May 3, 2019

Hon. Jonathan Wilkinson
Minister of Fisheries, Oceans and the Coast Guard
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Dear Minister Wilkinson:

The Canadian Energy Pipeline Association (CEPA) is pleased to provide comments on the Discussion Paper, “Proposed Modifications to the Applications for Authorization under Paragraph 35(2)(b) of the Fisheries Act Regulations.” CEPA members collectively operate 117,000 kilometres of transmission pipeline in Canada. These energy highways transport approximately 1.4 billion barrels of liquid petroleum products and 5.6 trillion cubic feet of natural gas each year.

With over 60 years of experience in the construction of pipelines, including tens of thousands of watercourse crossings, CEPA’s members have developed best practices and standard mitigation methods with high standards for the protection of the environment. The environmental assessments and permit applications that are required prior to construction have also enabled CEPA members, as well as Fisheries Authorities, to develop a very good understanding of the potential environmental effects of watercourse crossings. CEPA and its members are committed to ongoing dialogue and engagement with Fisheries and Oceans Canada (DFO) on this matter.

After reviewing the discussion paper, CEPA and its members have the following recommendations for consideration.

Delegation to the NEB

**Recommendation 1: The Memorandum of Understanding (MOU) between the DFO and the National Energy Board (NEB) remain in place under the mandate of the newly formed Canadian Energy Regulator should Bill C-69 receive royal assent.**

CEPA supports a review of the Fisheries Act that adheres to the principle of avoiding unnecessary duplication. The 2012 changes to the Fisheries Act enabled the NEB and DFO to sign a MOU which gave the NEB the responsibility to assess impacts of pipeline watercourse crossings on fisheries during reviews of federally-regulated pipelines. This significantly reduced the overlapping authority between the NEB and DFO by placing this responsibility with the NEB as the single, best-placed regulator. This was a positive step that not only created a more efficient permitting process, but also created better outcomes by reinforcing accountability with a single regulator.

The NEB employs experts who are knowledgeable about pipeline construction and operation. They have the expertise to not only assess impacts on fisheries, but also to identify safety and environmental effects of pipeline projects and corresponding mitigation measures. Although other federal government
departments have expertise specific to their areas, it is the NEB, with nearly 60 years of experience, that has the expertise specific to pipelines.

Under the current MOU, the NEB conducts site-specific reviews of the in-stream work to determine whether a project could result in serious harm to fish, including aquatic species-at-risk, based on measures identified by the DFO. If the NEB finds that in-stream activity may result in serious harm, it refers the project to DFO for review and a decision as to whether an authorization is required. However, if the NEB determines the project will not result in serious harm, the project applicant does not have to make a separate submission to DFO for review. The NEB’s assessment of impacts to fish and fish habitat takes place during its comprehensive review of pipeline applications, which has proven to be effective, efficient and outcome-oriented.

The MOU also gives the NEB the power to monitor a project to ensure that it complies with the conditions of a Fisheries Act Authorization after it has been issued. This complements the NEB’s lifecycle oversight of pipelines from design to abandonment. This integrated approach considers the full range of safety and environmental concerns and allows both industry and the regulator to work towards effectively achieving better results, while simultaneously ensuring federal objectives are met.

Although we strongly support having the MOU between the DFO and the National Energy Board (NEB) remain in place we also request further clarity regarding the triggers the NEB/CER would use to refer material for review by DFO. For example, currently the Operations and Maintenance Notification to the NEB does not address activities not involving ground disturbance within the riparian reserve strip of identified critical habitat of SARA-listed aquatic species. DFO’s measures to avoid serious harm to fish and fish habitat identifies riparian vegetation is not to be removed if the riparian area is identified as part of the critical habitat of an aquatic listed species-at-risk. With this, such activities should undergo agency review. Informal communication on specific crossings is needed between proponents and the regulator after DFO has completed its review of a component requested by the NEB/CER.

Assessments and regulatory guidance

Recommendation 2: DFO should introduce revised DFO-issued Operational Statements and other supporting tools.

By using DFO-supported tools that are based on science, fact and evidence, assessment of watercourse crossings and mitigation of impacts can be carried out without the need for DFO Authorization. CEPA believes that DFO resources should be focused on the review of works that have the potential of causing significant impacts that cannot be mitigated using accepted practices, or where impacts are uncertain.

Further to this point, project proponents should be permitted to continue the practice of engaging a qualified environmental professional to prepare a self-assessment for a project and identify appropriate mitigation methods to address any potential impacts. This allows professionals with knowledge and expertise of aquatic habitat, pipeline construction and operations to apply best practices to meet regulatory requirements. To further enhance this practice, CEPA believes DFO should introduce revised
DFO-Issued Operational Statements that existed under the previous Act. These Operational Statements provided information to proponents regarding how an assessment should be completed to determine whether the project causes serious harm to fish and when a review by DFO would be required. To ensure agency consistency, administration of Operational Statements should be incorporated under the NEB/CER and DFO MOU. Finalizing other tools such as the Pipeline Associated Watercourse Crossings Fish and Fish Habitat Impact Tool (PAWC), 5th Edition, and modifying it to deal with the reintroduction of Harmful Alteration, Disruption or Destruction of fish habitat (HADD) would be beneficial in standardizing how proponents complete their assessments. Adopting and officially endorsing the online self-assessment tool will help standardize how proponents assess the effects of their respective projects on watercourse crossings, provide for a systematic review as well as added certainty that projects are compliant with the intent of the legislation.

In terms of other supporting tools, CEPA would suggest externally developed standards be incorporated into regulation. The PAWC Guideline is one such standard, providing pipeline companies and their contractors with information to carry out watercourse crossings in a safe and environmentally responsible manner. A wide range of stakeholders participated in its development and revision, including industry associations (CEPA, Canadian Association of Petroleum Producers, and Canadian Gas Association), the DFO and the NEB. External standards such as PAWC, developed collaboratively, provide valuable operational implementation guidance to proponents, reflecting the most up-to-date advances in crossing technologies and mitigation methods. As such, we recommend their continued usage.

**Provincial requirements**

**Recommendation 3: DFO and provincial authorities should further enhance the coordination of federal and provincial requirements for the protection of fish and fish habitat.**

CEPA members believe that the current regulatory framework provides appropriate regulatory oversight of pipeline projects, including a robust environmental assessment process. Jurisdictional boundaries between federal and provincial responsibilities are clear and there are processes in place (including substitution and delegation) to avoid duplication in the regulatory process.

Provincial regulators, such as the British Columbia Oil and Gas Commission (BCOGC) and the Alberta Energy Regulator (AER), have similar project review processes in place for pipelines that are contained within provincial boundaries. These provincially regulated pipelines continue to be subject to the regional requirements of DFO. CEPA supports opportunities for DFO and provincial authorities to further enhance the coordination of federal and provincial requirements for the protection of fish and fish habitat. Reintroduction of HADD in the proposed legislation could result in a protracted regulatory process that could hinder operational and maintenance activities. An example would be where one CEPA member worked with the BCOGC to obtain an authorization under Section 11 of the BC Water Sustainability Act to permit low-risk instream works required for operational and maintenance activities. This permit allows for these works to proceed under a 21-working day notification process. Changes to the Fisheries Act and associated permitting process could negate such efforts by companies.
to streamline permitting under provincial jurisdiction. Development of supporting tools and a streamlined review process is essential to facilitate these mandated works.

An example of a provincially regulated project that was reviewed by DFO in 2013 is provided in Appendix I. The project met the measures to avoid causing harm to fish and fish habitat; however, at the time, the project proponent elected to submit the project to DFO for a review due to the uncertainty in the new measures. DFO determined the project met the appropriate requirements and determined that the project was “not reviewable.”

Notification to Indigenous Communities

Recommendation 4: CEPA recommends that DFO provide greater clarity and efficiency with respect to the process for notification to Indigenous communities.

CEPA understands the government’s intention is for the notification to complement, not replace, the duty to consult, and would like to see the intention clearly communicated in the regulation and supporting policy documents. It is currently unclear how the proposed approach would fit into the regulatory process. To ensure procedural fairness, CEPA suggests the applicant should have an opportunity to review Indigenous knowledge provided and respond to any information about the proposed project’s potential impacts on Indigenous rights.

Additionally, federal and provincial agencies currently have differing processes for identifying potentially affected Indigenous groups and consultation boundaries. This often leads to inconsistent lists of groups, posing a risk by creating uncertainty in the consultation process. CEPA would suggest DFO review and consider the existing processes and consultation boundaries as part of the plan to work with Indigenous groups to identify the notification areas. In addition, to understand and manage potential risks to project schedules, further information is required regarding the timeline for identifying notification areas with Indigenous groups as well as any plans, processes or timeframes for updating or changing the areas in the future.

Closing

CEPA and its members look forward to continuing our participation in the ongoing work on the Fisheries Act and would welcome the opportunity to further engage with DFO on the ongoing regulatory review. Please do not hesitate to contact the undersigned if you have any questions or require clarification regarding any of the comments made above.

Sincerely,

[Signature]
Jim Campbell
Vice President, Business Environment
Appendix I – Case study

1.1 Provincially Regulated Pipeline Construction of New Pipeline

Sturgeon River Crossing (Pembina Pipeline Corporation)

**Synopsis:** The following Case Study is one example of the many watercourse crossings that have been undertaken by the pipeline industry since the legislative changes were made in 2012. Because of the uncertainty associated with the regulatory changes, Pembina Pipeline Corporation sent a request to DFO to review the fisheries assessment to determine whether an approval was required. DFO determined that this project met the self-assessment guidance provided on the DFO website under Diversion/Dewatering, and did not contravene any SARA prohibitions, therefore a review or notification was not required.

**Project description:** Pembina Pipeline Corporation constructed a 27-km long pipeline from Namao Junction to the Redwater Fractionator in Alberta. Two lines, one 24” and one 16” outside diameter, were installed in the trench. The pipeline crosses the Sturgeon River upstream from its confluence with the North Saskatchewan River. The subsurface geotechnical conditions precluded a trenchless crossing, so an isolated crossing of the river was made using a dam and pump method. A qualified consulting firm was commissioned to conduct aquatic surveys of fish and habitat the year before construction based on the proposed design and scope of work. Through this assessment, the Qualified Environmental Professional (QEP) determined requirements for incorporation of measures to avoid serious harm to fish and fish habitat.

The Sturgeon River is known to support sport fishing. In-stream construction of the crossing took place during low flow conditions and outside of the Restricted Activity Period as set out by Alberta Environment and Parks. Accepted standards and best practices for instream works were used to avoid serious harm to fish and fish habitat. A QEP conducted a fish salvage for the isolated work area and fish were released unharmed downstream of the site. A QEP provided environmental monitoring to ensure effective implementation of site isolation and watercourse bypass for the duration of construction to ensure the works did not result in downstream sedimentation or alter flows of clean water downstream of the site. Following completion of the works the stream crossing was reconstructed to restore pre-construction conditions with no adverse alteration to instream habitat (i.e. substrate), cross section, longitudinal profile and or fish passage. The bypass and isolation measures were decommissioned without impact to water quality and/or flows. Restoration measures included seeding/planting to restore riparian habitat values. Post construction monitoring, including aerial and ground inspections during the following spring and summer, has shown the crossing had no impact on fish and habitat.

**Chronology of Events:**

- **August 2013:** Aquatic habitat and fish population studies were carried out at adjacent to the proposed crossing location.
- **February 12, 2014:** Submission to DFO with a request for review.
• March 5, 2014: Response received from DFO indicating the project did not require a review.
• June 22, 2015: Start of construction activities in the riparian zone.
• October 27, 2015: Completion of construction activities.
• April 16 – June 30: Restricted Activity Period.

Recommendations: This project demonstrates that the effective implementation of proven construction and mitigation measures during the crossing of watercourses by pipelines prevent serious harm to fish and protect fish habitat. Both the pipeline industry and DFO staff understand the potential effects of watercourse crossings and have worked to develop best practices for these crossings. There is little added value in having DFO review crossings where the impacts are known and can be mitigated. Resources should be focused on reviewing projects where impacts are uncertain or significant and in assisting project proponents in developing appropriate fish protection plans.
Photo 1 – Pembina Pipelines, Sturgeon River Crossing, Pre-construction
Photo 2 – Pembina Pipelines, Sturgeon River Crossing, Upstream Dam Installation
Photo 3 - Electrofishing
Photo 4 – Pembina Pipelines, Sturgeon River Crossing, Installation of pipes (17 hours in-stream)
Photo 5 – Pembina Pipelines, Sturgeon River Crossing, One year after construction