PRRO People of the River Referrals Office

Onshore Pipeline Regulations Review

Discussion Paper Response

Introduction

The Canada Energy Regulator's (CER) discussion paper relating to phase 1 of the Onshore Pipeline Regulations (OPR) review process contains 29 questions spread across six themes. While the discussion paper does not clarify how those six themes were selected, we address them below from the perspective of our experiences with the Trans Mountain Pipeline Expansion Project (TMEP), ongoing since 2013. Rather than structure our input as a listed response to the 29 questions, we explore each theme according to real-world experiences. We build on these experiences to provide a set of five broad recommendations. These recommendations point towards an alternative form of regulation: one that moves away from corporate responsibility and self-regulation, and towards the recognition of First Nations jurisdictional authority as tied to inherent rights, title, and interests. We encourage the CER to explore more equitable approaches related to legal pluralism.

This response to the discussion paper is a technical response, based on experiences among staff in the People of the River Referrals Office (PRRO), the Stó:lō Research and Resource Management Centre (SRRMC), and Ts'elxwéyeqw Tribes Management Ltd. (TTML). These staff support the Stó:lō First Nations that are members of the S'ólh Téméxw Stewardship Alliance (STSA; https://thestsa.ca). The STSA is an alliance of 17 Stó:lō First Nations that was established to support Stó:lō Peoples (who are the Aboriginal title holders) in making strong collective stewardship decisions that honour and maintain the integrity of Stó:lō Peoples' relationship with S'ólh Téméxw (Our World).[1]

[1] The STSA member First Nations are: Chawathil First Nation, Seabird Island First Nation, Kwaw'Kwaw'Apilt First Nation, Scowlitz First Nation, Shxwowhamel First Nation, Skawahlook (Sq'ewá:lxw) First Nation, Skwah First Nation, Sumas First Nation, Yale First Nation, and the members of Ts'elxwéyeqw Tribe (Aitchelitz First Nation, Shxwhà:y Village, Skowkale First Nation, Soowahlie First Nation, Squiala First Nation, Tzeachten First Nation, Yakweakwioose First Nation).

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Theme 1: Lessons learned

Following a brief overview of the purpose of the OPRs, the Discussion Paper presents an extremely broad question: "What's working well in relation to the OPR, and its implementation, and what could be improved?" (p3). Comprehensively answering this question is well beyond the scope of this response. Nonetheless, our elaboration of the following five themes points to some key areas for improvement.

Many of these points hinge on a key aspect of the OPR as a regulatory mechanism. As stated in the Discussion paper, "Where non-compliance [with the OPRs] occurs, the CER will take necessary compliance and enforcement action to *promote* compliance, and *deter* future non-compliance based on a stepped enforcement approach" (p2, emphasis added). Stó:lō experiences with the OPRs in relation to the TMEP, in particular, reveal that such a corporate responsibility approach to pipeline (self-)regulation is ineffective, fails to address unequal power relationships (e.g. between pipeline owners and First Nations or local communities), has insufficient regulatory strength, is prone to corporate abuse (through willful inaction), and fails to empower First Nations as holders of rights and title within their own territories.

Stó:lō First Nations have been able to build sufficient capacity to establish governance processes and protocols to regulate the activities of Trans Mountain Corporation (a role that the CER should play). Some key lessons learned include identifying knowledge needs, information flows, and monitoring activities early. In the Stó:lō case, for example, this has been achieved through:

A) The Stó:lō publication of field guides, which have become a key component to ensuring that Stó:lō cultural and environmental interests are clearly presented to Trans Mountain. Yet these field guides have arrived late in the process; they should have been developed prior to any route planning or construction. The field guides could be used to inform the routing and development plan, as opposed to working to mitigate impacts at a time when they have become in large part unavoidable.

B) The development of a chance finds protocol to protect discovered Stó:lō cultural heritage sites. Similarly, the chance finds protocol has emerged from the TMEP experience. The OPR should ensure that such protocols are a baseline, supporting First Nations to ensure that pipeline plans and construction are conducted in line with their cultural, heritage, and environmental needs and values. The chance finds process created an opportunity for the information being shared between Stó:lō First Nations and Trans Mountain to be meaningfully considered. Yet the emphasis of the OPRs on self-regulation has meant that Trans Mountain has failed to adequately uphold the chance finds process. SRRMC staff

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must frequently revoke Trans Mountain's closure of chance finds files, as they have not been fully evaluated by Stó:lō technical staff – a key part of the process.

Components such as these need to be connected to First Nations monitoring, control, authority, and jurisdiction. Process or protocol-oriented aspects of regulations can only be meaningfully implemented if they are connected to all parts of the system: planners, builders, contractors, owners, First Nations, Indigenous monitors, community members, etc. Reformed OPRs will only be more effective and more equitable in their application if they support First Nations jurisdiction and authority within the traditional territories that are underpinned by inherent rights and title.

Our responses to the five following themes elaborate on this position.

Theme 2: Reconciliation

The question of reconciliation in reforming the OPRs is a challenging one because of the contradiction between authority of the CER as a federal regulator in Canada, and the authority of First Nations within their own jurisdictions. True reconciliation would entail a different relationship between Canada's economy, fossil fuels, and First Nations (also see below on "Global competitiveness"). Too frequently, regulatory processes and practices are removed from First Nations hand, with external bodies or organizations possessing and using the required information for making informed decisions. Indigenous liaisons may consult with First Nations, but those with expert knowledge and full decision-making power too rarely engage with First Nations to *co*-develop pipeline plans, regulations, operation procedures and protocols, etc.

Stó:lō experiences with TMEP highlight at least four areas where reconciliation has been identified discursively and yet largely ignored in practical application.

1. *Indigenous knowledge*

   There is a need to identify regulatory measures that ensure Indigenous knowledge is included in the planning process as early as possible, and that such knowledge gets into the hands of people who can understand it and act on it in terms of decision-making. This is not an option, but now a requirement dictated by the United Nations Declaration on the Rights of Indigenous Peoples Act (Bill C14, 2021). Once Indigenous knowledge and concerns are included in regulatory processes, protocols should also be developed to ensure that inclusive processes of decision-making are developed to identify and implement collaborative management practices. Too frequently, requests for Indigenous

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knowledge are made without any subsequent action to address that knowledge in relation to existing bodies of Western science.

2. *Cultural awareness, sensitivity, and respect*

   Pipeline owners and their construction partners do not operate with reconciliation at the forefront of their practice. For example, cultural awareness training and education that places Indigenous and First Nations recognition at the forefront should be mandatory and improved for any and all staff operating in First Nations territories. This should be ongoing training, throughout all stages of pipeline operations – from conception and planning, through construction, to maintenance, monitoring, management. First Nations should be supported to provide the materials that are used in cultural training and for informing workers in general about cultural aspects.

   Stó:lō technical staff have witnessed many cultural insensitivities and errors in cultural training – such as materials developed in the context of one First Nation simply being applied in the context of another (without any specific references to the cultural or environmental context within which contractors would be operating); and offensive/ essentialist cultural videos. Importantly, this is not abstract cultural education: these contractors will frequently come into contact with First Nations members and representatives, meaning that appropriate cultural awareness should be a minimum for everyday operations.

3. *Protecting First Nations heritage, lands, waters, and spiritual connections to place*

   The chance finds process developed by the STSA serves to directly connect Indigenous organizations and staff, technical staff, and experts, ensuring that they are all involved directly in determining the nature and treatment of a chance find as a cultural feature, artefact, or Indigenous cultural belonging. The chance finds process ensures that consent is required directly from Indigenous participants to produce a conclusion about the nature of a chance find and the impact that any works might have on such Indigenous cultural properties. Reconciliation means that First Nations are directly involved in and have control and oversight over every point of decision making when it comes to heritage resources and other areas of sensitivity, including the environment. Yet the chance finds process is just one ad hoc process that was developed in response to the pressures of TMEP. Reconciliation means establishing such processes as a *minimum baseline*, and it means placing these processes firmly in the hands of First Nations along with necessary capacity support.

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4. *Oversight, stewardship, and jurisdictional authority – respecting inherent rights an title*

   The chance finds process is reactive to a pipeline planning and construction process that excludes First Nations. A reconciliatory approach that respects inherent rights, title, and jurisdictional authority would place assessment and decision-making authority in the hands of First Nations whose territories are impacted by pipelines. Reconciliation would mean a First Nations-led assessment process, where First Nations are co-leaders and co-permit-holders. In the Stó:lō case, this need is apparent in relation to archeological assessments of heritage. While an independent integrated cultural assessment was conducted by TTML, and should have fed into assessment and decision-making processes, the results were essentially received as a factor of "consultation" and dismissed as part of decision-making. This is not reconciliation but the status quo, where First Nations are consulted as a procedural requirement, while the substance of input is rarely taken into due consideration.

   Similarly, the STSA First Nations had to fight hard in order to secure Stó:lō Indigenous monitors of the pipeline construction. Indigenous monitoring should be a minimum baseline on the pathway to embedded Indigenous stewardship and decision-making about pipelines. Reconciliation should mean that First Nations do not have to campaign for Indigenous monitors, but rather are supported to establish monitoring activities as an Indigenous-led component of pipeline regulation (also see 'Implementation objectives').

Theme 3: Engagement and inclusive participation

Reconciliation extends into the theme of "engagement and inclusive participation". The existing regulatory context does not require a reconciliatory approach to engaging with First Nations as rights holders. Rather, engagement is seen as regulatory hurdle, as an exercise that merely needs completing without consideration of the quality or outcome of the process. For example, despite years of working with Trans Mountain to develop processes and protocols for identifying and protecting Stó:lō heritage, Trans Mountain continues to consider Stó:lō heritage and Stó:lō-led processes as barriers to pipeline construction and pipelines in general. Trans Mountain recently made an announcement that fifty per cent of the pipeline had been completed. During that announcement, Stó:lō cultural heritage and the investments of time and resources involved in working with Stó:lō First Nations were listed among the "barriers" to completion and among the "reasons" for delays. This approach is far from reconciliation; it reproduces colonial dynamics, unequal power relationships, and damaging cultural stereotypes.

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Importantly, these are not one-off occurrences. From the outset, Trans Mountain's "engagement" with Stó:lō First Nations has been conducted with consistent insensitivity. This includes not just cultural ignorance, but also the repeated dismissal of Stó:lō capacity and of First Nations organizations capable of and actively working on relevant issues. Stó:lō members and technical staff have repeatedly provided guidance to Trans Mountain employees; yet, with shifts in personnel, the same problems of cultural ignorance and procedural incompetence return. With each organizational reshuffle comes a loss of cultural knowledge and awareness, reproducing the gaps and limitations in the ways in which pipeline owners and operators work with First Nations. Ultimately, this produces an "engagement" context that is underpinned by ignorance, with too many staff simply unaware of the cultural context within which they are working.

This context of very limited (and indeed culturally ignorant) "engagement" and "participation" has a direct impact on operations and the governance of pipelines at various stages.

1. *Archaeological and environmental impact assessments, and engagement in pipeline planning.*

   There needs to be a clearer connection between engagement, consultation, and decision-making processes. These connections need to be established in planning phases, well before construction, for example in relation to the establishment of a route and to federal and provincial approvals. Ongoing relationships and co-developed protocols should be established to bridge the planning, construction, and monitoring and management phases. Conditions should be enforced with regulations and effective regulators – including the CER, but also First Nations empowered as regulators of pipelines within their territories.

   These protocols should be founded on the outcomes of environmental and cultural impact assessments, which should be conducted by First Nations with capacity support. The CER should mandate this in the OPRs. In the case of the TMEP, Ts'elxwéyeqw Tribe Management Ltd. (TTML) and the Stó:lō Research and Resource Management Centre (SRRMC) conducted an integrated cultural assessment. This assessment brought together wide inter-disciplinary expertise from archaeology, heritage, land management, and environmental studies. Yet the TMEP received regulatory approval *before* all of the elements of the integrated cultural assessment had been completed (e.g. the archaeological impact assessment). The pipeline is fifty per cent complete, and yet the integrated cultural assessment is still being complemented with further research.

   The OPRs should not allow this to occur, regardless of the Impact Assessment Act. The OPRs should ensure that proper process is upheld in parallel with federal and provincial

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impact assessment processes. The OPRs should require assessments that are inclusive of Indigenous perspectives because they are conducted by Indigenous groups with capacity support from proponents. The assessments should recognize different types of heritage sites and diverse aspects of environmental values and sensitivities.

The implementation of enforceable rules in line with such mandated assessments is a matter of procedural fairness – of ensuring that engagement respects First Nations jurisdictional authority in their own territories, where they possess inherent rights and title. It is also a practical issue. Stó:lō First Nations have put capacity and resources into an integrated cultural assessment, but it has not been taken into account to the extent that technical staff and Stó:lō leadership expect. This has meant that the TMEP has encountered numerous errors during the planning and construction phases. Trans Mountain has ignored Stó:lō input and forged ahead with its plans. This has led Stó:lō First Nations to order construction be immediately halted. This causes delays and is a waste of resources, as Trans Mountain must ultimately alter its plans and the pipeline route.

2. *Route planning, modifications, and the avoidance of cultural harm and destruction.*

The above mandated assessments *must* be completed very early in the process, not just to provide or withhold consent for a pipeline, but to actively inform the establishment of any route. The OPRs must legislate for the highest degree of flexibility in routing at the earliest stage possible, in connection with impact assessments that are conducted by affected First Nations. Those First Nations should be empowered to draw on the impact assessments – as well as any other culturally-informed protocols – to identify areas of concern and conditions of pipeline planning, routing, construction, maintenance, monitoring, and management. This may include First Nations mandated requirements for avoidance or mitigation.

A major flaw in the implementation of the TMEP was that the route was established while the work to complete the archeological impact assessment was ongoing. This scenario makes it extremely difficult to implement a program of avoidance of cultural, heritage, or environmentally sensitive sites. This procedural flaw causes unnecessary threat to and destruction of indigenous cultural heritage located within the pathway of an inflexible route, locked in place by the CER. It also increases costs by requiring directional drilling where otherwise a route could be redirected if points of concern are identified early on. The OPRs must improve the regulatory environment for First

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Nations-led assessments of pipelines (prior to permitting) and First Nations-led establishment of avoidance protocols and enforcement rules.

The discussion paper asks how the CER could improve planning, communication, trust and confidence via the OPRs. While the OPR reform process may not address the above issues at once, they can provide the regulatory framework to ensure that pipeline owners and operators adopt new working practices. For example, the OPRs and the CER can establish baseline requirements for engagement, which ensure that First Nations are decision-makers and can act as regulators within their territory. Currently, the OPRs are focused on *promoting* compliance and *deterring* future non-compliance. This is insufficient and does little to ensure that "engagement" and "participation" have an impact on the plans and actions of pipeline owners and operators. Trust and confidence in the OPRs can only built once they shift away from favouring energy and pipeline corporations, and towards a true position of reconciliation that recognizes First Nations' rights, title, and jurisdictional authority. In the case of TMEP, the proponent was given the authority to conduct engagement and consultation on behalf of the Crown, which does not reflect an UNDRIP-based approach to engagement.

Theme 4: Global competitiveness

The CER discussion paper asks how the OPRs can uphold a predictable regulatory system, support innovation, enhance transparency, and make it easier for pipeline owners to abandon or decommission their pipelines – all for the purpose of enhancing Canada's global competitiveness.

In our view, these questions reflect the mispositioning of pipeline regulations in Canada. The discussion paper implies that the CER aims to further increase the flexibility of regulations in favour of corporations' export markets. Yet pipelines across Canada travel through First Nations territories. The regulations should be strengthened to empower First Nations oversight and to ensure that the benefits of pipeline construction and expansion are shared with the communities who shoulder the risk. First Nations suffer from oil spills and gas leaks (see below), and yet there is no regulatory approach for ensuring equitable benefit sharing from pipelines that flow through First Nations territories.

The CER should pursue a regulatory reform process not just to enhance flexibility for Canada's export markets, but to build resilience and sustainability for the communities in Canada that are impacted by pipelines. This approach would reflect a genuine commitment to reconciliation, as it would demonstrate that Canada is ready to shift its model of economic development away from

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colonial resource extraction, and towards sustainable economies built on equitable resource sharing.

Similarly, the CER should implement regulatory changes that encourage a shift away from fossil fuel pipelines altogether. This might include incentives for using former pipeline routes for the transmission of renewable energy. It could also include strict financial penalties for errors and negative impacts derived from pipeline construction and management.

Pipelines are not the future of Canada's global competitiveness. The CER should recognize this now and proactively reform regulation for a future in which fossil fuel transport continues to decrease in significance.

Theme 5: Safety and environmental protection

The Discussion Paper questions focusing on safety and environmental protection are also couched in a corporate responsibility approach to regulation. The Paper asks how to OPRs could be clearer for corporations so that they can develop protection systems, and how safety guidelines and safety plans can be better aligned. It also asks how the OPRs can be revised to help corporations to improve their environmental performance, focusing on self-regulated Environmental Protection Programs and Emergency Management Programs.

Stó:lō experience illustrates that such self-regulation in safety and environmental protection is ineffective. Stó:lō communities have experienced multiple oil spills, many of which had to be identified by Stó:lō members and/or Stó:lō technical staff. There are likely others that have gone undetected. In all cases, there have been deficiencies in terms of response, remediation, and reporting. Sumas First Nation Chief Dalton Silver has spoken to this substantially in the past, highlighting the impacts on water and the subsequent effects on their community.

The dangers presented at the intersection of pipelines and environmental factors will only increase in the future, particularly with climate change induced transformations. The November 2021 floods in the Fraser Valley exposed existing pipelines, which were visible from Highway 1. Trans Mountain continued to deny any impact at all. The Indigenous Advisory and Monitoring Committee conducted some inspections but without the full collaboration of First Nations impacted by the floods and with safety or environmental concerns. There was a total lack of transparency in reviewing the integrity of existing lines and of conducting any reviews and changes to planned routes that result from significant flooding and other kinds of natural events.

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These spills and dangers result from a lack of effective monitoring and management because corporations set their own safety and environmental programs and regulate themselves in terms of adhering to those programs. The OPR must go beyond a corporate responsibility approach to self-regulation to develop effective and enforceable regulations that are upheld by an authorized third party. The lack of transparency and accountability demonstrates that self-regulation is ineffective. The CER must develop more stringent and rigorous approaches to ensure that Canada's pipelines live up to international standards and do not lead to large scale environmental, social, and economic catastrophe.

Theme 6: Implementation objectives

The final theme of the discussion paper focuses on how the OPRs provide a "compliance promotion function", and how they can be supported with "technical information". This brief section shrouds many core issues in reforming regulations to align with the UNDRIP and the federal UNDRIP Act. From a First Nations perspective, there are many implementation objectives that extent beyond "promoting compliance" from a distance with technical information.

1. *Capacity*

   Resourcing is a major concern for First Nations when it comes to ensuring that pipelines are planned, constructed, and managed appropriately on their territories. Data produced by First Nations that can and should be shared between First Nations is also retained by proponents, leaving First Nations with limited capacity relatively less able to be involved in the identification of problem areas and research needs. Agreements need to be developed during the planning phase well in advance of pipeline construction, enabling First Nations to inform the planning, routing, safety and mitigation measures etc. In the case of TMEP, it took years for Trans Mountain to engage with Stó:lō First Nations in a way that enabled adequate participation and oversight. There were also gaps when transitioning from the federal to the provincial process, which need to be addressed. The OPRs should establish some standards to hold pipeline owners accountable in supporting the capacity of First Nations and other communities who must cope with the consequences of pipeline construction. Only if First Nations are supported to play an active role can the OPRs truly uphold a reconciliatory approach to regulation. Capacity support should not be ad hoc, on a project-by-project (or project phase-by-project phase) basis; it should be clearly outlined and mandated as part of pipeline regulation.

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2. *Mandating minimum requirements (e.g. chance finds) beyond corporate responsibility.*

   The chance finds process developed by Stó:lō First Nations to manage the impacts of the TMEP provided opportunities for improved pipeline management. However, the process has not been upheld consistently. The OPR reform process must establish processes such as the chance finds protocol as a baseline. First Nations and other affected community must be empowered to hold corporations accountable to tangible rules and regulations. There must be recourse when corporations are shown to breach established protocols. This would take the OPRs beyond a corporate responsibility and self-regulation approach, towards an UNDRIP-centred model of Indigenous regulation and enforcement within Indigenous territories.

3. *Communication*

   Pipelines are complex, linear developments requiring input from many different organizations and sectors. Along the TMEP, for example, each segment involves activities from multiple contractors. There are recurrent communication issues among the contractors, and between First Nations and the contractors in both directions (e.g. contractors do not inform Indigenous monitors of relevant activities). The OPR should legislate for clear, transparent, and enforceable communication standards, ensuring that all parties are held to the same standard and preventing pipeline owners from blaming contractors for destructive errors (such as the removal or destruction of heritage sites). Stó:lō First Nations have continuously worked on alignment sheets, to ensure that the TEMP is developed and implemented to plan. However, deviations from the alignment sheet often fail to be reported, leaving Indigenous monitors feeling disempowered and First Nations feeling helpless to the relentless pipeline construction. Standards are therefore required to ensure that the type, quality, quantity, and methods of communication are designed to protect Indigenous rights and assert Indigenous oversight and jurisdiction.

4. *Dedication to cost-effective good governance*

   The implementation of reformed OPRs can be considered in terms of effectiveness, efficiencies, and cost effectiveness. The conventional approach is to consolidate as much in the way of provincial permitting into the hands of the Oil and Gas Commission, enabling the OGC to expedite permitting to get pipelines built. This regulatory model favours constructing pipelines speedily. A Stó:lō First Nations perspective focuses on doing it right throughout all stages. Adopting the former approach – placing First Nations

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and indigenous interests, inputs, and participation in the back seat – ultimately creates delays and drives up costs, as pipeline owners must ultimately listen to rights holders and alter the pipeline plans. Instead of implementing costly alternatives at the last minute, pipeline constructors and operators should be mandated to listed to rights holders and to explore all options for the avoidance of cultural sites. This will prevent costly and last-minute alterations. For example, it was Sumas First Nations technical experts who devised a plan to avoid the destruction of Lightning Rock, but only at high financial expense. These issues drive up the cost of pipelines, making them even less viable and less sustainable. Reformed OPRs should focus on long term approaches to good governance, which will also support cost-effectiveness.

Embedding good governance into the OPR reforms will not only improve cost-effectiveness but will also ensure cultural accountability. SRRMC has trained archaeologists conducting assessments of proposed pipeline routes. At times, Trans Mountain has sent under-qualified staff to conduct archaeological assessments (i.e. staff who are not trained archaeologists). The staff were flown in from other provinces, possessing no knowledge of the local context in terms of environment, culture, and heritage. It is impossible for such assessments to be thorough and rigorous. The CER should legislate against such approaches.

A lack of professionalism from these assessors in the field led to Stó:lō First Nations issuing a stop-work notice, allowing SRRMC technical staff to conduct Stó:lō-led permitting policies in line with the Stó:lō heritage policy. The stop work order resulted in a shutdown for a period of months, with work only resuming once Trans Mountain staff had conducted the necessary technical and cultural training. Other stop work orders have followed, such as following a unilateral determination by Trans Mountain that restricted Stó:lō archaeological crews from working on private (fee simple) properties (a perspective that reproduces colonial land laws and denies First Nations rights and title). These stop work orders and the application of the Stó:lō heritage policy demonstrate that Stó:lō First Nations can act as de facto regulators. However, the regulations do not provide adequate support for this approach, meaning that it is a continuous struggle for First Nations communities to hold Trans Mountain to account. With the OPR reforms, there is an opportunity to address this inequality head on: empower First Nations to be regulators, and enforce compliance among corporations.

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5. *Data for First Nations governance*

Too frequently data is held in the hands of pipeline owners and operators, who are able to control the scientific narrative around pipeline construction and routing. The structure of relations tied to engagement and consultation processes with First Nations means that company engagement teams become the primary point of contact and communication. This separates First Nations technical staff and leadership from the technical and decision-making staff at pipeline owners and operators. This creates a significant communication gap, which in the case of TMEP cost years in terms of establishing even the most basic protocols. The relationship was plagued by many inefficiencies in trying to get even the most basic request for information addressed. This information should be freely available from the outset. This includes geographic information systems (GIS) and data to create alignment sheets that SRRMC staff can populate with Stó:lō information. These alignment sheets should be co-developed. Yet it took years to get to a point of even basic communication regarding these alignment sheets.

It was only once the CER made a proactive decision that an alignment sheet including Stó:lō data was produced. This demonstrates the need for the CER to be more proactive, and to reform the OPRs in a way that mandates pipeline owners and operators to be committed to two-way data sharing. In this scenario, pipelines in First Nations territories are governed by First Nations data management processes and their technical staff in collaboration with those of pipeline owners and operators.

This includes mandating that pipeline owners and operators find and hire appropriate staff capable of speaking to and conducting research on the issues being raised by First Nations. For example, in exploring impacts on aquatic systems, Trans Mountain have failed to listen to Stó:lō concerns about the temporal range of their studies, which Stó:lō technical staff believe to be far too short. There has been a complete lack of willingness to engage in a collaborative or collegial conversation about study design, as Trans Mountain continues to dismisses Stó:lō technical expertise as inferior to their own (albeit externally contracted) expertise. The CER must find a way of reforming the OPRs that prevent this continued colonial attitude to knowledge production and actualization. For example, this might mean creating the right communication channels or mandating that pipeline owners and operators contract First Nations technical teams, where available, for work that affects First Nations territories.

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6. *Cultural training and awareness*

   The examples provided above, in relation to reconciliation and engagement, demonstrate that the CER must reform the OPRs in a way that promotes – and indeed mandates – culturally informed and appropriate approaches to pipeline planning, construction, and governance. Pipelines continue to perpetuate colonial and racist relationships between pipeline owners and operators, on the one hand, and First Nations on the other. While the former benefit, the latter must bear the costs – environmentally, culturally, socially. The CER must implement clearer and stricter regulations that prevent the continuation of these unequal relationships. These regulations must go beyond corporate self-regulation to provide First Nations with oversight and enforcement powers.

7. *Supporting Indigenous oversight, consent, and enforcement*

   There needs to be an effective and rapid transition to an UNDRIP-based approach where First Nations are empowered as regulators. This would include First Nations relaying regulatory information directly to CER in a manner that is not founded on a consultation model that places the proponent at the centre. The Crown needs to be responsible directly to Indigenous peoples as stewards and must improve Indigenous relations to uphold UNDRIP. That would put the proponent in a position of being a technical resource, which is ultimately where Trans Mountain ended up at the very end of the process – after the completion of the federal and nearly all of the provincial engagement and consultation processes. Only since September 2020, has the proponent shown the willingness to provide the technical input that can help Stó:lō First Nations in maintaining oversight of the pipeline construction process.

   The field guides are a good example of a form of Indigenous oversight that should have been in place seven or eight years ago. They should have informed the development plan and the routing decisions, instead of being implemented as an after-thought to mitigate impacts at a time when they are now largely unavoidable. The CER must revise the OPRs in a way that mandates these processes and protocols are in-place from the outset – from the very beginning of pipeline planning, not as an after-thought.

   Currently, pipeline owners and operators are expected to self-regulate, such as with safety and environmental plans and programs. This is ineffective. The CER should revise the OPRs so that First Nations affected by pipelines are able to maintain arm's length, independent involvement – as monitors, evaluators, regulators etc. – where needed (to be determined by First Nations). SRRMC ultimately managed to arrive at a position where

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Trans Mountain contracted work to SRRMC technical staff – ensuring that evaluations were conducted through a Stó:lō lens and with Stó:lō knowledge. This situation is not the norm, as First Nations are not supported to reach this position of informed evaluator of pipelines. The CER must work to rectify this situation, to empower First Nations to provide oversight within their territories and to reduce the power and self-regulation options for pipeline corporations. This is a kind of mirror to consultation: rather than consult with First Nations without any requirement to address or incorporate the results of such consultation, providing First Nations with regulatory oversight ensures that First Nations knowledge, expertise, and firsthand experiences with pipelines are driving regulatory decisions. This shifts First Nations to the decision-making role, and proponents to the position of being governed effectively by established laws. First Nations would work with federal and provincial agencies to uphold pipeline regulations. This would move the OPRs beyond the corporate responsibility model of self-regulation, which is ineffective and simply reproduces power imbalances and broader inequalities, and towards a model of devolved regulation and enforcement to First Nations (see below on legal pluralism).

a. Indigenous monitoring

   Indigenous oversight can be actioned through Indigenous monitoring programs. Trans Mountain has developed a monitoring program, but it has been shaped without adequate First Nations input, review, and management. There was a large amount of red tape and resistance for establishing Stó:lō's own Indigenous monitoring program for oversight of the TMEP. Trans Mountain monitors work within Trans Mountain's own established parameters – according to the self-regulatory approach of proponents developing and managing their own management programs. Stó:lō monitors work according to Stó:lō rights, title, and interest. It is important that the CER support such autonomous approaches to Indigenous monitoring of pipelines at all stages of their development and management.

   It is also important that the revised OPRs create the space for First Nations organizations to work together where there are overlapping interests and jurisdictions. Many First Nations and Tribes are looking to learn from each other's experiences to build a better process for all Indigenous groups impacted by pipelines and with Indigenous monitoring programs. The OPRs would benefit from creating the legislative space for First Nations to work together to build

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collaborative and collective Indigenous monitoring activities to ensure Indigenous oversight over pipelines in their neighbouring and overlapping jurisdictions.

Recommendations

Our exploration of the discussion paper themes focused on Stó:lō experiences of TEMP. From these experiences, we identify five over-riding recommendations in terms of shifting the scope and direction of the OPRs through the reform process.

Recommendation 1: From consultation to asserting jurisdictional authority

Existing regulatory frameworks mean that proponents (pipeline owners, builders, operators) are in a position of power over First Nations. That is despite First Nations possessing inherent rights and title to the lands across which pipelines travel. Existing frameworks require proponents to consult First Nations. But in this consultative model, the proponent holds the resources – the capital, information, expertise, etc. – that is required for any form of collaboration.

The OPR reform should legislate changes that move from such a consultative model to one that upholds First Nations jurisdictional authority. This would place the onus on proponents to relinquish pipeline-related knowledge and resources to First Nations, so that they can establish the processes and protocols required to uphold Indigenous governance mechanisms. Regulatory reform must make it clear that First Nations have jurisdictional authority and the pipeline owners and operators must adhere to such authority.

Recommendation 2: From "collaboration" to deferred decision-making with capacity support

Supporting First Nations jurisdictional authority means supporting First Nations' own decision-making capabilities and capacities. Regulation should move from loose models of collaboration to explicit deferred decision-making. This would mean that First Nations make decisions at an arm's length from proponents.

To support such decision-making, capacity funding should be mandated without any conditions. Rather than offer First Nations capacity funding to conduct work that helps the proponent in their environmental assessment processes, for example, that capacity funding should be offered as a regular grant. This would help First Nations to build decision-making capacity in the longer term, enabling them to realize their roles as regulators. Funding guidelines should be clear and mandated, not subject to ad hoc negotiation between proponents and First Nations (an approach that reproduces inequalities).

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Recommendation 3: From corporate responsibility (self-regulation) to enforceability (arms-length Indigenous regulation and enforcement)

A key weakness of the current OPRs is the emphasis on corporate responsibility and self-regulation. This approach must be replaced with one that focuses on clear rules and enforceable regulations. As First Nations build decision-making capacity they can grow into regulators, ensuring that clear and enforceable rules are upheld in their territories. Under the current model, proponents can ignore First Nations requests when developing their safety and environmental monitoring programs. Under a new model of First Nations enforcing clearer regulations, proponents would be accountable.

Such regulatory reforms would require that First Nations be provided with the legal power to enforce rules. This is a consistent topic of conversation regarding Indigenous monitoring programs. If proponents are to be held accountable to clearer rules and regulations in First Nations territories, then First Nations require the legislative power to enforce those rules. Increasingly, this should also support a move towards First Nations laws being asserted in Indigenous territories (see below), which would add further legitimacy and authority to First Nations as empowered regulators.

Recommendation 4: From export concerns to revenue sharing with impacted communities

The current approach to pipeline governance seeks to balance environmental and cultural risks with the assumed benefits of fossil fuel (oil and gas) exports. This is an antiquated model, rooted in a resource extraction-based economic development model that leads to environmental catastrophe (global climate change), deep inequalities (the concentration of wealth), and the exposure of marginal communities to environmental harms (exposure of northern and Indigenous communities to pollution related to resource extraction).

To support the shifts outlined above – such as building capacity for First Nations regulation – we recommend a shift from an export-oriented model of development and governance to a revenue sharing approach. In this model, those communities that bear the burden of risk related to pipelines (i.e., those with pipelines running through their territories) would be entitled to very specific shares of any revenues and other benefits derived from pipelines. This differs from the current ad hoc approach of capacity funding and retroactive funding of First Nations programs (e.g. the federal Terrestrial Studies Initiative). It would ensure transparent approaches to ensuring that those communities most affected by pipelines are able to build the capacity to make decisions on their own terms.

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Recommendation 5: Towards the application of Indigenous laws in pipeline regulation and governance

The eventual goal of these recommendations would be to support a future scenario of *legal pluralism*. In such a scenario, federal regulations that govern pipeline development, planning, construction, and management (including but not limited to the OPRs) would work in tandem with a place-based approach to applying Indigenous laws. The OPRs should be developed with a view to developing First Nations capacity to restore their laws within their own territories. This would constitute the true recognition of First Nations jurisdictional authority. This would also be a genuine and deep approach to reconciliation, moving away from the repeated application and imposition of settler laws, towards the co-development of a geographically and culturally patterned application of legal pluralism – that is, with place-based Indigenous laws providing the grounded backbone to how pipeline regulations are developed, applied, and enforced.

Conclusion

This is a technical response from technical staff in the People of the River Referrals Office (PRRO), the Stó:lō Research and Resource Management Centre (SRRMC), and Ts'elxwéyeqw Tribes Management Ltd. (TTML). It is based heavily on experiences with the Trans Mountain Expansion Project. We look forward to engaging with Stó:lō First Nations members and leader during phase 2 of the regulatory review process.

This response does not contain a comprehensive list of concerns. This is partly due to time constraints and feasibility, but also because the discussion paper created the conceptual terms of the conversation. That is, it set the scene for comments on the OPRs that line up with CER's already-existing ideas for regulatory reform (according to the six themes).

The Discussion paper asks many of the wrong questions. It focuses on tweaking a flawed approach to pipeline regulation, rather than thinking creatively for an alternative, more equitable regulatory model. The flawed model focuses on corporate responsibility and self-regulation. We recommend a more rigorous path to reform focused on developing laws and regulations that are enforceable by First Nations, while recognizing the jurisdictional authority that is tied to inherent rights, title, and interest. We encourage the CER to explore this more equitable model of legal pluralism.

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