



**SUBMISSION TO THE HOUSE OF COMMONS
STANDING COMMITTEE ON
NATURAL RESOURCES**

Bill C-46, PIPELINES SAFETY ACT, 2015

April 2, 2015

Assembly of First Nations

Submission to the Standing Committee On Natural Resources

Bill C-46, Pipelines Safety Act, 2015

A. INTRODUCTION

The Assembly of First Nations (“AFN”) respectfully provides this submission on Bill C-46 (*An Act to amend the National Energy Board Act (NEBA) and the Canada Oil and Gas Operations Act*) otherwise known as the *Pipelines Safety Act (PSA)*.

The AFN is in support of measures that strengthen the safety and security of pipelines and recognize that there are many welcomed changes contained within the Bill. We would also direct the Standing Committee to our 2013 submission regarding bulk transport of hydrocarbons (attached). Nonetheless, there are some important measures in relation to First Nations that are missing such as ensuring the process for compensable claims are available to First Nations and ensuring that the current Bill is in compliance with constitutional law.

As a threshold matter, this submission maintains that all legislation, regulations, policies, or delegated decisions related to pipeline safety must adequately consider First Nations’ rights and title as protected under the *Constitution Act (1982)* consistent with articles 29 and 32 of the *United Nations Declaration on the Rights of Indigenous Peoples*. In particular, Article 32 of the UNDRIP states:

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.
3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

At minimum, the PSA should ensure that First Nations receive “just and fair redress” for damages incurred as a result of a pipeline spill and that the Act includes “appropriate measures...to mitigate adverse environmental, economic, social, cultural or spiritual” impacts of pipeline operations. In addition, the PSA and the NEBA more generally, should ensure a process of “good faith” consultation with First Nations governments to ensure that First Nations free, prior and informed consent is secured prior to the development of any pipeline project which could impact their lands, territories and resources, including aquatic resources.

In addition, the Act should mandate the mobilization of both information and financial resources to First Nations, so that they are capable of responding to pipeline spills and are aware of pipelines which might impact their lands, territories and resources.

The PSA remains silent on issues related to First Nations concerns, and would not likely lead to a change in current practice. First Nations are often directly and profoundly impacted by pipeline spills. Spills which occur in remote areas can go unreported for days before a company is even aware of an event. On some occasions, First Nations harvesters have been the first persons to discover a spill. Moreover, when spills occur in rivers, the geographic scope of the spill may be broad. Even when First Nations are notified of a spill, past practice has been to involve only those First Nations proximate to the source of the spill, even as the spill may dramatically impact the aquatic resources and livelihoods of First Nations far removed.

The PSA does not address First Nations capacity to respond to spills. The AFN suggested in 2013 that the federal government undertake a needs assessment of First Nations capabilities to respond to hydrocarbons spills, an action the federal government declined to consider. Even worse, the PSA would not result in disclosure to First Nations of the material passing through pipelines. Often, companies will add chemical ‘dilutants’ to increase the viscosity of hydrocarbons products. Some of these dilutants may pose direct human health risks to first responders or to others who are exposed to oil spills. In addition, chemical dilutants may have unknown and undisclosed impacts on the local ecology, the same local ecology harvesters rely upon to practice their constitutional rights.

B. CONCERNS

In general, the rights and interests of First Nations are neither acknowledged nor reflected by the PSA. This should be disturbing to First Nations, Canadian citizens and parliament, given the demonstrated adverse impacts that pipeline spills have on First Nations.

1. Orders of the National Energy Board

Changes to section 48(1.1)(a) (included in s. 15. (1) of the PSA), which is concerned with the Construction, Regulation and Abandonment of Pipelines, is a provision which allows the National Energy Board to make orders of Pipeline companies. The notable change in section 48(1.1) is actually a limiting provision, which now limits the authority of the Board to making orders related to two factors, whereas the NEBA currently provides the Board broader authority. Available grounds for orders include the “safety and security of the public, of the company’s employees” or for “the protection of property or the environment.” This is important because the ‘security of a company’s employees’ could be used to order a company to enjoin or restrain First Nations protesters seeking recognition and implementation of constitutional rights, yet it seems unlikely that the Board would be capable of issuing orders to ensure those constitutional rights are protected. The AFN recommends that the National Energy Board be prohibited from making orders regarding First Nations or civil society protests.

Aboriginal and treaty rights are not included as factors for which “[t]he Board may order a company to take measures” under the section. The AFN recommends that the National Energy Board be empowered to make orders to recognize, protect and implement Aboriginal and treaty rights.

So far as the Act, and the National Energy Board is concerned, pipelines (or abandoned pipelines) and the factors listed above receive greater recognition and protection from the National Energy Board than Aboriginal or treaty rights. This is not a change, but it is a notable point – under this section of the NEBA, pipelines have greater rights than First Nations. The AFN believes that the Act should reflect that our citizens should have rights at least equal to those of the pipelines.

2. Touching an abandoned (or active) pipeline is a violation of the Act

Section 48(1.2) authorizes a company or any third party to take ‘any action or measure they consider necessary’ to protect an abandoned pipeline. This suggests that if First Nations were protesting or otherwise violating a pipeline (for example, by touching it – the new s 48.1(1) prohibits anyone from making contact with an abandoned pipeline.), a company could be authorized to use any means necessary to protect that pipeline. In addition, section 48(1.3) and 48(1.4) indemnify the Crown and the company in situations where this occurs.

The AFN recommends that section 48(1.2-1.4) be removed from the PSA. Similarly, section 48.1(1) of the NEBA should replace references to making contact with ‘substantial interference’.

3. Liability and Claims brought by First Nations

Section 48.12 (10) provides an order of ranking for recovery of claims when claims are recovered in any court of competent jurisdiction in Canada as follows: first, claims for actual loss or damage; second, claims for costs and expenses in taking an action or measure; and third, claims for loss of non-use value. There is no acknowledgement or ranking of claims that might arise as a result of an Aboriginal or treaty right. As such, there are constitutional restraints with respect to fixing a class that needs to be abided by or else this law will not be valid. With respect to 48.12(1)(a), the AFN requests clarification in the Act that a First Nation government is considered a 'person' for purposes of compensation.

In addition, First Nation governments should not be precluded from claiming loss of non-use values related to public resources. First Nation governments have public resources just as other levels of government do. Section 48.12 (1) (c) addresses the issue of liability without proof of fault or negligence and includes non-use values related to a public resource. There is no definition of "public resource" and no statement as to whether public resources held by First Nations are included. And despite the lack of definition, section 48.12 (9) allows only the federal or a provincial government to initiate proceedings to recover a loss of non-use value.

Use values and non-use values are defined in Environment Canada, *Measuring Economic Values for the Environment* as follows:

Use values are associated with direct use of the environment such as fishing and swimming in a lake, hiking in a forest -- or commercial uses such as logging or farming. Non-use values are related to the knowledge of the continued existence of the environment (*existence values*), or the need to leave environmental resources to future generations (*bequest values*).¹

There is no rationale as to why First Nation governments are excluded from this provision and from the ability to file such a claim for consideration to the Pipeline Claims Tribunal.

4. Pipeline Claims Tribunal

There is no capacity, as currently mandated under this Bill, to deal with Aboriginal issues, property issues or Aboriginal and treaty rights for those individuals who will be appointed to sit on the Pipeline Claims Tribunal.

There should be a requirement for persons appointed to the Pipeline Claims Tribunal to have knowledge of the complex area of Aboriginal law and furthermore to have the capacity to understand or deal with First Nation issues. The AFN recommends that this

¹ Online at: <https://www.ec.gc.ca/air/default.asp?lang=En&n=DB24CA96-1>.

Committee require, at minimum, one member appointed to the Pipeline Claims Tribunal to have the knowledge, understanding and capacity to deal with Aboriginal issues in relation to land and more specifically in relation to Aboriginal and treaty rights.

5. Pipeline Claims Tribunal Hearings and Traditional Knowledge

Section 48.36 of the PSA states that hearings of the PCT will generally be held in public. However, there are three exceptions where:

- public Hearing would not be in the public interest;
- a person's privacy interest outweighs the principle that hearings should be public; and,
- confidential business information may be disclosed.

While the Act protects the privacy interests of the individual and the business interests of companies, it does not provide any recognition of the importance of traditional knowledge, nor First Nations interests in protecting traditional knowledge. Absence of an assurance of a private hearing under section 48.36 that traditional knowledge deserves protection from wide public disclosure will be a barrier to First Nations participation in compensation regimes.

The AFN demands that a fourth category be added regarding traditional knowledge. Knowledge about the locations of sensitive environmental resources (traditional medicines, culturally important areas, genetic resources, spawning beds, etc.) are generally held by First Nations which are sometimes reluctant to disclose such information publicly – usually out of fear that if such information is made public, those resources will be damaged or destroyed. It is not unheard of for arbitral tribunals to convene private proceedings where traditional knowledge is being disclosed, nor is it unheard of for arbitral tribunals to redact those portions of their reasons which would otherwise disclose traditional knowledge.

6. Judicial Review of PCT decisions

Section 48.45 establishes grounds for judicial review of PCT decisions. While the PSA permits judicial review of PCT decisions, there are some limitations. Decisions of the PCT cannot be reviewed for:

- an error of law;
- a decision based on an erroneous fact; or
- an action contrary to the law.

The AFN requests that the reference to “an error in law” should be struck from section 48.45. This may be relevant for First Nations seeking to access the PCT, since most Aboriginal and treaty rights issues are mixed issues of fact and law. If a First Nation or harvester seeks to recover through the PCT, it would be very difficult to appeal the

decision of the PCT, to the extent it is related to a misinterpretation of a treaty or Aboriginal right or is founded on an erroneous fact.

7. Lack of Consultation with First Nations

In too many circumstances, First Nations are forced to resort to litigation because the legislative and policy development process does not adequately consider Aboriginal and treaty Rights. The AFN has called on parliament to provide a process whereby bills being considered are reviewed to ensure compliance with Aboriginal and treaty rights in order to avoid such costly litigation.

In fact, the federal court has also agreed that there is a requirement for consultation regarding Bills before parliament where there is a sufficient potential risk to an Aboriginal or treaty right so as to trigger the duty to consult.² While there are some important measures that go to safety, the potential impacts regarding Aboriginal and treaty rights are much broader than this and must be upheld and protected. The AFN recommends that the Committee require that consultations be held with First Nations before adopting regulations that could damage either asserted or established Aboriginal or treaty rights.

8. Polluter Pays Limit of \$1 Billion

There is a liability limit of \$1 billion for some companies however it has been reported that this cap does not represent a true absolute liability since some spills have been reported to cost more than the \$1 billion. For example, the Kalamazoo spill in Michigan was reported to have cost \$1.2 billion and was not a full clean up since the river remains contaminated. The AFN supports the request that the rationale behind using \$1 billion cap be publicly shared.

In addition, this liability only applies to companies who have the capacity to transport at least 250,000 barrels of oil per day however there is no rationale to explain this requirement. Further information and clarification should be provided.

9. Reimbursement by Company

Section 48.15 provides for compensation above and beyond the liability limits established by the Act in section 48.12. The inclusion of 'aboriginal governments' in section 48.15 suggests that Parliament should also clarify that 'aboriginal governments' are included in section 48.12(1)(b), or alternatively, that section 48.15 would provide total indemnification for all costs and expenses incurred by a First Nation. Section 48.15 is not an adequate substitute for explicit inclusion of First Nations governments

² *Mikisew Cree First Nation v. Canada (Governor General in Council)*, 2014 FCC 1244.

under section 48.12(1)(b). Section 48.15 provides indemnification only on order of the Board, whereas section 48.12(1)(b) would provide First Nations with the opportunity to pursue responsible parties directly for losses.

10. Designated Companies

The PSA and the statutes it amends can only be understood by reference to section 35, proved and claimed Aboriginal rights and treaties. Section 48.16 relates to 'designated companies'. When a company cannot (s. 48.16(1)(a)) or will not (s.(48.16(1)(b)) comply with an order of the Board after a release, the Board may take over the response, either directly or by assigning actions to a third party. This power can only be exercised by the federal cabinet, and only after a recommendation from the Minister. When this occurs, the Board, its employees (s. 48.16(3)), or any third party taking actions under direction of the National Energy Board (s. 48.16(4)) can be found liable for their actions taken or omitted during the response. When designation occurs, the National Energy Board may reimburse First Nations for any reasonable expenses incurred related to the release (s. 48.14(5)).

Parliament cannot legislate away the duty to consult where legislation, regulation or policy requires a decision from the Crown. The designation provisions of the PSA, particularly related to liability of the Crown and third parties, creates confusion between First Nations, third parties and the Crown about where the duty to consult and accommodate, particularly procedural aspects of the duty, rests. Such confusion is remarkably unhelpful in the context of an emergency response. Beyond the duty to consult and accommodate, the AFN notes that the Crown is incapable of relieving itself or third parties of responsibilities for damages incurred as a result of an unjustifiable infringement of an Aboriginal or treaty right.

As a consequence, AFN recommends the legislation be amended to clarify, for third parties and companies, that 48.16(3) and 48.16(4), and indeed, the PSA scheme as a whole, have no adverse impact on the Crown's duty to consult and accommodate, nor any adverse impact on the Crown's obligation to honour (i.e. avoid infringement) of treaties.

11. Passing over Buried Pipelines

Section 112(2) prohibits "any person to operate a vehicle or mobile equipment across a pipeline". Exceptions to section 112(2) include going over the "travelled portion of a highway or public road" (s. 112(2)(b) and where permitted by order of the Board or through regulations. 112(2)(a)). This could be a major problem for First Nations harvesters if their trails intersect pipeline routes and if they use motor vehicles to travel their trails.

AFN proposes an explicit exemption for First Nations harvesters in a new Section 112(2)(c): “the person is an aboriginal harvester accessing sites for hunting, fishing trapping or other activities related to their aboriginal or treaty rights.”

Appendices

Assembly of First Nations Submission to the Senate Standing Committee on Energy, the Environment and Natural Resources *Environment Submission on Hydrocarbon Transportation* - June 27, 2013



**Assembly of First Nations
Submission to the
Senate Standing Committee on Energy, the Environment
and Natural Resources**

Environment Submission on Hydrocarbon Transportation

June 27, 2013

About the Assembly of First Nations

The Assembly of First Nations (AFN) is the national, political representative of First Nation governments and their citizens in Canada, including those living on reserves and in urban and rural areas. The National Chief is elected by the Chiefs, who in turn are elected by their citizens.

The role and function of the Assembly is to serve as a national delegated forum for determining and harmonizing effective collective and co-operative measures on any subject matter that the First Nations delegate for review, study, response or action, and ultimately for advancing the aspirations of First Nations.

For more information, please contact us at:

55 Metcalfe Street
Suite 1600
Ottawa, ON K1P 6L5

Telephone: 613-241-6789
Toll-Free: 1-866-869-6789
Fax: 613-241-5808

or visit the AFN Web site: www.afn.ca

INTRODUCTION

The Assembly of First Nations (AFN) respectfully provides this submission on the current state of the safety elements of the bulk transport of hydrocarbon products in Canada. The AFN is the national representative organization advocating for the interests of over 630 First Nations communities across Canada. The AFN is not a holder of Aboriginal or treaty rights; therefore positions expressed by the AFN do not replace the need for meaningful consultation with rights holders in situations where potential or established rights may be affected.

First Nations' inherent and treaty rights are distinct from other rights in Canada. First Nations hold a unique and important relationship with their environments. While we recognize that humanity and the wellbeing of humanity is closely tied to its relationship to the environment, this relationship is profoundly expressed through First Nations culture. Understanding the unique nature of First Nations' rights and interests, this submission will focus primarily on the safety and security of First Nations' in the event of leaks or spills while transporting hydrocarbons.

As a threshold matter, this submission maintains that all legislation, regulations, policies, or delegated decisions related to the safety of the bulk transport of hydrocarbon product must adequately consider First Nations' rights and title as protected under the *Constitution Act (1982)* consistent with articles 29 and 31 of the *United Nations Declaration on the Rights of Indigenous Peoples*. This submission underscores the need for resources from the Government of Canada for First Nations to undertake studies and measures in order to adequately assess and ensure the current and future security of First Nations' in the event of a spill of hydrocarbon products.

FIRST NATIONS RIGHTS RELATED TO THE TRANSPORTATION OF HYDROCARBONS

The safety and security of First Nations is inextricably linked to the security of First Nations' Aboriginal and treaty rights and the ability to exercise those rights currently and in the future. First Nations have broad and diverse inherent and treaty rights that are likely to be materially affected in the event of a spill involving crude oil or bitumen. As recognized by Canadian and international law, these rights include but are not limited to: hunting, fishing and trapping; autonomous decision making (e.g., the right to grant or withhold consent); the enforcement of traditional or customary laws; and the pursuit of economic activities including traditional occupations and traditional economies. A spill event and the subsequent response will result in and affect short-term and long-term impacts on local resources and assets and are therefore directly relevant to the ability of a community to exercise rights. Therefore, considerations must be made with respect to: the health of communities and resources, approvals processes, liability and compensation, and First Nations' capacity to respond to an emergency event.

Recommendations

First Nations' rights holders are best prepared to identify potential or established rights that are infringed or risk infringement from the transportation of oil or in the event of an oil spill. In order to ensure the duty to consult and accommodate First Nations is discharged, and in order to ensure consultation is meaningful, the AFN makes the following general recommendations with respect to areas and processes for consultation:

- All governments should consult with First Nations on all pipelines, rail corridors, and shipping corridors to determine First Nations that may be affected by an oil spill;
- All governments should consult with First Nations to determine existing customary or traditional laws that must be reconciled with provincial, federal and international laws, legislation and policies;
- Consultation should be carried out in advance of the designation, approval or establishment of pipelines, shipping or rail routes, including the designation of Places of Refuge for tankers, operating within or near a First Nation's territory;
- Government and transporters should fully engage with and consult First Nations in determining response methods and priorities prior to transportation of hydrocarbon products in or near a First Nation' territory, including downstream First Nations;
- In order to ensure consultation is meaningful and that adequate engagement occurs in the designation of plans and priorities, all relevant information must be disclosed by transporters, handlers and the Government, including information that may be considered confidential (e.g., proprietary information); and
- In order to ensure the integrity of the consultation process and of safety plans, adequate resources should be afforded for First Nations to maintain capacity to engage in fully informed dialogue.

First Nations may identify specific topics where consultation and joint-decision making is necessary with respect to plans and priorities in their particular territory and the information and resources necessary in order to ensure meaningful consultation.

CONSIDERATION WITH RESPECT TO HEALTH OF COMMUNITIES AND RESOURCES

Processed and unprocessed hydrocarbon products are harmful to living organisms and ecosystems. Oil introduced in the physical environment is difficult to remediate as density varies amongst constituent compounds. First Nations' inherent and treaty rights are dependent upon environmental integrity and negative impacts to flora, fauna, or habitat relevant to the exercise of an Aboriginal or treaty right constitutes an infringement or negative impact upon those rights.

The transport of bitumen and heavy oils requires the addition of diluents and surfactants to alter the viscosity and density of the oil and to emulsify heavy oil. Limited data exists to determine potential short- and long-term impacts directly related to diluents and surfactants cumulative impacts. However, recent spills of diluted bitumen suggest that these substances pose significant risk in addition, the difficulties posed by the safe and effective cleanup of diluted bitumen suggest a high probability of negative impacts to the ability of First Nations to exercise Aboriginal and treaty rights in the event of an oil spill.

Diluents and surfactants are proprietary information. Therefore, the chemical composition of hydrocarbons in transport is not disclosed. Poor or insufficient data about diluents and surfactants prevents effective and meaningful consultation. Diluents and surfactants have varying levels of toxicity and stability and can therefore pose: (a) a short term danger to first responders and those in the immediately vicinity of a spill; (b) longer-term dangers related to health impacts from exposure to toxics; (c) longer-term dangers related to the contamination of soil; (d) long-term dangers related to the health of flora and fauna used for purposes consistent with the practice of Aboriginal or treaty rights; and (e) longer-term dangers related to bioaccumulation in flora and fauna used for food purposes.

Recommendations

Due to the high risk posed by oil, diluents, surfactants, in the immediate-term of a spill (i.e., during spill response) and the longer-term of a spill (i.e., from continued use of the land and resources) to First Nations' lands, territories and resources, the AFN makes the following recommendations:

- The Government of Canada should include in legislation, or develop regulations and policies to recognize that First Nations' inherent and treaty rights related to hunting, fishing, trapping, and the use of aquatic and terrestrial resources is impacted by the loss, degradation, and/or decrease in the productivity of flora or fauna;

- The Government of Canada should undertake an in-depth study with the full and effective participation of First Nations on dangers to human health posed by diluents and surfactants used for the transportation of oil and determine appropriate (a) response protocols; (b) training for first responders; (c) liability in the event of a spill where diluents and surfactants are not disclosed to potentially affected parties, where the calculation of liability includes the cost to human health and the cost to continued use of resources; and (d) mechanisms or processes to address infringements or affects to First Nations' rights to hunting, fishing, trapping and land use that will occur as a result of a degradation to environmental integrity and the increase in environmental health risks.
- The Government of Canada should require disclosure of all chemical substances used in transport (i.e., diluents and surfactants) to First Nations communities when the transportation traverses or passes near a First Nation

CONSIDERATIONS WITH RESPECT TO APPROVALS PROCESSES

At this time, Federal processes to approve hydrocarbon transportation routes are not sufficient to adequately assess or determine risks to the safety and security of First Nations communities. Current decision making structures with respect to compulsory or recommended shipping routes and the transportation of oil through existing rail networks do not permit the full or effective input of potentially impacted First Nations communities. In fact, it is the understanding of the AFN that Transport Canada, the federal regulator for the movement of hydrocarbon products by rail or ship, is only made aware of the use of existing transportation networks to move hydrocarbon products in the event of a hydrocarbon product spill. Approval processes for pipelines, which fall within the mandate of the National Energy Board (NEB), lack the necessary scope and mandate to adequately consider all relevant First Nations' interests and rights. Furthermore, there are significant barriers to access for First Nations' seeking interventions on approval processes for pipelines.

First Nations face three significant barriers to the NEB process for pipelines: (a) ability to obtain intervenor status or standing before the NEB hearing; (b) ability to procure adequate resources to fully study or determine issues with respect to community safety or security; (c) access to all information relevant to fully study or determine issues; and (d) the limited scope of issues considered by the board.

First Nations seeking standing before an NEB hearing or submit written comments must be pre-approved by the NEB. Approval can be sought through the submission of an "Application to Participate form." However, a minimal window is granted for the submission of applications. Furthermore, standing is only granted to those with "direct interest" as determined by the panel. The AFN has been made aware of some instances

where First Nations have been denied standing before the NEB in matters relevant to inherent and treaty rights. Consideration of upstream impacts, downstream oil use, or oil sands is not undertaken as part of the proceedings. Currently, the NEB does not have a coordinated process to consider First Nations' Aboriginal or treaty rights issues and it is questionable if current processes are adequate to discharge the Crown's obligation to consult or accommodate First Nations on potential infringements to potential or established rights. Therefore, it is questionable if the NEB process is adequate to protect community safety or security. Furthermore, it is questionable if the process is adequate from an economic development perspective, as First Nations that cannot participate are left to seek remedy through costly and protracted litigation.

Recommendations

With respect to approvals processes, the AFN makes the following recommendations to improve safety and security for First Nations communities:

- With respect to granting standing at hearings for proposed pipeline projects, the NEB should consider *any* First Nation with traditional territories in or near the proposed route to be a party with "direct interest;"
- The Government of Canada should develop separate processes to consider First Nations issues in the context of NEB approvals;
- First Nations should be consulted on potential hydrocarbon product spills and adequate resourcing procured in order to train First Nation leaders and responders for spill preparedness.

CONSIDERATIONS WITH RESPECT TO FIRST NATIONS' CAPACITY TO RESPOND

Individual First Nations have varying capacity to respond to emergency situations resulting from a spill of hydrocarbon products. At this time, there is no comprehensive assessment of First Nations' capacity to respond nor is there a comprehensive inventory of: (a) spill equipment available to or owned by First Nations; (b) First Nations responders; (c) available funds from private or public sources for First Nations to procure response equipment or training; and (d) current barriers to First Nations' capacity or ability to respond to spills.

At this time, resources are not readily accessible by First Nations from the Government of Canada to procure necessary equipment, training or research. The AFN has received requests from Transport Canada with respect to a study to determine current capacity across Canada to respond to an oil spill event. It should be noted that no First Nations' representatives are members to the panel conducting the study. Furthermore, First

Nations have not received resources to adequately respond with the accuracy required to meaningfully consider the current state of First Nations' preparedness to respond to an oil spill.

The expansion of Canada's oil transportation network poses new challenges with respect to preparedness and requires growing government resources to ensure adequate preparedness for First Nations' communities in the vicinity of proposed, new or existing pipelines and rail routes or shipping lanes that may be used to transport oil.

Recommendations

With respect to improving First Nations' capacity to respond to oil spills, the AFN makes the following recommendations:

- The Government of Canada should extend the timeline of its current study related to marine oil safety preparedness to ensure First Nation participation on the study's panel and adequate resources for First Nations' involvement in the study;
- The Government of Canada should allocate adequate funds for First Nations to undertake assessments of current preparedness and gaps in preparedness and for First Nations to acquire training and equipment as necessary; and
- The Government of Canada should provide adequate resources for First Nations to undertake studies with respect to the security of customary and traditional uses of resources and potential impacts to that security in the event of hydrocarbon products entering local terrestrial or aquatic habitats.

CONSIDERATIONS WITH RESPECT TO LIABILITY AND COMPENSATION

In the event of an oil spill, the Government of Canada has an adopted "polluter pays" principal requiring transporters to be held liable in the event of an oil spill. There are several topics with respect to liability that are directly relevant to the security of First Nations, including: (a) absolute liability caps; (b) eligible claims under the *Marine Liability Act* and Ship Source Oil Pollution Fund; and (c) access to funds to offset damages and re-establish conditions conducive to the exercise of Aboriginal and treaty rights in situations where those rights are impacted by an oil spill.

Canada currently operates a multi-tier compensation system in the event of a marine oil spill. This regime solely covers ship-source spills. The system relies on two international mechanisms and one domestic fund (i.e., the Ship Source Oil Pollution Fund, SOPF). The international regime applies solely to oil tankers and persistent oil. Through the international regime, approximately \$1.3 Billion is available to Canada in the event of an

oil spill from a tanker source. Under the SOPF, individuals or the Crown may apply for compensation related to loss, damage, expenses or costs from a spill with a maximum amount of \$154,392,072 per spill.

Although adequate structures are in place to ensure necessary access to funds in the event of an oil spill, the effectiveness of the regime to respond to First Nations needs requires further analysis. Funds are available for losses in fishing and mariculture income; however, the cultural and rights value of fisheries and aquatic resources are difficult to quantify and ineligible to claim. As tanker traffic increases and as plans call for progressively larger tankers in sensitive areas and productive fishing grounds, it is unclear if current liability caps are adequate to cover all damages, including the damages incurred by First Nations, in the event of a spill. Furthermore, as limits exist to current funds, it is unclear if Canada can currently access enough funds in the event of multiple oil spills in one year. Lastly, it is unclear if all First Nations claims relevant to the community security are applicable under the current structure.

At this time, the AFN is not aware of dedicated federal regimes or structures to assist First Nations in the event of terrestrial spills, nor are there structures in place to address marine or aquatic damages from non-ship source spills (e.g., pipeline or rail).

Recommendations

- The Government of Canada should undertake a dedicated study to determine if current regimes are adequate in the event of increased transportation of hydrocarbon products by tankers;
- As part of this study, the Government of Canada should assess if current regimes are adequate to compensate all First Nations damages related to aquatic flora and fauna that either support or are used for reasons consistent with an Aboriginal or treaty right.

CONCLUSION

At this time, Government studies, programs and procedures are insufficient to determine or adequately address concerns with respect to the safety and security of First Nations communities in the event of an oil spill. The AFN respectfully recommends that the Government of Canada undertakes further studies specific to the safety and security of First Nations communities and provides adequate resources and means for First Nations to fully participate in such studies. Furthermore, the AFN recommends that robust, meaningful consultation and accommodation is taken prior to any actions by the Crown or by proponents with respect to the alteration, establishment, or designation of new routes for the bulk transportation of hydrocarbon products.

Appendix A: Letter from the AFN to Transport Canada Regarding Participation in a Study to Assess Marine Oil Safety Preparedness

Assembly of First Nations

55 Metcalfe Street, Suite 1600
Ottawa, Ontario K1P 6L5
Telephone: 613-241-6789 Fax: 613-241-5808
www.afn.ca



Assemblée des Premières Nations

55, rue Metcalfe, Suite 1600
Ottawa (Ontario) K1P 6L5
Téléphone: 613-241-6789 Télécopieur: 613-241-5808
www.afn.ca

May 17, 2013

Mr. Louis Lévesque
Deputy Minister
Deputy Minister's Office
Transport Canada
330 Sparks Street
Ottawa, Ontario K1A 0N5

Dear Mr. Lévesque:

I am writing on behalf of the Assembly of First Nations (AFN) with respect to First Nations participation in Transport Canada initiatives. The AFN is the national advocacy body for over 630 First Nations across Canada. As an advocacy organization, the AFN has an integral interest in promoting First Nations perspectives in the creation and implementation of national policies, regulations and guidelines, including those contemplated by Transport Canada with respect to the *Navigable Waters Protection Act* and marine oil spill preparedness.

The AFN values its ongoing partnerships with the Government of Canada and is pleased to provide advice and assistance to Transport Canada in regulatory and policy reform processes. However, the AFN is not a holder of Aboriginal or Treaty rights or title; therefore, engagement with the AFN does not replace consultation or accommodation with First Nations rights holders.

First Nations have broad and diverse interests related to the *Navigable Waters Protection Act* and marine oil spill preparedness. Aquatic habitats and resources are central to First Nations cultures and economies, and the integrity of those habitats and resources is directly relevant to the ability of First Nations to practice rights related to fisheries. The AFN encourages Transport Canada to continue to seek broad input from First Nations across the country throughout the course of its activities related to the implementation of the amendments to the *Navigable Waters Protection Act* and marine oil spill preparedness. Specifically, in order to ensure meaningful incorporation of First Nations perspectives and strong consideration of relevant First Nations rights, the AFN strongly recommends appointing a First Nation representative on the panel for the study on marine oil spill preparedness.

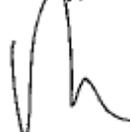
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Engagement requires substantial contributions from First Nations' governments and technicians. First Nations do not receive dedicated funds to undertake these activities and therefore require adequate funds to ensure the integrity of these activities. The AFN is concerned that First Nations will be unable to access information sessions about the *Navigable Waters Protection Act*, the Minor Works Order and the Minor Waters Order due to a lack of participant funding. Similarly, the AFN is concerned that First Nations may lack adequate resources to provide meaningful input and advice on marine oil spill preparedness. This concern has been raised to the AFN by members of the AFN's National Fisheries Committee, which is a chiefs' and technicians' committee that considers legislative, policy and regulatory reforms that affect aquatic areas. The AFN asks that Transport Canada considers delaying the information sessions until participant funding can be procured and recommends that funding envelopes be created with respect to the marine oil spill preparedness study.

Moving forward, in order to ensure robust engagement on the *Navigable Waters Protection Act* and the initiatives related to marine oil spill safety, the AFN requests that Transport Canada provides information and background documents regarding proposed activities. In particular, engagement can be facilitated by providing briefings and information with respect to: (a) the scope of activities, (b) the objective of activities, (c) the information Transport Canada is seeking through activities, (d) proposed plans as to how the information collected will be used, and (e) planned follow up activities. This information will allow the AFN to assist Transport Canada in moving forward initiatives in a positive and mutually beneficial fashion.

The AFN looks forward to continuing to work with Transport Canada in the important initiatives. I encourage Transport Canada to continue engaging with First Nations and I am pleased to offer our continuing support throughout the engagement process. I wish to extend an invitation to meet at your convenience to discuss effective and efficient ways to coordinate on the reforms being considered by Transport Canada and to build on our current relationship. I invite your staff to contact Lori Martin, Executive Assistant to the A/CEO, via e-mail at LMartin@afn.ca or by calling (613) 241-6789, ext. 208 to arrange for a meeting.

Sincerely,

A handwritten signature in black ink, appearing to be 'Peter Dinsdale', written over a light blue horizontal line.

Peter Dinsdale
A/Chief Executive Officer

Appendix B: AFN Internal Memo on Pipeline Spill Concerns

BACKGROUND: Pipelines create a number of environmental issues. They may interfere with wildlife corridors and wildlife migration. They may be constructed on archaeological sites, or other culturally significant areas, such as medicine walks or healing places. Pipelines also leak with alarming frequency.

Authorities are quick to point out that major leaks such as the Rainbow Spill are rare. However, the last spill on the Rainbow pipeline was five years ago. The 2006 spill released about 25% of the amount of hydrocarbon released in the 2011 spill (still over 10,000 gallons). Last weekend (May 7-8), the Keystone pipeline in Alberta suffered a leak of over 20,000 gallons.

A 2001 analysis of US-based oil spills reveals that over 74% of pipeline spills involve 100 gallons or less, and 90% are under 1000 gallons. Overall, technology improvements have made a big difference. There were only 20% of the spills reported in 1998 as there were in 1968. Assertions that large spills (more than 1,000 gallons) are relatively rare, or that pipeline safety is improving as technology improves appear accurate.

However, the analysis also concludes that in recent years, “U.S. pipelines have spilled more than tankers and barges combined”. Land pipelines made up 22.4% of total oil spilled in the United States during the 1990s. The reason for this is that the amount of oil being carried in existing pipelines has increased dramatically. Worse, total spill amounts from pipelines “are dominated by a small number of large events.”

This suggests that spills of at least 10,000 gallons represent 90% of the [total] amount [of oil] spilled, but only 5% of the actual numbers of spills”.

Minor spills generate considerable damage to local wildlife and cultural resources. Despite improvements to pipeline safety, minor spills remain surprisingly common (about 100 in the United States in 1999). At this time, AFN is not aware whether such events are tracked, nor whether it is industry practice to inform First Nations of such incidents.

For example, in 2006, the Rainbow pipeline had a spill that released about 25% of the oil spilled in the Rainbow spill of 2011. The 2006 Rainbow pipeline spill response team did not inform First Nations until the main response action was complete.

ABOUT THE ASSEMBLY OF FIRST NATIONS

The Assembly of First Nations (AFN) is the national, political representative of First Nations governments and their citizens in Canada, including those living on reserve and in urban and rural areas. Every Chief in Canada is entitled to be a member of the Assembly. The National Chief is elected by the Chiefs in Canada, who in turn are elected by their citizens.

The role and function of the AFN is to serve as a national delegated forum for determining and harmonizing effective collective and co-operative measures on any subject matter that the First Nations delegate for review, study, response or action and for advancing the aspirations of First Nations.

For more information, please contact us at:

55 Metcalfe Street, Suite 1600
Ottawa, ON
K1P 6L5