Gwìch'inat Eenjit Gàdatr'igwijìlcheii Gidilii
Gwìch'in nan, nakhwek'yùu ts'àt gwitr'it tthak nakhwidavee gwiheezàa eenjit

Gwich'in Tribal Council
Gwich'in land, culture & economy for a better future

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Gwich'in Tribal Council Feedback on Onshore Pipeline Regulations (OPR) Discussion Paper

Dear Annik,

The Gwich'in Tribal Council is pleased to submit the following report on the Onshore Pipeline Regulations (OPR) Discussion Paper funded by the Impact Assessment Agency of Canada.

Project

Policy Dialogue Program: Review of the Onshore Pipeline Regulation – Phase 1 – Discussion Paper.

Purpose

The objective of this undertaking is to meaningfully participate in the review of the Onshore Pipeline Regulations (OPR) Discussion Paper with the goal of delivering *a regulation that supports the highest level of safety, security and environmental protection, advances Reconciliation with Indigenous peoples, addresses transparency and inclusive participation, provides for predictable and timely oversight and encourages innovation*. The focus of GTC's review centered around providing feedback that incorporated Traditional Knowledge (TK), in order to help ensure that TK is adequately and accurately considered in the revision of the OPR, while also confirming that Gwich'in inherent rights and interests are protected.

About the Gwich'in Tribal Council (GTC)

The GTC was established in 1992 with the finalization of the *Gwich'in Comprehensive Land Claim Agreement* (GCLCA). As such, the GTC is the regional land claim organization responsible for upholding the rights and interests of the Gwich'in people through the implementation of the GCLCA. Communities in the Gwich'in Settlement Area (GSA) include Aklavik, Inuvik, Teetl'it Zheh (Fort McPherson) and Tsiigehtchic. Currently, there are nearly 3,600 registered Gwich'in participants under the GCLCA with over 50% residing outside of the GSA communities.

The GTC represents and defends the inherent and Treaty rights of all Gwich'in under the GCLCA. The governance model of the GTC consists of a Board of Directors (10 members) that governs the corporation in implementing the direction provided to it by the Annual General Assembly (AGA). The GTC Board of Directors is composed of an Executive (Grand Chief & Deputy Grand

GTC

Chief) along with two (2) members from each community in the GSA as nominated by their Designated Gwich'in Organization (DGO). The Grand Chief and the Deputy Grand Chief are elected by participants of the GCLCA over the age of eighteen (18) years for a four (4) year term through a General Election. The Executive manages and governs the GTC on a day-to-day basis and the last General Election was held on September 3rd, 2020.

Discussion Paper Activities

The discussion paper was disseminated to all four Gwich'in communities via email.   More specifically, information was provided to each community Gwich'in Organization, as well as the community Renewable Resources Councils.   Each council is composed of both subject matter experts, Elders, community representatives and experienced harvesters. Gwich'in community councils engaged included Aklavik (Edhiitat), Tsiigehtchic (Gwichya), Fort McPherson (Tetlit) and Inuvik (Nihtat).

GTC's Department of Culture and Heritage (DCH) and the Department of Lands and Resources (GLR) were also provided an opportunity to submit feedback on the Discussion paper.   Moreover, GLR presented an overview of the Discussion Paper at GTC's Board of Directors meeting, to help encourage community council feedback.

Participants were asked to review and comment on the six sections within the Discussion Paper, and specifically to attempt to answer the section questions to the best of their abilities. Feedback from participants is included in the overview below, with answers to specific questions, included as an Appendix to this report.

A concurrent legal review by legal consultant D. V. Wright, MA, JD, LLM was conducted to ensure Gwich'in inherent rights and interests were adequately considered and protected.

Discussion Paper Feedback: Overview[1]

Previous external reviews of the existing regime and its implementation have uncovered concerning problems. For example, the federal Office of the Auditor General (OAG) found that the CER was falling short on pipeline oversight, and on tracking project approval conditions implementation in particular (see this 2015 and 2020 report: https://www.oag-bvg.gc.ca/internet/english/parl_cesd_201601_02_e_41021.html; https://www.oag-bvg.gc.ca/internet/English/parl_cesd_202010_01_e_43641.html#hd4b).

Since devolution, The GWNT Office of the Regulator of Oil and Gas Operations (OROGO) is responsible for most onshore pipelines in NWT (see https://www.orogo.gov.nt.ca/en/about-us). However, the CER still has jurisdiction over regulation of onshore pipelines in the Inuvialuit Settlement Region (ISR) and in relation to several specific pipelines (see https://www.nrcan.gc.ca/our-natural-resources/energy-sources-distribution/fossil-fuels/pipelines/pipeline-safety-regimes-canada/the-northwest-territories-pipeline-regulatory-regime/16449) such as the Enbridge pipeline from Norman Wells to Zama, AB.

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[1] This section incorporates the written and verbal comments received by GTC from D. V. Wright, MA, JD, LLM, Department of Culture and Heritage, Department of Lands and Resources, as well as both verbal and written comment submissions from the four Gwich'in communities.

As such, the fact that the regime is being reviewed with a view to improvement is a good thing, and the CER regulations do have relevance to Gwich'in in the post-devolution context. Put succinctly, the Gwich'in Settlement Area (GSA) is both downstream and upstream of CER-regulated onshore pipelines in today's context. Therefore, GTC considers the review and amendment of the OPR as a welcomed development given that the regime was due for review and updating.

From a legal perspective, GTC does not foresee this initiative presenting any glaring risks for the Gwich'in at its initial stages. However, GTC will continue to remain engaged throughout the process, as details will matter as the review initiative progresses toward specific regulatory amendments and then onward to implementation.

Potential Concerns

First, the OPR review includes a significant focus on the rights and interests of Indigenous people. That is a positive development; however, the review, which will ultimately include amendments to the OPR and ensuing implementation, needs to be aware of specific modern treaty contexts like that of the Gwich'in Comprehensive Land Claim Agreement (GCLCA). There is a risk that the regime and its implementation may be designed and implemented primarily based on southern First Nations' contexts. As such, this review needs to deeply understand the specific land claim contexts, including the rights and interests set out in the GCLCA, as well as the spirit and intent of the treaty. For example, the review and the amendment of the regime and its implementation need to recognize explicit requirements pertaining to GCLCA provisions that deal with Gwich'in lands in Chapter 18, land access in Chapter 20, heritage resources in Chapter 25, wildlife harvesting and management in Chapter 12, economic development in Chapter 10, land use and water in Chapter 24, etc.

Second, the OPR review contemplates enhanced roles for Indigenous communities and individuals, particularly with respect to pipeline oversight. Again, this is a positive starting point, but the review needs to lead to an explicit basis in the revised regulatory regime for Indigenous collaboration and meaningful engagement, including in design and implementation of management systems that are required under the regulation's performance-based regulation approach. The CER's existing "Indigenous Monitoring Program" may not go far enough, especially in modern treaty contexts where Gwich'in have comprehensive rights and interests. It is an open question what implementation of the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP) means in modern treaty contexts, but at minimum a regime like this should be consistent with GCLCA provisions and with Gwich'in inherent rights, including with respect to self-determination. This means meaningful engagement and control over decisions and processes that may affect Gwich'in lives and livelihoods.

Third, implementation of the revised OPR regime needs to include significant capacity building and economic development opportunities for Gwich'in. This is contemplated in the discussion paper, but as the initiative progresses and as the ensuing regime is implemented, it needs to be sensitive to the GCLCA context by honoring the spirit and intent of the treaty, including with respect to economic development (with a view to Chapter 10 in particular) and capacity building (with sensitivity to ongoing 'capacity fatigue' from so many requests from the Crown and others). At a specific level, this means an amended regime that creates a basis for opportunities for Gwich'in businesses, as well as Gwich'in development corporations.

Fourth, a large part of the OPR regime is focused on pipeline operator "management systems" such as those pertaining to environmental protection. These typically take the form of corporate "plans" – e.g. an "Environmental Protection Plan". The review of the regime and ensuing amendments and implementation need to explicitly require that such corporate plans not only achieve the outcomes required by law (e.g. environmental protection) but they also need to be tailored to specific modern treaty contexts, such as the GCLCA. In practical terms, this means the regulations need to clearly require that these plans set out how the corporate plan will integrate with existing Gwich'in systems and practices pertaining to environmental protection, health and safety, etc. This also means that CER's own systems and practices will vigilantly ensure operator compliance with such requirements (and this is where CER improvements are required based on the findings of the OAG noted above).

Finally, noting the discussion paper's reference to "predictable and timely regulatory oversight", the review and ensuing amendments regime and implementation need to be sensitive to explicit consultation requirements set out in the GCLCA and the broader Crown consultation legal landscape. In short, this regulatory regime cannot be inconsistent with those constitutionally protected rights and duties. While timeliness may be a desirable regulatory objective, that objective is subordinate to legal obligations of the Crown and of operators under the treaty and as a matter of common law and constitutional law.

Financial Reporting

Detailed Financial Report to follow.

Should you have any questions or concerns, please do not hesitate to contact me directly at ████████████ or by email at ████████████████████████████

Sincerely,

███████████████████

Manager, Lands & Resources

APPENDIX A

Questionnaire Feedback: Overview[2]

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

Greater collaboration with regulatory agencies that have existing legislation and policies in place that are *tried and tested and have stood the test of time.* [3]A good example is the Mackenzie Valley Resource Management Act (MVRMA), which governed the licensing and permitting of four of the largest diamond mines in Canada. Moreover, it is constitutionally protected in the Gwich'in Land Claim Agreement. *No need to reinvent the wheel*.

2. How can the OPR contribute to the advancement of Reconciliation with Indigenous peoples?

Recognize and aim to meet the spirit and intent of the two reconciliation documents (UNDRIP, T&R), in addition to honoring the more specific instructions within them. Education (of CER staff/contractors, as well as pipeline company staff and contractors) about Indigenous peoples and about UNDRIP and T&R, using specific and regional examples where possible, will also help.

Recognize the authority of local, regional, and national Indigenous organizations when decisions are being made that pertain to areas within their authorities.

Recognition of the parity between Traditional Knowledge and western science in developing legislation and policies - *Reconciling Traditional Knowledge and Western Science in decision-making, especially if it has the potential to impact our lands, culture or rights*. The provision of interpreters for public hearings and public engagement within Indigenous communities to allow for full and meaningful engagement with all Indigenous Peoples. *Maybe even present in language of the community, with English interpreters*.

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[2] Questionnaire feedback includes both internal and community comments.
[3] All italicized wording relate to direct quotes by Elders/Community members.

3. **How can the OPR contribute to the protection of heritage resources on a pipeline right-of-way during construction, and operations and maintenance activities?**

Regional CER staff must be knowledgeable about the heritage resource laws in the specific regions in which they work. They must create and maintain relationships with the Indigenous institutions that oversee heritage and culture.

Maintain an open conversation with Indigenous communities about their specific wishes in regards to the conservation and mitigation of archaeological sites—there is not always one right answer.

Create educational requirements for on-the-ground construction crew in the identification of heritage remains.

Facilitate conversations between contract archaeologists, provincial/territorial archaeological staff, and pipeline companies.

Use of existing mechanisms already in place that govern the protection of Heritage Sites, e.g. Land Use Plans, Prince of Whales Museum, clauses within the MVMRA, etc. Hire local trained monitors/personnel to oversee construction phase and ensure compliance with heritage site protection. Engagement with TK holders during pre-construction to identify known areas of cultural or heritage significance.

4. **How can the OPR contribute to the protection of traditional land and resource use, and sites of significance for Indigenous peoples on a pipeline right-of-way, during construction, and operations and maintenance activities?**

The largest barrier to the protection of these sites is a lack of funding for Indigenous communities to locate, record, and maintain a good record of them, and to make management decisions. With this record, the ability to mitigate these sites through avoidance or other measures is greatly enhanced. The CER should support the efforts of Indigenous communities to sustainably fund culture and heritage departments to undertake this work and maintain these databases.

Provide funding to existing programs that are currently underfunded. Working collaboratively with Indigenous Organizations to negotiate an impacts benefit agreement to govern the protection of traditional land and resource use and sites of significance.

5. How can the use of Indigenous knowledge be addressed in the OPR?

Different Indigenous communities prefer Indigenous Knowledge to be gathered and used in different ways. These approaches may be codified in guidance documents, which should be consulted. In places where there is no guidance available, the guidance from national Indigenous, Metis, and Inuit organizations may be acceptably used as a starting point during initial engagement. Typically, these guidance documents will outline how TK may be gathered and used along with other sources of knowledge.

Engagement with the affected community through community meetings, or workshops that could facilitate knowledge transfer, including discussions around the expectations of how that knowledge is used, understood and portrayed.

6. How can the OPR address the participation of Indigenous peoples in pipeline oversight?

Indigenous-led initiatives such as the Guardians should be included, rather than creating new programs headquartered in either private or government hands. In addition, the CER should support the creation of these programs.

The inclusion of negotiated impacts benefit agreements that address the hiring of local monitors to help ensure compliance.

Use of existing mechanisms, already in place, that oversee pipelines, e.g. co-management Boards, public boards, etc. comprised of representatives from Indigenous Communities.

7. How can the OPR support collaborative interaction between companies and those who live and work near pipelines?

The standard of what constitutes enough in the way of "interaction" should not be left up to pipeline companies, and instead should be decided upon collaboratively by the companies, the regulators, and the public/Indigenous communities.

Engagement with the affected community through community meetings, or workshops. Working collaboratively with Indigenous Organizations to negotiate an impacts benefit agreement to address potential impacts.

8. How could communication and engagement requirements in the OPR be improved?

Where local/regional standards exist for engagement created by Indigenous governments, these should be understood to be primary guidance. An approach which works for one region or community may not be appropriate for another.

Many indigenous organizations have reduced capacity to handle the engagement activities for all the development in their area. There needs to be supports in place to help increase this capacity. Local/regional CER staff with knowledge of the human/environmental context are required to provide this supportive role.

The provision of community workshops/meetings. The provision of interpreters for these workshops/meetings within Indigenous communities to allow for full and meaningful engagement with all Indigenous Peoples.

Working collaboratively with Indigenous Organizations to negotiate an impacts benefit agreement to address communication and engagement expectations.

9. How could the CER improve transparency through the OPR?

Speaking to the public using well-designed plain language resources will help improve transparency. Technical documents filled with industry jargon and hidden as PDFs on a website repository are not appropriate. Staff skilled in plain language communication and public engagement will ensure that public-facing materials are appropriate. Some regions (for example, the NWT) have plain language guidelines which should be followed. There should be a shift from thinking that *the public can do the work of finding out and figuring out what we're doing* to be a proactive one instead, of *what and how can we best attract the public's attention and share what we are doing*.

The provision of community workshops/meetings. The provision of interpreters for these workshops/meetings within Indigenous communities to allow for full and meaningful engagement with all Indigenous Peoples. Better communication and provision of updates through use of newsletters, social media, and online registries with ability for public comment submissions.

10. Gender and other intersecting identity factors may influence how people experience policies and initiatives. What should the CER consider with respect to: a. those people

implementing the OPR; or b. those people who are impacted by the operational activities addressed in the OPR?

No comments received.

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

No comments received.

Greater collaboration with regulatory agencies that have existing legislation and policies in place that are tried and tested and have stood the test of time. A good example is the MVRMA, which is a well-known Federal Act that is considered to be a predictable and timely regulatory system, particularly when tied to a Land Use Plan.

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

No comments received.

13. What company-specific or industry-wide performance metrics could the CER consider to support enhanced oversight and transparency for CER-regulated facilities?

No comments received.

14. Are there opportunities within the OPR for data and digital innovation that could be used by the CER and by companies regulated by the CER?

15. How can the OPR be improved to address changing pipeline use and pipeline status?

No comments received.

The provision of community workshops/meetings. The provision of interpreters for these workshops/meetings within Indigenous communities to allow for full and meaningful engagement with all Indigenous Peoples. Better communication and provision of updates through use of newsletters, social media, and online registries with ability for public comment submissions.

16. **What further clarification, in either the OPR (e.g. structure or content), or in guidance, would support company interpretation and implementation of management system requirements?**

No comments received.

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17. **How should information about human and organizational factors, including how they can be integrated into a company's management system, for both employees and contractors, be provided in the OPR, and/or described in related guidance?**

No comments received.

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

Safety manuals aimed at staff/contractors should be in plain language, with easy-to-follow graphics. Technical jargon should be avoided unless required.

19. **How can respect and personal workplace safety be assured at CER regulated sites?**

Educational modules focussing on systemic racism, Indigenous peoples and history, and misogyny/homophobia/transphobia should be required for on-site supervisory staff. They should also know how to immediately intervene. Protocols for anonymously and safely reporting misconduct should be available and whistle-blower protections in place.

20. **How should the CER be more explicit about requirements for contractor management?**

No comments received.

21. **How should the OPR include more explicit requirements for process safety?**

No comments received.

22. **How can the OPR drive further improvement to the environmental performance of regulated companies?**

Indigenous knowledge monitoring should be included along with other types of monitoring, to determine if Indigenous knowledge holders have identified any changes to the environment due

to the project. For example, include ongoing support of Indigenous guardians programs and formal inclusion of TK monitoring into monitoring protocols.

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

No comments received.

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

No comments received.

25. Are there any matters related to the Emergency Management Program in the OPR that require clarification? If so, what are they? Are there any matters for which further guidance is required?

No comments received.

26. How could the requirement for a Quality Assurance Program be improved or clarified in the OPR?

No comments received.

27. How can the OPR incorporate the key issues identified in the Safety Advisory regarding the strength of steel and the relative strength of the weld area?

No comments received.

28. What are your recommendations for compliance promotion at the CER?

No comments received.

Implementation or adoption of a goal-based compliance approach similar to that of the National Energy Board (NEB).

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

No comments received.

The provision of community workshops/meetings. The provision of interpreters for these workshops/meetings within Indigenous communities to allow for full and meaningful engagement with all Indigenous Peoples.

Adhering to existing consultation and engagement policies held by Indigenous Organization.

Note: Engagement in this context is not to be misconstrued with the consultation tied to the fulfillment of the Crowns obligation under the Constitution of Canada, Section 35.