



**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.

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## **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

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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](mailto: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 read 'Peter Dinsdale', with a stylized flourish at the end.

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.