



Douglas Eyford
Aboriginal Affairs and Northern Development Canada
10 Wellington, 8th floor
Gatineau, QC K1A 0H4

28 November 2014

Dear Mr. Eyford,

RE: Reviewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing section 35 Aboriginal Rights

The Canadian Energy Pipeline Association (CEPA) would like to thank the Ministry of Aboriginal Affairs and Northern Development Canada (AANDC) for the opportunity to comment on the Ministry's interim policy, *Reviewing the Comprehensive Land Claims Policy: Towards a Framework for Addressing section 35 Aboriginal Rights*. CEPA members operate 115,000 kilometres of transmission pipeline in Canada. Our members 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 is encouraged by AANDC's efforts to renew the government's framework for addressing section 35 Aboriginal rights. We believe the intentions, as articulated in this document, are a good starting point for discussion with partners. AANDC has indicated that the overriding objective of reconciliation will be consistent with the Crown's efforts to consult with and, where appropriate, accommodate Aboriginal Peoples. CEPA believes that the Crown's current effort on Aboriginal consultation requires significant improvement and should be dealt with in conjunction with efforts to address section 35 Aboriginal rights.

The lack of accountability and clarity in the Crown consultation process has been a primary reason for the delay and uncertainty with respect to the regulatory process for pipeline projects. In June of 2008 CEPA submitted a letter to multiple Ministers, urging prompt action by the federal government on issues of Crown consultation. CEPA believes that further actions regarding the recommendations made in our 2008 letter are needed. Specifically we are seeking:

- 1. A mechanism through which the federal government would provide a Crown consultation needs assessment early in the project planning phase given the specific case, thereby ensuring early determination of the appropriate approach and level of consultation.**
- 2. A project management function within the federal government to oversee Crown consultation from beginning to end, including clear accountabilities, timelines and departmental assignment to manage and track crown consultative processes.**
- 3. Transparent intelligence sharing between departments regarding various consultation activities.**
- 4. Presentation of clear evidence to regulators that the Crown's fiduciary duty has been fulfilled and that the process has come to a satisfactory conclusion in a timely manner.**

CEPA believes the interim policy does address these critical concerns and if acted upon in an efficient and timely manner, significant progress can be made. Below we have provided specific comments regarding each of the above recommendations as they relate to the interim policy.



1. A mechanism through which the federal government would provide a Crown consultation needs assessment early in the project planning phase given the specific case, thereby ensuring early determination of the appropriate approach and level of consultation.

Due to the unique nature of transmission pipeline projects, which transport energy over long distances and often cross multiple jurisdictional boundaries, our member companies interface with many more Aboriginal groups on any given project than a single site project would. As such, our needs for Crown consultation are acute and particularly complex. On any given project, affected Aboriginal groups, the Crown and pipeline companies must establish a common approach that can support long term cooperation. CEPA member companies are committed to active, early engagement of local and affected aboriginal communities. Crown consultation that is effective, efficient, respectful, clear and timely is critical.

CEPA is encouraged with the Ministry's intention to pursue "other constructive arrangements" in the reconciliation process. Specifically, we see value in establishing consultation and accommodation protocols. If done effectively, these types of arrangements could establish greater clarity, especially in the early stages of a project. We recommend that these types of agreements include a mechanism to ensure an early determination of the appropriate approach and establish the level of consultation needed.

2. A project management function within the federal government to oversee Crown consultation from beginning to end, including clear accountabilities, timelines and departmental assignment to manage and track crown consultative processes.

The interim policy recognizes "the importance of upholding the honour of the Crown, which requires Canada and its departments, agencies and officials to act with honour, integrity and fairness in all its dealings with Aboriginal peoples." In order to uphold this important principle, a strong coordination role is needed, especially given the fact that the Crown's specific duties require action to be taken by various federal departments. In relation the Crown's duty to consult on major projects, this role is currently the responsibility of the Major Projects Management Office (MPMO). However, we believe that the MPMO's responsibility should be enhanced to include stronger leadership in the implementation of federal guidelines and agreed approaches relating to the Crown's duty to consult.

In order to successfully plan and deliver new infrastructure projects, it is critical that the regulatory review by federal departments, including appropriate consultation, be coordinated and completed in an effective and timely manner. The MPMO has the mandate to enable horizontal coordination of federal departments' review of major project. Through a project agreement, the roles of departments are identified, a timeline is established, and work plans are developed as well as tools for monitoring progress on the project. The MPMO also enables the Deputy Ministers' Committee to address strategic and cross-cutting issues as they arise.

CEPA believes that the Crown's responsibilities relating to Aboriginal engagement goes beyond the duty to consult. To this end, we support the establishment of the Major Projects Management Office West (MPMO West) to act as a single window for First Nations to engage with the Government of Canada on issues related to West Coast energy infrastructure development. We believe this is an important step towards increasing Aboriginal engagement in energy developments in Western Canada. However, in order to realize the full potential of this regional office, clear goals and accountabilities need to be established.

Although CEPA is supportive of their mandate and priorities, the office must ensure the activities are not interpreted as consultation. A more clear distinction between Aboriginal consultation and engagement and more clarity of process around the Crown's duty to consult would be of significant value in this context.



3. Transparent intelligence sharing between departments regarding various consultation activities.

The interim policy does recognize the need for coordination between federal departments and agencies “to implement treaties in a timely and diligent manner.” We believe that this is of critical importance not only for treaty negotiations but also within the context of the Crown’s responsibilities regarding Aboriginal groups. A venue for collaboration between the various provincial and federal Ministries is essential for doing so in a timely manner. This venue must outline transparent, consistent and meaningful metrics for tracking performance. For the many companies that operate in both federal and provincial jurisdiction, conflicting policy directions are a detriment to making meaningful advancements in aboriginal engagement. Simple, clear and comparable performance information should be provided publicly.

4. Clear evidence to regulators that the Crown’s fiduciary duty has been fulfilled and that the process has come to a satisfactory conclusion in a timely way.

CEPA supports the Ministry’s intentions to create consistency between the overriding objectives on reconciliation and the Crown’s efforts to consult. As indicated in the interim policy, the Crown’s efforts in this regard are guided by the *Updated Guidelines for Federal Officials to Fulfill the Duty to Consult*. We believe that these guidelines should better reflect the need for a review of the Crown’s consultation efforts on a given project to ensure that the process has come to a satisfactory, timely conclusion. We believe that this practice will be of benefit to the Crown consultation process, as well as other Aboriginal-Crown negotiations.

Concluding remarks

CEPA member companies have a strong record of upholding our responsibility to consult with Aboriginals on many aspects pertaining to our projects. In addition, our primary regulator, the National Energy Board (NEB), has a 50 year track record of effective process to gather and confirm evidence related to critical infrastructure decisions.

To this end, CEPA is encouraged by the Ministry’s recognition of the “importance of working jointly with Aboriginal groups to identify timely and effective processes for the negotiation of modern treaties and other constrictive arrangements that address Section 35 rights.” Although provincial and federal governments are responsible for settling treaties, land claims and programs, the lack of progress made by the government has hindered the ability of our member companies to move forward on critical infrastructure projects. By settling aboriginal land claims and treaties effectively and in a timely manner, greater certainty is created for resource development.

CEPA appreciates the opportunity to provide comments on the interim policy. We believe that the intentions found within the document can be a good starting point for discussion with partners. CEPA looks forward to these intentions being operationalized in a meaningful way across the relevant federal departments.

Yours sincerely,

Philippe Reicher
VP, External Relations