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Phase 1 Comments on the CER's Review of the Rules of Practice and Procedures (1995).

Doig River First Nation (DRFN) appreciates the opportunity to provide comments and recommendations for the proposed revisions to the National Energy Board Rules of Practice and Procedure (1995) (the Rules). DRFN provides these comments based on our experience with past hearing processes that ignored DRFN concerns (e.g., Alliance Pipeline) and recent hearing processes (e.g., Northeast BC Connector Pipeline (NEBC)) that did not adequately consider Indigenous knowledge and ultimately failed to meet the CER's commitment to Reconciliation. There appears to be an ongoing refusal on the part of the CER and the Commission to recognize that feedback from Indigenous communities, like DRFN, is intended to provide pathways to free, prior, and informed consent, which is a pillar of the federal UNDRIP Act. The result might be some increased capital costs to the proponent during initial development, but the outcome is a sustainably constructed project and the protection and, in some cases, enhancement of Indigenous people's ability to exercise their treaty rights. In other words, ongoing economic development and a healthy environment. This is the very definition of the public interest. DRFN's experience with these hearings, and the rules and procedures that structure them, is that Indigenous intervenors are participating under the assumption that the CER and the Commission are operating under a spirit of Reconciliation but the reality falls well short of this assumption, to the ongoing detriment of communities and the ongoing infringement of rights. It is DRFN's sincere hope that the CER is approaching these revisions with genuine intent. Our comments follow below:

1. Are there specific process steps for cost apportionment applications that you would like to see made mandatory through the Rules?

   DRFN does not have comments related to cost apportionment applications.

2. Are there specific process steps for compensation applications that would like to see made mandatory through the Rules?

   DRFN would like to see the concept of compensation evolve more generally and be captured in the Rules. There is guidance around hearing compensation applications for private landowners, but there is no mechanism for compensation for the infringement of treaty rights. In fact, during final oral arguments for the NEBC hearing, the Commission asked whether it was DRFN's opinion that the Commission could set a condition around compensation for impacts to rights. At the time, DRFN felt that compensation per se was not within the Commission's authority; however, the Commission did have the authority to set conditions with respect to offsetting impacts of oil and gas development on treaty rights.

DRFN is seeking the development of a policy, guideline, or rule that requires a proponent to offset impacts to rights. As part of DRFN's land use planning process, and given the current state of cumulative effects in BC and AB, offsetting will be required by DRFN (and likely other Indigenous groups as evidenced during the NEBC hearing) on every CER regulated project in DRFN's territory. Providing process steps in the Rules to collaborate with communities like DRFN in the development of the offset ultimately results in a streamlined and efficient pathway to consent and is a necessary component to meeting the CER's commitment to Reconciliation.

In the absence of an offset, or an offset that is conditioned by the Commission and shown to be inadequate, Indigenous communities should have the opportunity to apply for compensation for ongoing rights infringements associated with these new approvals. This is a matter of procedural fairness akin to what is afforded to private landowners.

3. Do you have feedback regarding how the Rules could incorporate process steps for providing and protecting Indigenous knowledge within hearings?

During the NEBC hearing and to date during the Pouce Coupe Taylor to Gordondale hearing process, DRFN has found that there is adequate opportunity to provide both written and oral Indigenous knowledge. While not directly applicable to DRFN at the time, the Commission did provide flexibility to communities struggling with capacity to submit Indigenous knowledge reports or other information as requested. The opportunity to provide information, however, is a very different issue from how that information is used to make decisions and recommendations. Time and again DRFN has observed that Indigenous information is received under the guise of consultation, but ultimately ignored or certainly not considered in any meaningful way.

For example, during the NEBC hearing, there were process steps included for a cumulative effects workshop and an offsets workshop. These were met with cautious optimism. The objectives of these workshops were to understand the impacts of cumulative effects on the ability of Indigenous peoples to exercise their treaty and aboriginal rights, and to determine the appropriate mechanism to offset those impacts. Over 30 Indigenous intervenors and participants collaborated and agreed upon an offsets approach that would provide equitable offsets for the majority of impacted communities. Despite all this effort and all the good work that was conducted, the Commission went ahead with an offset proposal developed by the proponent that minimized their environmental obligations and ultimately benefited only one Indigenous community. This was a demonstration of the typical and blatant disregard with which the CER addresses its requirement to 'consider' Indigenous knowledge. It was a waste of time and effort under the façade of consultation.

The Rules require a linkage between the provision of information and outcomes. The Commission should be required to demonstrate that they have heard and understood the Indigenous knowledge being provided and there needs to be transparency in how the Commission plans to use that information in their recommendations. By the time Indigenous communities receive the recommendations report, it is too late. Indigenous communities should be drafting this guidance for the CER and the Commission given the principle that only

the rights holders can evaluate impacts to their rights, and ultimately the rights holders are best positioned to develop mitigations and offsets for those impacts.

4. Would you like to see the role of the Crown Consultation Coordinator, and the nature of its participation in Commission hearings reflected in the Rules? If so, how?

   DRFN would like to see the role of the CCC formalized in the Rules and DRFN would like to see more meaningful consultation authority assigned to the CCC. The CCC's role during the NEBC hearing was one of educator, facilitator, and information gatherer. Providing a Crown body with an information gathering role is an important one. DRFN was impressed by the effort of the CCC to build relationships and to understand community concerns. The CCC also played a large role in educating communities on the hearing process and expectations for participation. Most importantly perhaps was the CCC's role in facilitating collective community dialogue and independent discussions, and assimilating that information for the Commission. It is a difficult task and was not always perfect, but it will be a vital component moving forward.

   DRFN would like to see the role of the CCC evolve to be one of advocacy and accountability. Meaningful consultation requires meaningful outcomes. It is not enough to collect information and check a box that the Commission has considered the information simply by collecting it. DRFN would like to avoid a repeat of the experience during the NEBC Connector hearing whereby the Commission misinterpreted and mischaracterized DRFN information in the recommendations report. By this time, it is too late to make changes. The CCC as an agent of the Crown responsible for consultation is best positioned to not only collect information, but to ensure that the Commission fully understands the information it is receiving and to guide the Commission on how to use the information to achieve positive outcomes for communities. This mediator role between information gathering and outcomes is a vital progression for the hearing process.

5. Do you have other feedback related to how the Commission can align the Rules with the CER Act, including the objectives outlined in the Act's preamble, such as the commitment to Reconciliation, and the UN Declaration?

   Formalizing rules and procedures around offsetting requirements provides a link between project level operational objectives and broader commitments to Reconciliation. In the absence of any willingness on the part of the CER to deny proponents a recommendation for approval, offsetting is the only tool available to DRFN and other Indigenous communities to manage contributions to cumulative effects and to manage risk and uncertainty associated with project impacts on the ability to exercise treaty and aboriginal rights. Without formalized rules or policies around offsets at a regulatory level, and without the necessary leadership on the part of the Commission to impose meaningful offsets on an ad hoc basis, DRFN and other communities will continue to struggle with ongoing infringements to the exercising of rights. DRFN has put considerable effort into offsets research and the development of an offset policy as part of its own land use planning process. DRFN would welcome an opportunity to participate in more dialogue around developing a legislative offsets framework that would guide CER hearings in the future.

Whether it is in the Rules, the Guidelines, or at a legislative level, the CER and the Commission needs to restructure how it approaches environmental assessment. The mitigation hierarchy has been the cornerstone of environmental assessment for decades; however, the concept of residual effects is the single greatest enemy to environmental and cultural sustainability. Residual effects are wholly arbitrary determinations based on pseudo scientific rationale and subsequent significance determinations are based on equally arbitrary thresholds leading to death by a thousand cuts. The resultant cumulative effects have reached a critical point in British Columbia despite decades of non-significant residual effects. As a result, DRFN is a strong advocate for offsetting at a project footprint scale, which would incentivize significant avoidance, reduction, and mitigation measures and result in offsets at a scale with measurable and tangible benefits to environmental and cultural sustainability without sacrificing economic progress. Please also refer to comment responses to questions 2, 3, and 7.

6. Do you have any suggested changes to the Rules to reflect hearings pursuant to the Canada Oil and Gas Operations Act or other legislation?

   DRFN does not have suggested changes to the Rules pursuant to other legislation at this time.

7. Do you have any feedback with regards to any timelines set in the Rules, additional timelines you would like to see added to the Rules, or the approach for computation of time (Rules, s5-7)?

   Currently, opportunities to workshop cumulative effects, impacts to rights, and offsetting are considered and scheduled on an ad hoc basis. The Rules should incorporate dedicated process steps for these workshops and their associated timelines for completion within the legislated period. Further, the Rules should direct the Commission to incorporate the outcomes of these workshops into the conditions and recommendations report without further interpretation or modification.

8. Do you have feedback related to the notice of motion process or suggested changes to support efficiency? Do you have feedback on the use of oral notice of motion process to support efficiency?

   DRFN does not necessarily oppose an oral notice of motion process; however, we require more information on what that might look like. DRFN envisions potential scheduling issues in receiving and responding to these notices and what implications that might hold for participation generally.

9. Do you have feedback on the current process for fixing costs related to detailed route hearings?

   DRFN does not have feedback on fixing costs related to detailed route hearings at this time.

10. Are there processes you would like to see written into the Rules?

    Nothing in addition to what has been suggested throughout these comments.

11. Do you have feedback regarding changes that could be made to the information request process to clarify its use and support efficiency?

    The written IR process is generally inefficient and largely ineffective. The initial IRs result in responses that without fail are minimal in content and often require a motion to compel for

more detailed information, which can be unnecessarily onerous. There are generally 2 or 3 back and forth opportunities to gather this information, and issues are rarely resolved.

DRFN is unclear about the role of the IR process and perhaps the Rules are a way to define the purpose. It is our opinion that the IR process should be part of an overall issue resolution process, or clarification on elements of the impact statements, methodologies, mitigations, conclusions, etc. Applications are generally large enough that their review is challenging and only 2 or 3 IR attempts from generally reluctant proponents are inadequate to make meaningful evaluations of any application.

As an additional option for intervenors, the CER might consider conducting an IR process in workshop format similar to what has been conducted for cumulative effects and offsetting. The objective of an IR workshop would be for the proponent to present its application in detail, review study findings, mitigations, and conclusions, and provide opportunities for intervenors and participants to present their IRs in real time. Outcomes would result in action items for the proponent to address and the results of those activities might be open to another round of IRs. A workshop IR format would be more efficient and ultimately result in a more fulsome exchange of information for all parties, and even clarity for the Commission.

12. Can you identify rules of other regulators or tribunals that support efficiency and could inform the Commission's Review?

This comment is not necessarily related to efficiency of process, but does link to proponent timelines and competitiveness. The Commission must not make recommendations for approval that ultimately undermine land use management objectives of the provincial jurisdiction where the development will operate. For example, during the NEBC hearing process, the Commission went against the recommendations of Indigenous intervenors and established a suite of conditions related to offsetting impacts to rights that were largely counter to the ones proposed by the actual rights holders. During permitting and in recognition of significant cumulative effects in its jurisdiction, the BCER has withheld permits from the NEBC proponent on two occasions, resulting in an application for paramountcy on the part of the proponent back to the CER. DRFN can only guess at the costs of the delay and impact on competitive position. Had the Commission afforded the proper weight to the land management directives of the host jurisdiction, and had the Commission adequately considered the Indigenous knowledge it had received during the various opportunities to receive that information, the permitting process would have been well streamlined for the proponent to construct and enter the marketplace.

13. Do you have other feedback related to how the Commission can update the Rules to enhance competitiveness through predictable and timely processes?

There is already an overemphasis on competitiveness and expedience at the expense of, and to the detriment of, Indigenous communities. Shifting focus to also consider consent from communities and certainty for communities is a requirement to meet the CER's commitment to Reconciliation. This requires careful deliberation and the safe space to enable this dialogue.

14. Do you have feedback regarding the modernization of requirements to allow for electronic filing and service in most instances?

    DRFN welcomes efforts to modernize.

15. Do you have feedback regarding the potential removal of signature requirements in certain instances (e.g., physical signatures on applications and notice of motions)?

    DRFN does not have comment on the issue of signatures at this time.

16. Do you have feedback regarding the removal of the current requirement for the company/applicant and the CER to have a hard copy of project applications on site for public inspection (Rules s.24)?

    In the digital age, DRFN does not have an opinion on the provision of hard copies.

17. Do you have feedback regarding what type of notice publication requirements are appropriate in a digital age and where Commission approval is necessary?

    Electronic notification as part of an overall process for modernization seems appropriate.

18. Do you have feedback related to how the Rules could better support accessibility to and throughout Commission processes?

    This might fall under the modernization process, but additional opportunities for virtual participation in various components of the hearing process, including engagement with the CCC, might improve accessibility, particularly for elders.

19. Do you have other feedback on how the Commission can update the Rules to modernize practices and procedures?

    Continue to provide opportunities for in-person and virtual engagements. Virtual engagements may provide opportunities for additional process steps within a defined legislative time period.

20. Is there other feedback or suggestions you have related to the Rules Review?

    The Rules need to consider a process to access the Commission for clarification on issues of compliance and adherence to the project conditions, or straight forward matters related to the interpretation of conditions. For example, on the North Corridor Expansion Project, there is an offset condition to restore 183ha of legacy disturbance. The offset is to be guided by an Indigenous Working Group (IWG). The assumption from Indigenous groups was that 183ha would result in approximately 18km of linear restoration, which would be consistent with consultation during the hearing process. The proponent felt that the condition was open to interpretation and that restoration would total 2-3km, and a 500m buffer around this restoration would approximate 183ha. This is not in keeping with the intent of the condition from an Indigenous perspective and will be an inadequate offset. DRFN's experience in trying to get clarification has been frustrating. It is a significant concern that a regulator cannot easily provide clarity on its own conditions, which calls to question how the CER is positioned to undertake compliance monitoring. DRFN was instructed to file a request on the record and

that the Commission '*might*' consider it. That is unacceptable. DRFN was further instructed to provide comment on the implementation report, which is far too late. A post-approval check-in process should be incorporated into the Rules.

Furthermore, the IWG is wholly dysfunctional and simply a mechanism for the proponent to instruct community representatives how things are going to be done and stated their preference to adhere to guidance from the Alberta government. There has been no interest or meaningful attempt to incorporate Indigenous input. There is no functional purpose for the IWG. Given the IWG was a condition, it should be a matter of concern for the CER because failure of the IWG (and other conditions) runs counter to the CER's commitment to Reconciliation.

Fundamentally, the issue is an absence of clarity around compliance monitoring and community access to compliance determinations and the interpretation of conditions. DRFN sees opportunity to address this shortcoming in the Rules.

21. Would like to see guidance on any specific topic related to the Rules Review.

No thank you.

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