to be co-developed with Indigenous communities and provide for Indigenous community reporting in order to be effective. Without these accountability mechanisms, the Management System runs the risk of become yet another ineffectual and unaccountable regulatory requirement.

- **Recommendation 5:** The OPR should require that proponents consult Indigenous communities and co-develop Management Systems for the Inclusion of Indigenous Knowledge with these Indigenous communities;
- **Recommendation 6:** As part of the follow-up tracking of the Management System, Indigenous communities must be afforded opportunity, time, and resources to report on how their Indigenous Knowledge is being used by the proponent, to ensure that Indigenous knowledge is being used effectively, respectfully, and appropriately;

Issue 5 – Protection Program for Indigenous Rights

McMurray Métis fully supports revisions to the OPR to require that proponents develop a protection program for Indigenous rights. To be effective and accountable, however, the protection program should aim not simply to minimize potential adverse effects to Indigenous rights, but to strengthen Indigenous rights so that the project in question leaves each Indigenous community



better able to exercise their Indigenous rights than they were before. Rather than infringing upon Indigenous rights more slowly, the CER and proponents should aim to develop projects that in fact reverse historical trends and strengthen the ability of Indigenous peoples to exercise their rights.

To meet this goal, the Protection Program will require an adequate baseline of cumulative effects to the exercise of Indigenous rights, to determine their present condition. This would require that the CER and the proponents provide resources to Indigenous communities to develop a pre-development cumulative effects baseline for rights. Otherwise, any determination of impacts to rights and Protection Program will lack the information necessary to succeed.

- **Recommendation 7:** Revisions to the OPR should require a Protection Program for Indigenous rights that seeks to anticipate, prevent, manage, and mitigate adverse effects to rights, *and* that enhances the capacity of Indigenous peoples to exercise those rights;
- **Recommendation 8:** The OPR should require that proponents consult on and co-develop Protection Programs for Indigenous Rights with potentially-affected Indigenous communities.
- **Recommendation 9:** The Protection Program for Indigenous Rights should work from a pre-development baseline of cumulative effects to Indigenous rights, in order to determine the present state and vulnerability of the rights in question, and determine the most appropriate courses of action to ensure the project in question contributes to a reversal of any negative historical trends

Issue 6 – Engagement and Consultation

McMurray Métis is concerned that the OPRs and FMs use the term ‘engagement’ to describe consultation with Indigenous peoples. The term ‘engagement’ should never be used in relation to



the CER or the proponents relations with Indigenous peoples. Indigenous peoples are not ‘stakeholders’, like a municipality or private landowners. Indigenous peoples are the holders of constitutionally protected Treaty and Aboriginal rights and are legally owed the “duty to consult” (not the ‘duty to engage’), which is a legally-defined standard that requires not simply that the CER and proponents consult with Indigenous peoples but accommodate their concerns and recommendations whenever reasonable.

- **Recommendation 10:** All references to “engagement in relation to Indigenous peoples should be changed to “consultation” to ensure that the CER and proponents are clear that their dealings with Indigenous peoples are not voluntary and must meet standards of consultation and accommodation as defined by the Supreme Court of Canada;

FILING MANUAL – RIGHTS AND INTERESTS OF INDIGENOUS PEOPLES

Issue 1 – Indigenous Role in Impact Assessment

The existing impact assessment process is heavily skewed towards proponents and the consultants hired by proponents. In Alberta, this means that the proponent conducts impact assessments with little-to-no input from Indigenous communities, who are provided modest capacity funding to submit information to the proponent on their use of project areas for traditional purposes. In the CER process, proponents either conduct cursory impact assessments with little input from Indigenous communities (where there is no hearing) or submit a list of potential valued components for Indigenous input and conduct an assessment of impacts to rights with little to no input from Indigenous communities beyond whatever traditional land use information is submitted by the participant community. Oftentimes, the negotiation of capacity funding and the limited scopes of work provided therein do not allow Indigenous communities to engage meaningfully with the proponent before the proponent has completed their own assessment of potential impacts to Indigenous rights.



This process is entirely colonial and inconsistent with the principles of reconciliation and the *United Nations Declaration on the Rights of Indigenous Peoples* (UNDRIP). The proponent should not be required or even allowed to assess the potential impacts of a project to Indigenous peoples, nor should their consultants, who are conflicted as independent assessors as a result of their financial relationships with proponents.

- **Recommendation 11:** There should be separate Valued Components for Rights and Interests of Indigenous Peoples that should be co-developed by Indigenous participants;
- **Recommendation 12:** Indigenous Rights Assessments should be led by Indigenous communities and supported by the proponent and CER; the proponent should not be able to submit an assessment of impacts to Indigenous rights. The proponent can test the assessments submitted by Indigenous communities during the regulatory process;

Issue 2 – Socio-Economic Effects

Typically, there is very little transparency or follow-up on the socio-economic effects of projects in relation to Indigenous peoples. Insofar as information is provided by the proponent, it tends to be at a high level of abstraction and provides little valuable information for Indigenous communities to ensure commitments are being upheld. Likewise, proponents often privatize the impact assessment and Crown consultation and accommodation process through the use of Impact Benefit Agreements (IBAs), which are regularly confidential.

- **Recommendation 13:** Socio-Economic Effects Programs should direct proponents to pursue economic opportunities and benefits for Indigenous communities. The CER should develop guidance related to this process;



- **Recommendation 14:** Socio-Economic Effects Programs should require transparency for capacity funding and benefit agreements to address the chronic inequity in capacity funding provided by proponents, where proponents regularly provide First Nations with double or more the capacity funding provided to Métis communities, despite the fact that most Métis communities do not receive operational funding from Canada;

- **Recommendation 15:** The CER should develop guidance in relation to the provision of capacity funding and Impact Benefit Agreements, in relation to how to determine the distribution of capacity funding and benefits, to ensure the process is transparent and based upon clear criteria, such as proximity to the project, size of the community, strength of the asserted rights, et cetera, and not based on which community spends the most money on lawyers or has the strongest negotiating team;

Issues 3 – Communications and Monitoring

Indigenous communities, and particularly those without a strong internal capacity for Crown consultation and industry relations, often struggle to sift through the myriad of information presented to them by proponents and regulators, and often struggle to access clear baseline information and subsequent information on environmental and other monitoring.

- **Recommendation 16:** All Environmental and Socio-Economic Assessments should contain plain-language summaries of all major sections;

- **Recommendation 17:** All environmental monitoring programs should require community-based monitoring, which addresses concerns about access to, intelligibility of, and confidence in existing monitoring programs. All monitoring activities will be developed before approval and will be an approval condition;



- **Recommendation 18:** All monitoring information should be made available publicly and there should be regular meetings of Indigenous communities to review and provide oversight of monitoring findings;
- **Recommendation 19:** Key performance reports should be regularly submitted for all incidents, spills, et cetera, as well as updates for climate and other risk factors over the lifecycle; Key Performance Indicators (KPIs) should be co-developed with participant Indigenous communities;
- **Recommendation 20:** All monitoring programs should focus on monitoring the claims made in ESAs and monitoring and evaluating the effectiveness of mitigation measures to determine whether they actually work or not; at present, there is little to no evidence collected on whether mitigation measures actually work;

OPR - ENVIRONMENTAL PROTECTION

This section includes recommendations related to OPR – Environmental Protection. Due to constraints associated with the limited participant funding available to review the quantity of documentation on the CER website for the OPR review and approach to conduct community engagement on the documents, the recommendations are directly stated with little background context. The context under which the recommendations were developed by the McMurray Metis members participating in the engagement sessions can be further obtained through direct consultation with McMurray Metis by the CER.

- **Recommendation 21:** McMurray Metis recommends that the CER conduct a consultation session with the McMurray Metis members who developed the recommendations in this submission to fully understand the context in which the recommendations should be applied in the OPR and Filing Manuals.



Issue 1 – Sub-topic 1 Duty to report and manage contamination

The objectives for ST1 refer to the environment.

- **Recommendation 22:** The definition of environment applied to the OPR must include Indigenous use of the environment and biodiversity and cultural landscapes needed to support Indigenous Peoples ability to exercise Aboriginal and Treaty Rights in the environment;
- **Recommendation 23:** McMurray Métis recommends that pipeline operators be required to report contamination immediately to the Regulator and Potentially Affected Indigenous Communities;
- **Recommendation 24:** McMurray Metis recommends that a timeframe be defined for ‘as soon as practicable’;

Issue 2 – Sub-Topic 2 Reclamation, Restoration and Vegetation Management

Discussion Question 2 (DQ2) asks if the requirements enhance environmental protection and clarify CER expectations in the areas of reclamation and vegetation management.

- **Recommendation 25:** McMurray Metis recommends that the definition of reclamation applied in the OPR reflects that reclamation is the mitigation measure implemented by pipeline proponents and operators for land disturbance impacts on lands used by Indigenous Peoples to exercise Aboriginal and Treaty Rights. Any impacts to land use areas are therefore impacts to rights and the reclamation planning must include planning to re-establish conditions for the exercise of rights;



- **Recommendation 26:** McMurray Metis requests that pipeline operators avoid the use of herbicides as a method for vegetation management and establish Indigenous Guardians to conduct physical management of vegetation. This would reduce herbicide contamination of food for wildlife and plants harvested by Indigenous Peoples;
- **Recommendation 27:** McMurray Metis recommends that research be conducted into the iterative expansion of pipeline rights-of-way as pipeline corridors are being created in northeastern Alberta. The purpose of the research would be to understand the impacts of continually widening the rights-of-way and re-disturbing reclaimed rights-of-way to construct the right-of-way for a new pipeline adjacent to an existing right-of-way.

Issue 3 – Sub-Topic 3 Participation in development of environmental monitoring by Indigenous Peoples

The objective for improvement under ST3 refers to including Indigenous Peoples in the development, implementation, and monitoring of reclamation activities.

- **Recommendation 28:** McMurray Metis recommends that all reclamation monitoring be done by Indigenous Communities;
- **Recommendation 29:** McMurray Metis recommends that the CER establish a Co-Management Framework for the CER to facilitate Indigenous Community Monitoring in all life cycle phases including development, implementation, reclamation and post-construction phases;



- **Recommendation 30:** McMurray Metis recommends that Indigenous Communities be consulted on Reclamation Planning from the beginning of the project (i.e., during the application phase);
- **Recommendation 31:** McMurray Metis recommends that the operations authorization for a pipeline project require the pipeline operator to allocate a percentage of profits to support a Co-management Framework for Indigenous Community Monitoring;

Issue 4: Subtopic 4 – Environmental Protection Plan required for Construction and Operation and Maintenance Activities

The following recommendations apply to Subtopic 4:

- **Recommendation 32:** McMurray Metis recommends that the Environmental Protection Plan be required for all life cycle phases including the application phase and that it be scalable for all life cycle phases beginning with the application phase. An Environmental Protection Plan for all life cycle phases would support improved planning, construction, operations, maintenance and decommissioning, achieve better overall life cycle performance and improve long-term planning;
- **Recommendation 33:** McMurray Metis recommends that the Environmental Protection Plan include climate change adaptation planning is a requirement to complete a risk assessment and evaluate climate resiliency that addresses wildfire impacts and responses to wildfires and impacts of climate change to Indigenous Rights;
- **Recommendation 34:** McMurray Metis recommends that the operations authorization require that the Environmental Protection Plan be reviewed every 5 years, this would



ensure that the plan is updated to address uncertainties related to climate change throughout the lifetime of the project;

- **Recommendation 35:** McMurray Metis recommends that proponents be required to include Indigenous Peoples in the development of the Environmental Protection Plan and climate change adaptation planning during the application phase;
- **Recommendation 36:** McMurray Metis recommends that the CER acknowledge the Environmental Management System is distinct from the Environmental Protection Plan and both are required to ensure good management of the pipeline and protection of the environment.

DISCUSS TOPIC PAPER K - FILING MANUAL - ENVIRONMENTAL AND SOCIO-ECONOMIC ASSESSMENT

The following recommendations apply to Filing Manual K:

- **Recommendation 37:** McMurray Metis recommends that Environmental and Socio-Economic Assessment and Rights and Interests of Indigenous Peoples be distinct sections in the Filings Manual. Each section will have distinct guidance, simplifying to generic guidance is not supported by McMurray Metis;
- **Recommendation 38:** McMurray Metis recommends that Indigenous Peoples be consulted on the identification of valued components in a pre-planning phase and through the application phase. McMurray Metis supports identification of a range of narrow and broad VCs to be confirmed with Indigenous Peoples through consultation during the pre-planning and applications phases;



- **Recommendation 39:** McMurray Metis recommends that Indigenous Peoples be consulted on the scoping of Cumulative Effects Assessment and determining baseline conditions during the pre-planning and application phases;

- **Recommendation 40:** McMurray Metis recommends that proponents be required to conduct a cumulative effects assessment for all projects, no exclusions.