



Marylene Cormier, Manager, Operational Policy
Canadian Environmental Assessment Agency
22nd Floor, Place Bell
160 Elgin Street

16 June 2016

Dear Ms. Cormier,

RE: Technical Guidance for Assessing the Current Use of Lands and Resources for Traditional Purposes, under the Canadian Environmental Assessment Act.

The Canadian Energy Pipeline Association (CEPA) would like to thank the Canadian Environmental Assessment Agency for the opportunity to comment on the Technical Guidance for Assessing the Current Use of Lands and Resources for Traditional Purposes under the *Canadian Environmental Assessment Act*. CEPA members operate 119,000 kilometres of transmission pipeline in Canada and transport 97 per cent of Canada's daily natural gas and onshore crude oil production from producing regions to markets throughout Canada and the US.

CEPA members are operating in an increasingly complex environment with an increasing number of challenges posed by external stakeholders. We welcome any tools or resources that clarify the roles, duties and expectations of all the key players in the context of a project review and believe the agency's draft guidance improves on what is currently available. In order to best achieve the objectives of the guidance; however, there are a number of areas within the document where amendments would be beneficial for project proponents as well as Indigenous communities.

We have divided our comments into three areas: document scope, clarity of terms and clarity in process, all of which are elaborated on below.

DOCUMENT SCOPE

Under the *Canadian Environmental Assessment Act* 2012 (CEAA 2012), the environmental effects that are to be taken into account during an environmental assessment are limited to changes to components of the environment that are under federal jurisdiction (i.e. fish, aquatic species and migratory birds). With respect to Indigenous peoples, environmental effects can also include the impacts of a project on the "current use of lands and resources [by Aboriginal peoples] for traditional purposes". It is important that the Guidance Document not extend beyond this stated scope. This means that there should not be any predetermined assumptions regarding impacted resources and their use by Indigenous peoples for traditional purposes.

In addition, CEPA members also seek clarity on the scope of the document in the following areas:

- As many as hundreds of Indigenous communities may be engaged on a transmission pipeline project, so clarity is needed on how/if the Guidance Document applies to Indigenous communities that are not recognized by the federal government.
- Given the recent Supreme Court judgment on the *Daniels* decision, clarity is requested on the application of the Guidance Document with respect to non-status Aboriginal groups and Métis.
- Clearer boundaries of studies would help to manage expectations of all parties involved. For example, the traditional use of areas traversed to get to the project area often comes up for consideration. Limits on boundaries of studies would ensure project proponents and Indigenous communities clearly understand their rights and responsibilities.



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- Additional guidance on the application and usage of past traditional knowledge and land use studies would be beneficial as it would allow project proponents to build on work already completed.
 - The Guidance Document should include consideration for projects within a previously disturbed footprint or those where traditional activities are no longer taking place.
 - Further information is requested on how the Agency is connecting with Aboriginal Affairs and Northern Development Canada's documentation on consultation requirements of proponents.

CLARITY OF TERMS

CEPA members request further clarity on a number of key terms. The terms and the specific aspects that require improved clarity are outlined below.

Traditional Land Use

All key parties involved in a project review (communities, proponents, regulators and Crown agencies) have varied views as to what constitutes an appropriate approach, framework and level of information gathering and assessment in relation to Traditional Land and Resource Use (TLRU). Generally, the Guidance Document provides additional clarity on the regulatory approach that companies are required to follow. There are, however, areas where CEPA members would benefit from additional guidance in order to ensure best possible outcomes.

For example, the Guidance Document does not include consideration of different land tenures and the traditional use opportunities on those lands (i.e. privately-tenured lands are generally unavailable for traditional use without the owner's consent). The Guidance Document would be more useful if it were to recognize the impact that land tenure has on the use of land by Aboriginal peoples for traditional purposes.

Current use

The Guidance Document defines 'current use' to include uses by Indigenous peoples that are actively being carried out at the time of the assessment, and uses that are likely to occur in a reasonably foreseeable future, provided that they have continuity with traditional practices, traditions or customs. CEPA members are concerned that including 'future use' in this definition may create unreasonable expectations. Furthermore, the Guidance Document directs proponents to set the scope of a TLRU assessment, considering current use, at the time of the assessment. This has the potential to create an expectation that a proponent will support studies that assess differing TLRU scenarios over the life cycle of a project, which could lead to speculative conclusions.

CEPA members believe an assessment of current use of lands and resources, based on observable facts and phenomena at the time of the assessment is reasonable and achievable; however, an assessment of multiple, potential possibilities and scenarios would not ultimately be a science based exercise. CEPA recommends separating the two matters in the document with emphasis placed on the assessment of current use, with some following commentary that includes reasonably foreseeable uses that are tied to a pattern of proven past uses over time.

Value Components (VC)

In principle, CEPA members agree that the identification of VCs of interest should be informed by engaging Aboriginal groups; however, it is generally not feasible to advance an environmental assessment within a workable time frame and involve multiple Indigenous communities on the selection of VCs. Furthermore this requirement could lead to unrealistic expectations that consultation should be taken in respect to VCs and that some or all VCs identified by a First Nation, should be included in the assessment. CEPA believes the principle of Indigenous engagement on VC selection still be contained in



the draft Guidance Document but be predicated on terms such as “where feasible”, “where practical”. Alternatively, the guidance could suggest that a proponent or RA undertake “reasonable efforts” to seek feedback from First Nations on VCs, spatial and temporal boundaries, mitigation recommendations, etc.

PROCESS

With respect to the processes outlined in the Guidance Document, CEPA members have the following comments:

- Pertaining to the handling of confidential information, it is outlined that proponents should consider description of a specific site in a general way. Further guidance is required on how a proponent ought to avoid/mitigate a potential impact on a traditional land use site without knowing the specific locations.
- Additional information on timing triggers for TLU studies is needed in order to inform the environmental and socio-economic assessment and not just to supplement it.
- CEPA members request that the Guidance Document address situations where overlap regarding different traditional activities/practices occurs. For example, where unoccupied Crown lands are used for traditional hunting by two or more Indigenous communities.
- The Guidance Document should identify a process to incorporate information into the ESA and consequently outline mitigation when confidentiality agreements are in place.
- Further guidance on how and to what extent “community knowledge and ATK should factor into decisions around temporal boundaries.” is requested to provide clarity.

CONCLUSION

In closing, CEPA is supportive of the efforts of the Canadian Environmental Assessment Agency to clarify the roles, duties and expectations of all the key players in the context of a project review. In order to ensure the guidance document effectively achieves this objective, our members have the following recommendations:

1. The Guidance Document should not extend beyond the scope of impacts of a project to the environment on the “current use of lands and resources [by Aboriginal peoples] for traditional purposes”;
2. Further clarity of key terms should be provided in order to ensure expectations are well understood; and
3. The process outlined in the Guidance Document should be more detailed in specific areas (identified above).

Again, thank you for the opportunity to provide comments on the Technical Guidance for Assessing the Current Use of Lands and Resources for Traditional Purposes under the *Canadian Environmental Assessment Act*. If you have any questions or concerns, please do not hesitate to contact the undersigned.

Sincerely,

Sonya Savage
Senior Director, Policy and Regulatory