



Canada Energy Regulator Régie de l'énergie du Canada

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LETTER DECISION

File OF-Fac-Gas-M182-2019-02 01
22 July 2020

Mr. Terry Jordan
Senior Legal Counsel
Many Islands Pipe Lines (Canada) Limited
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Dear Mr. Jordan:

**Many Islands Pipe Lines (Canada) Limited (MIPL(C)L)
Application for the Pierceland Supply Project (Project) under Section 58 of the
National Energy Board Act (NEB Act)**

On 12 June 2019, the then National Energy Board (NEB) received an application from MIPL(C)L (the Application) for the Project. The Commission of the Canada Energy Regulator (Commission) also considered all submissions received from interested parties, including Big Island Lake Cree Nation (BILCN), Cold Lake First Nations (CLFN), Métis Nation -Saskatchewan (MN-S), and B. Henetiuk and subsequent filings from MIPL(C)L dated 20 September 2019, 9 October 2019, 24 October 2019, 8 November 2019, 28 November 2019, 23 December 2019, 3 February 2020, 16 April 2020, 20 April 2020, 7 May 2020, 29 May 2020 and 9 June 2020.

On 28 August 2019, the *Canadian Energy Regulator Act* (the CER Act) came into force and the NEB became the Canada Energy Regulator (CER). Section 36 of the transitional provisions associated with the CER Act states that applications pending before the NEB immediately before the commencement day are to be taken up before the Commission and continued in accordance with the NEB Act.

For the reasons set out below, the Commission has decided to grant the exemption under section 58 of the NEB Act, the effect of which is to approve the Project. The Commission has issued Order XG-017-2020. A copy of the Order and its Schedule A, which together, outline the specifics of the Project as approved, is attached. As indicated in the Order, the Commission grants MIPL(C)L an exemption from the provisions of paragraph 30(1)(a) and section 31 of the NEB Act for the Project. The Commission has considered all of the submissions and for the reasons set out in the following sections, the Commission finds that the benefits of the Project outweigh the burdens and that approval of the Project is in the public interest. However, the Commission requires MIPL(C)L to apply for Leave to Open pursuant to section 213 of the CER Act, prior to the facilities being placed in operation.

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1.0. Project Overview and Process

1.1. Application and Project Overview

MIPL(C)L applied pursuant to section 58 of the NEB Act for an exemption from the provisions of sections 30, 31 and 47 of the NEB Act, the effect of which is to approve the construction and operation of the Project.

MIPL(C)L's Application sought leave for the construction and operation of an approximate 30.3 km long, 20-inch outside diameter (OD) non-sour, natural gas pipeline extending from a riser adjacent to a new NOVA Gas Transmission Ltd. (NGTL) meter station in Alberta (SW 12-62-01 W4M) to a tie-in point adjacent to an existing TransGas Limited compressor station in Saskatchewan (NE 07-62-24 W3M). The Project also includes a new MIPL(C)L compressor station to be constructed inside the Saskatchewan border as well as a construction staging area and access on previously disturbed land. The nearest village is Pierceland, Saskatchewan located approximately 500 m north of the Cold Lake-Beacon Hill NPS 20 Loop.

The Project will be located on both Crown and freehold land crossing the Alberta/Saskatchewan border. The proposed pipeline route will parallel the existing Alberta Border – Beacon Hill pipeline for the majority of the route where total land area for the pipeline Right-of-Way (ROW) is 77.639 ha. The new permanent ROW will be 26 m wide. The compressor station will be located on 2.661 ha of leased Saskatchewan provincial crown land. An access road will also be required and will lease 0.358 ha of Saskatchewan provincial crown land. Temporary workspace (TWS) will be required for the construction of the Project.

The purpose of the Project is to meet demand. A supply expansion is required to meet customer requirements and future-dated transportation contracts. Delivery demand growth in northwest Saskatchewan is forecasted to continue for the next five to ten years and declining Saskatchewan gas production is further increasing requirements for Alberta supply imports.

1.2. The Process

On 18 July 2019, the CER notified the 32 Indigenous communities potentially affected by the Project indicating that an application was filed with the CER, and that Indigenous peoples could provide a letter of comment to the CER regarding the Project. The CER notification also included a copy of a letter from Natural Resources Canada clarifying the federal Crown's approach to fulfilling any potential duty to consult that may arise on projects regulated by the CER. Specifically, the federal Crown relies to the extent possible on the CER processes to fulfil its duty to consult, as the CER has the technical expertise and mandate to consider and address project impacts, including those affecting the rights and interests of Indigenous peoples.

On 5 September 2019, CLFN filed a letter with the CER submitting that the MIPL(C)L Pierceland Supply Project and NGTL Saddle Lake Lateral Loop Project are contiguous, and together they represent 50.9 km of new pipeline that cross the Alberta/Saskatchewan border. Subsequently, CLFN argued that by filing separately, MIPL(C)L and NGTL were project splitting.

On 2 December 2019, the Commission issued a decision with reasons with respect to the project splitting concern raised by CLFN. There, the Commission was guided by previous regulatory decisions indicating that evidence of deliberate project splitting that would constitute an abuse of process or a serious waste of resources by the Commission or other parties, or an attempt to avoid jurisdiction, may be cogent reasons to have applications proceed in aggregate. There was no evidence of any of those factors before the Commission. The Commission also noted that consultation requirements and cumulative effects assessments are not generally affected by whether project applications proceed in aggregate or individually, as consultation and cumulative effects assessments are generally required where potentially impacted parties are identified and where residual project effects are expected after mitigation measures have been applied. Based on these and other considerations noted in the decision, the Commission was not persuaded there were sufficient grounds to support a decision to combine the assessment of the Projects.

On 24 March 2020, the Commission issued a letter on the Legislated Time Limit and decision on process where it assigned the Application a Category C designation. The Commission also set out process steps in this letter to enable interested parties to file written comment on the evidence to date once all Information Request (IR) responses were received and for MIPL(C)L to reply before the CER completed its Application assessment. Written comments on the evidence were received from CLFN and MN-S on 28 April, 1 May and 13 May 2020.

In response to supplemental filings No. 3 and No. 4 received from MIPL(C)L after the deadline for interested parties to file written comment on the evidence, the Commission issued Procedural Updates No. 1 and No. 2 on 8 and 19 June 2020, respectively, providing additional opportunity for interested persons to comment on the filings. No comments were received in response to Procedural Updates No. 1 or No. 2.

2.0. The Assessment of the Application

2.1. Engineering Matters

In its original Application, MIPL(C)L proposed crossing two unnamed creeks via horizontal direction drilling (HDD) and provided preliminary HDD drawings for additional details. Later, in its second supplemental filing, MIPL(C)L provided an HDD Feasibility Report for the two unnamed creeks. MIPL(C)L also proposed using HDD or a trenchless uncased crossing method to cross roads.

MIPL(C)L requested exemption from the provisions of section 47 of the NEB Act, namely the requirement to apply for Leave to Open (LTO). MIPL(C)L stated that exemption from this requirement will provide maximum flexibility to MIPL(C)L for timing of construction of the pipeline and compressor station, and the associated tie-ins. Additionally MIPL(C)L requested that if exemption to section 47 of the NEB Act is not granted for the entire Project, that the Project be separated into individual LTO phases (i.e. pipeline independent from the compressor) which will support the scheduling of outages needed to minimize their duration and impact to MIPL(C)L's shipper.

Views of the Commission

The Commission notes that MIPL(C)L did not provide a Contingency Plan for the crossing of two unnamed creeks via HDD. The Commission imposes **Condition 11** which requires MIPL(C)L to file a Contingency Plan for the crossing of the two unnamed creeks.

Further, the Commission notes that MIPL(C)L did not provide detailed information on road crossing methods. Therefore, the Commission imposes **Condition 10** which requires MIPL(C)L to file the results of the Project's Detailed Feasibility Assessments and Contingency Plans for each road crossing if, and where, MIPL(C)L intends to employ HDD.

The Commission denies MIPL(C)L's request for exemption from the requirement to apply for LTO pursuant to section 47 of the NEB Act, and reminds MIPL(C)L to make such application to the Commission pursuant to section 213 of the CER Act prior to the facilities being placed in operation. However, the Commission is imposing **Condition 12** which allows MIPL(C)L to identify auxiliary and low pressure piping in the Pierceland West Compressor Station it proposes to be exempt from LTO.

Pursuant to **Conditions 1 and 14** of the Order, MIPL(C)L must file any technical specification updates for the Project listed in the Application concurrently with its LTO application. Technical specification updates are limited to differences in pipe length, diameter, wall thickness, grade or material that do not impact any other information provided in the Application. Any other changes will require advance approval from the Commission. Once filed by MIPL(C)L, the Commission will evaluate all final technical specification updates and issue an Amending Order as appropriate.

For clarity, MIPL(C)L has the option to apply for LTO in phases as it sees fit and the Commission will consider each application separately.

2.2 Public Engagement and Land Matters

The new NPS 20 Pierceland Supply pipeline and Pierceland West compressor station are located on private land (66.3%), Crown land (32.8%), and road allowances (0.9%) and crosses mainly agricultural land (e.g., cultivated, hay, tame pasture), upland vegetation, cleared land, urban or developed land, and anthropogenic disturbance.

MIPL(C)L stated that the Project will require the acquisition of approximately 101.4 ha of new permanent land rights. TWS for soil storage, access and general construction activities will require approximately 42.54 ha of land. The pipeline will be placed in a new 26 m wide ROW, which will parallel the existing Alberta Border – Beacon Hill pipeline for the majority of the route (where possible) as well as Highway 55 in Saskatchewan.

MIPL(C)L stated that it considered the following factors when selecting the proposed pipeline route: environmental factors such as the presence of waterbodies, existing linear infrastructure, landowner input, and economics. A desktop study was performed to identify a preliminary route that sought to parallel existing infrastructure, and field studies were performed to refine the route.

MIPL(C)L confirmed that it will acquire land in compliance with the applicable sections of the NEB Act, including sections 86 and 87. MIPL(C)L also confirmed that where the Project is expected to cross or is adjacent to other existing linear facilities or developments or where road access is required, MIPL(C)L will obtain the necessary agreements, consents and approvals from each third-party owner in accordance with requirements of the applicable legislation.

In its Application, MIPL(C)L stated that stakeholders were contacted via open house, newspaper ads, mailout of a Project information package, in-person visits or telephone calls and fax or email correspondence. An Open House was held on 4 October 2018. Meetings with landowners commenced 1 November 2018 to discuss right of entry agreements for the purpose of conducting environmental studies and land surveys. Specific concerns regarding the proposed pipeline route were raised by Mr. B. Henetiuk and a landowner in SE 04-62-26-W3M.

Views of Landowners

In a letter to the CER dated 12 December 2019, Mr. Henetiuk stated that he and his wife were against this pipeline passing through their property in any form.

The Landowner in SE 04-62-26-W3M expressed concerns during negotiations with MIPL(C)L regarding the number of pipeline crossings currently on the north half of his land.

MIPL(C)L's Reply

In response to Mr. Henetiuk's letter, MIPL(C)L stated that options for a route across the Henetiuk lands had been discussed in an attempt to accommodate Mr. Henetiuk's concerns. On 3 February 2020, MIPL(C)L included a map in its supplemental filing No. 1 showing that the pipeline route no longer crosses Mr. Henetiuk's land.

In response to the concerns from the Landowner in SE 04-62-26-W3M, by agreement, MIPL(C)L moved the pipeline route to the south half of the property.

MIPL(C)L stated that negotiations with landowners are still ongoing, including negotiations about land acquisition and the impact the Project will have on future land subdividing opportunities. Regarding unresolved issues, MIPL(C)L stated that it would continue negotiations with property owners/occupants to try to resolve any issues in order to secure land rights. MIPL(C)L further stated that after construction is complete, operational teams will be maintaining records of contact to document communication with stakeholders, and completed tasks as required.

Views of the Commission

The Commission notes that routing decisions involve the consideration of many factors, including environmental, archaeological and engineering factors, as well as consultation with landowners, provincial governments, municipalities, and Indigenous peoples. The Commission appreciates and acknowledges MIPL(C)L's efforts to minimize the potential environmental impact of the Project by proposing a route that parallels existing ROWs, and minimizes the taking up of new lands wherever practicable. The Commission finds that MIPL(C)L's route selection, land requirements, and land acquisition process are acceptable for the scale and scope of this Project.

The Commission is of the view that MIPL(C)L adequately and appropriately identified stakeholders and potentially affected landowners, as well as developed appropriate engagement activities. The Commission recognizes that MIPL(C)L has engaged landowners along the proposed pipeline route and considered their input, resulting in two instances where landowner routing concerns were accommodated (Henetiuk and landowner in SE 04-62-26-W3M).

The Commission also notes that MIPL(C)L has committed to continue negotiations with property owners or occupants to resolve issues including after construction of the Project is complete. For example, regarding the new staging area, MIPL(C)L has committed to engage two new nearby landowners regarding any concerns they may have with the use of the pre-existing staging area. The Commission imposes **Condition 5**, for a Commitments Tracking Table to increase MIP(C)L's transparency regarding implementation of all commitments it made throughout the proceeding. Based on an evaluation of the Application and supplemental filings, and that MIPL(C)L continues to engage landowners and report on progress, the Commission is satisfied that MIPL(C)L has addressed the guidance and requirements outlined in the Filing Manual, and provided in the Online Application System.

2.3. Engagement with Indigenous peoples

MIPL(C)L stated that it identified potentially affected Indigenous communities based on the location of the Project within asserted traditional territories, regional boundaries, and/or areas of interest. MIPL(C)L used desktop research supplemented by its own experience in working with Indigenous communities on other projects in the area as well as feedback from the Alberta Consultation Office. MIPL(C)L also contacted the NEB on 30 January 2019 to request a Traditional Territory Analysis to provide a list of potentially impacted Indigenous communities. As a result, MIPL(C)L identified and engaged with the following 32 Indigenous communities peoples (listed in alphabetical order):

- Alexander First Nation
- Beaver Lake Cree Nation
- Big Island Lake Cree Nation
- Birch Narrows (Turnor Lake) First Nation
- Buffalo Lake Métis Settlement
- Buffalo River Dene First Nation
- Canoe Lake Cree First Nation
- Chipewyan Prairie (Janvier) First Nation
- Cold Lake First Nations
- East Prairie Métis Settlement
- Elizabeth Métis Settlement
- Fishing Lake Métis Settlement
- Flying Dust First Nation
- Frog Lake First Nation
- Gift Lake Métis Settlement
- Heart Lake First Nation
- Island Lake (Ministikawan) First Nation
- Kehewin Cree Nation
- Kikino Métis Settlement
- Makwa Sahgaiehcan First Nation
- Métis Nation of Alberta
- Métis Nation of Alberta – Region 2
- Métis Nation of Saskatchewan
- Métis Nation of Saskatchewan – Western Region I
- Onion Lake First Nation
- Paddle Prairie Métis Settlement
- Peavine Métis Settlement
- Red Pheasant First Nation
- Saddle Lake Cree (Onihcikiskowapowin) Nation
- Sîkîp Sâkahikan (Waterhen Lake) First Nation
- Thunderchild First Nation

- Whitefish (Goodfish) Lake First Nation #128

MIPL(C)L stated that preliminary engagement commenced with via fax and follow-up mailout to the 32 potentially affected Indigenous communities on 4 March 2019 and included notification and provision of Project information for review, including a Project description and preliminary map of the potential Project route. Beaver Lake Cree Nation (BLCN), Red Pheasant First Nation, and Thunderchild First Nation also received an Open House invitation on 10 April 2019.

Written responses to the MIPL(C)L mailout were received from BLCN, CLFN, and MN-S. Written responses were not provided by Red Pheasant or Thunderchild First Nations, rather, MIPL(C)L entered into benefits and consultants agreements with these two First Nations to employ monitors and Elders in relation to construction activities.

Views of Beaver Lake Cree Nation

BLCN requested a legible copy of the Project map as the fax copy was not legible. BLCN also requested a meeting to review the Project and establish a budget for initial consultation.

Views of Cold Lake First Nations

On 30 August 2019, CLFN stated that the proposed NGTL Saddle Lake Lateral Loop Project and the MIPL(C)L Pierceland Supply Project were contiguous and together represent 50.9 km of new pipeline that cross the Alberta/Saskatchewan border. CLFN argued these Projects should not be considered as unique under section 58 of the NEB Act, and that by filing separately, MIPL(C)L and NGTL were project splitting in an effort to speed up the NEB process. CLFN argued that they should be considered one project and not be split into separate s. 58 applications. CLFN argued this amounted to a piecemeal project application strategy, allowing NGTL and MIPL(C)L to simplify the process by not considering overall impacts and limiting the transparent review of potential impacts through fewer filing requirements (i.e., provision of Environmental and Socio-Economic Assessments (ESAs)). CLFN argued this may also minimize potential effects by failing to holistically consider the cumulative impacts of the NGTL Saddle Lake Lateral Loop Project and the MIPL(C)L Pierceland Supply Project. CLFN stated their concern about the burden imposed upon them to review the Project, an effort that diverted their resources away from other matters of interest to them. CLFN stated they had made several attempts to contact MIPL(C)L for further information but MIPL(C)L had not responded.

On 4 October 2019, CLFN filed a letter with the CER in response to MIPL(C)L's 20 September 2019 response. CLFN stated that as a result of the Project's potential impacts to their rights and interests, funding was requested for their work in reviewing the Project, and adequate advance funding to support a traditional use study to inform mitigation planning for the Project.

Views of Métis Nation – Saskatchewan

On 17 October 2019, MN-S wrote to the CER regarding the proposed mitigation measures provided in the environmental assessment summary included in the Project Application and noted that 2019 field surveys had not been made available. However, MN-S stated that the proposed mitigation strategies appeared to be sufficient to minimize residual impacts to native vegetation communities in the area. MN-S stated that no resources were provided to assist the MN-S in its engagement on the Application and requested capacity funding.

On 24 April 2020, MN-S wrote to MIPL(C)L stating that it had not received any offer to assist with capacity funding to assist with limited resources further exacerbated by the COVID-19 pandemic, and that in effect, no consultation had been offered to MN-S by MIPL(C)L.

On 13 May 2020, MN-S wrote to the CER reiterating its position that MIPL(C)L was not meaningfully engaging MN-S nor were they proactive in providing capacity support.

MIPL(C)L's Reply

Reply to Views of Beaver Lake Cree Nation

In response to BLCN's request for a legible Project map, MIPL(C)L provided a new Project map via email. MIPL(C)L responded to the meeting request with an email suggesting a phone call to further discuss the Project. MIPL(C)L indicated that no response was received from BLCN.

Reply to Views of Cold Lake First Nations

With regard to CLFN's request for additional information, MIPL(C)L stated it received a request from CLFN on 23 July 2019, but as a result of an oversight, the information was delayed in being sent until 6 September 2019. MIPL(C)L stated it had not received a specific request for the ESA from CLFN but that it had no objection to filing the ESA with the CER or providing a copy to CLFN. MIPL(C)L stated it would be prepared to assist with capacity funding to support ESA review or utilize resources within the CLFN community relative to the Project, including a Monitor and Elder Program during construction. In response to the request to support a traditional use study, MIPL(C)L made a proposal to CLFN and offered limited capacity funding for documentation review in the circumstances. Limited capacity funding for documentation review was offered to CLFN by MIPL(C)L on 1 April 2020.

Reply to Views of Métis Nation – Saskatchewan

In response to MN-S's concerns, MIPL(C)L stated it would ensure MN-S was kept apprised of Project progress, including any environmental matters. MIPL(C)L stated it would be pleased to meet with members of the MN-S community to provide further information about the Project and ESA conclusions and answer any questions community members might have. MIPL(C)L stated such discussions could help facilitate an ESA review, provide an opportunity to collaboratively consider how Elder participation could be incorporated into the Project and allow for better informed discussions about the potential need for capacity funding in this particular case. Such discussions could also inform potential Elder and Indigenous peoples monitoring agreements with the MN-S. MIPL(C)L stated that it remains committed to incorporating information provided by Indigenous peoples into Project planning and the Environmental Protection Plan (EPP), as appropriate.

Views of the Commission

The Commission is of the view that a company's early engagement with Indigenous peoples is a critical part of the development of a proposed project. Timely, accessible, and inclusive engagement facilitates the meaningful exchange of information. When conducted effectively, engagement activities provide opportunities for the company to learn about the concerns of potentially affected Indigenous peoples, to discuss how those concerns can be addressed through project design and operations, and to develop and discuss measures to reduce and mitigate the effects a project may have on the rights and the interests of Indigenous peoples.

On 25 February 2020, the Commission issued a decision with reasons with respect to the project splitting concern raised by CLFN. The Commission noted that engagement requirements and cumulative effects assessments are not generally affected by whether project applications proceed in aggregate or individually.

The Commission notes that engagement efforts undertaken by a proponent with Indigenous peoples are considered within the context of the expectations set out in the CER's Filing Manual. While a proponent's engagement efforts are distinct from those of the Crown, the information gathered as a result of such efforts often provides helpful information to the Commission's understanding of the views and concerns with respect to the rights and interests of potentially affected Indigenous peoples. The Commission expects companies to design and implement their engagement activities with regard to the nature and magnitude of a project's potential impacts early in the design phase and throughout the lifecycle of the project.

The Commission is satisfied that MIPL(C)L has identified the appropriate Indigenous communities, provided Project information to these communities, and responded to issues and concerns that were raised. For example, the Commission notes that MIPL(C)L has entered into agreements for construction monitoring involving Elders and Indigenous peoples with Red Pheasant and Thunderchild First Nations.

However, the Commission also notes concerns expressed by CLFN that issues or concerns raised during construction will not be dealt with in a meaningful manner. As a result, the Commission imposes **Conditions 4, 7, 15, and 17** to require MIPL(C)L to provide a clear understanding of its engagement with Indigenous peoples prior to, during, and after construction is complete. **Conditions 4 and 17** require MIPL(C)L to develop a plan for participation of CLFN and MN-S during construction and post-construction and to require MIPL(C)L to address issues or concerns raised by Elders or Indigenous people performing the role of Construction Monitor in a meaningful manner. **Conditions 7 and 15** require MIPL(C)L to continue to engage CLFN and MN-S prior to and after construction of the Project and discuss how any issues or concerns raised are addressed. Specifically, these conditions require MIPL(C)L to demonstrate how, in a meaningful way, it will take Indigenous peoples' concerns into account ahead of, during, and after construction of the Project

Based on an evaluation of the Application and supplemental filings, and the commitment from MIPL(C)L to continue engaging Indigenous peoples and report on progress, the Commission is satisfied that MIPL(C)L has addressed the guidance and requirements outlined in the Filing Manual regarding engagement with Indigenous peoples.

2.4. Issues and Concerns Raised by Indigenous Peoples

2.4.1 Contract Opportunities

Views of Big Island Lake Cree Nation

BILCN requested that its land clearing and earthworks company, Aquiver Ventures Ltd., be used for tree clearing and access road construction during pipeline construction.

MIPL(C)L's Reply

MIPL(C)L stated it continues to engage with BILCN to find a mutually agreeable date to discuss the Project and potential working opportunities. MIPL(C)L stated that, when conducting a competition to select the vendor or vendors to construct and install the pipeline

associated with this Project, 5% of the total score of each vendor will be based on their Indigenous employment component. The potential working opportunities of each vendor will be considered within MIPL(C)L's procurement process.

Views of the Commission

The Commission is satisfied that MIPL(C)L has a procurement process in place for creating opportunities for Indigenous peoples. The Commission expects MIPL(C)L to fully explore opportunities for training and education and to seek employment opportunities amongst Indigenous communities with traditional territories affected by the Project route. The Commission also expects MIPL(C)L to work with local Indigenous communities to clearly communicate job descriptions and necessary skill requirements for each job, for all aspects of construction for this Project.

To that end, the Commission imposes **Condition 18**, requiring MIPL(C)L to report on employment, contracting, and procurement, once Project construction is complete. The Commission is interested in knowing how many self-identified Indigenous businesses and individuals were employed by MIPL(C)L, if any, for this Project.

2.4.2 Impacts on Heritage Resources

MIPL(C)L stated that there will be no residual effects of the Project on heritage resources due to project-specific avoidance or mitigation of any sites with high heritage value, as specified by Alberta Culture and Tourism and the Saskatchewan Heritage Conservation Branch, and with the implementation of the EPP and the Heritage Resources Discovery Contingency Plan. MIPL(C)L has obtained Heritage Resource clearances/approvals for the portion of the pipeline in Alberta and MIPL(C)L will conduct Historical Resource Impact Assessments and receive clearances for two portions of the pipeline in Saskatchewan from the Saskatchewan Heritage Conservation Branch.

Views of the Commission

The Commission notes MIPL(C)L's commitment to conduct Historical Resource Impact Assessments and receive clearances for two portions of the pipeline in Saskatchewan from the Saskatchewan Heritage Conservation Branch. Therefore, the Commission imposes **Condition 8** requiring MIPL(C)L to submit all Heritage Resource clearances/approvals prior to start of construction¹. As a result, the Commission is of the view that the potential adverse effects of the Project on heritage resources are not likely to be significant.

2.4.3 Section 35(1), Constitution Act, 1982, including the Use of Lands and Resources for Traditional Purposes

MIPL(C)L stated the current land tenure and land use of the Project consists of primarily private (freehold) private land (66.3%), Crown land (32.8%), and road allowances (0.9%). The Project crosses mainly agricultural land (e.g., cultivated, hay tame pasture), upland vegetation, cleared land, urban or developed land, and anthropogenic disturbance (Highway 55 in Saskatchewan). In its Project update, MIPL(C)L concluded that existing disturbances, such as roads, and both agricultural and residential development constrain the use of lands for traditional land and resource use (TLRU).

¹ Commencement of construction refers to the clearing of vegetation, ground-breaking and other forms of right-of-way preparation that may have an impact on the environment (activities associated with normal surveying do not constitute commencing construction).

MIPL(C)L stated it engaged with Indigenous and Métis communities through the Project's Engagement Process and the Indigenous Relations – Aboriginal Policy AR_001. MIPL(C)L consulted with 32 Indigenous communities overall and of those, MIPL(C)L provided additional information, offered meetings and capacity funding, as requested, with two of the communities. MIPL(C)L also responded to issues raised by BLFN, CLFN and MN-S.

MIPL(C)L stated that it plans to utilize an online training module to conduct cultural awareness training for construction workers. Workers who are unable to perform online training will be provided an opportunity to complete the training at the construction site. During the development of cultural awareness training for temporary workers, MIPL(C)L would leverage resources used by Saskatchewan Crown Investment Corporation who has extensive experience with providing similar training for several years. Also, MIPL(C)L will provide opportunities for feedback from Indigenous communities in the Project area to finalize the training. The training will be conducted throughout the construction phase of the Project.

MIPL(C)L stated the residual effects of the Project on current use of lands and resources for traditional purposes are predicted to be not significant because they are not expected to result in the long-term loss of availability of traditionally used resources, loss of access to lands currently relied on for traditional use practices, or the permanent loss of current use sites and areas in the local and regional assessment areas. MIPL(C)L stated the Project will not result in significant adverse effects on environmental conditions upon which current use of lands and resources for traditional purposes depend. MIPL(C)L stated that the overall confidence in significance prediction for current use of lands and resources for traditional purposes is moderate given the lack of information on current use of lands and resources for traditional purposes, but that the conservative approach adopted for the assessment assumes that current sites, areas, and resources might occur and that current use sites or areas have the potential to be present on Crown land. MIPL(C)L stated it remains available to discuss the Project with interested or potentially affected Indigenous communities. MIPL(C)L has filed with the CER a copy of its EPP.

Views of Cold Lake First Nations

CLFN indicated that conclusions contained in the Project ESA could not be validated given the lack of capacity funding to conduct a traditional use study and therefore, direct traditional land use information from impacted Indigenous communities is absent.

Regarding MIPL(C)L's Elder Program and Monitor Program, CLFN stated that similar monitoring programs are of limited usefulness unless coupled with an enforceable condition that the Project proponent will address the concerns or issues identified by monitors. Mere monitoring without a requirement to act upon or address concerns raised provides no appreciable mitigation of Project impacts.

Regarding MIPL(C)L's management or contingency plans, CLFN stated the draft agreements provided do not provide any express commitment to address concerns or issues raised during the monitoring of construction or during Project operations. In CLFN's experience, what is necessary is a more explicit commitment and associated process to identify and respond to issues raised during construction. An agreement to "cooperate" does not sufficiently protect CLFN's rights and interests. In particular, the "remedies" alluded to in MIPL(C)L's description could not address impacts to CLFN's rights after completion of the consultation and regulatory processes unless there is an enforceable commitment (either by way of agreement or approval conditions) to address CLFN's concerns.

MIPL(C)L's Reply

MIPL(C)L stated that Indigenous communities have not recommended any project-specific measures to mitigate effects on current use of lands and resources for traditional purposes, nor have any Indigenous communities engaged on the Project expressed concerns regarding the continued ability to practice traditional activities due to cumulative effects associated with industrial development.

In its response to CLFN's concerns regarding whether concerns raised by Elders or through monitoring programs would be addressed appropriately and that the ESA conclusions needed to be validated by TLRU study, MIPL(C)L stated that it and CLFN have been in discussions about the potential for Elder and Monitoring programs related to Project construction, with draft agreements provided to CLFN by MIPL(C)L on 16 April 2020. On that date, MIPL(C)L also made an offer to pay reasonable CLFN expenses associated with its review of the agreements in light of difficulties arising from the COVID-19 pandemic. MIPL(C)L stated that it also sent draft agreements to CLFN on 27 May 2020. MIPL(C)L stated CLFN has not responded to MIPL(C)L's 16 April 2020 communication. MIPL(C)L also stated that it understood that CLFN is concerned that, as currently drafted, the proposed Elder and Monitoring program agreements do not expressly compel MIPL(C)L to address concerns or issues raised by CLFN after Project approval is issued. In these circumstances, MIPL(C)L further stated that it is prepared to amend its standard-form agreements to expressly detail this approach and specific engagement and decision-making processes to address concerns that might be raised on behalf of the community during Project construction. MIPL(C)L is also prepared to work with CLFN to develop protocols that identify the rights and responsibilities of Elders and Monitors and agreed-upon actions in the event that relevant concerns are raised (all for inclusion in the EPP). MIPL(C)L will work directly with CLFN on the particulars of possible revisions to the agreements.

Regarding capacity funding, MIPL(C)L indicated that it would be willing to further meet with CLFN to discuss the ESA and whether capacity funding might still be necessary. MIPL(C)L stated it remains committed to incorporating information provided by Indigenous communities into Project planning and the EPP, as appropriate. MIPL(C)L stated it is of the view that CLFN's desire to validate ESA conclusions regarding potential impacts on traditional uses may also be effectively addressed through the integrated participation of Elders or monitors during Project construction.

Views of the Commission

The Commission acknowledges MIPL(C)L's efforts to reduce any potential Project impacts on the exercise of rights of Indigenous peoples by designing its route to parallel existing disturbances, such as a pipeline ROW and Highway 55, wherever feasible. The Commission notes that the majority of lands in the Project area are private lands and the predominant land use is agricultural and residential development.

The Commission is of the view that there has been adequate consultation and accommodation for the purpose of the Commission's decision on this Project. This conclusion is based on factors such as MIPL(C)L's consultation with Indigenous peoples for the Project, notice and sufficiency of information about the Project being provided to Indigenous peoples, the evaluation process for the Project, and participation opportunities for Indigenous peoples. The Commission is also of the view that any potential Project impacts on the interests, including rights, of affected Indigenous peoples are not likely to be significant and can be effectively addressed.

The Commission notes that the Government of Canada relied on the then-NEB's and now relies on the CER's process as appropriate and to the extent possible to fulfill its duty to consult Indigenous peoples for proposed projects. The assessment process employed by the Commission is robust and inclusive. It makes use of its technical expertise and has broad remedial powers with respect to Project-related matters. A number of judicial decisions, including *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director)*, [2004] S.C.J. No. 69, have acknowledged the Crown's ability to rely on opportunities for Indigenous consultation that are available within existing processes for regulatory or environmental review. This is a means by which the Crown may be satisfied that Indigenous concerns have been heard and considered, and where appropriate accommodated. The Commission notes that the Supreme Court of Canada has acknowledged in two more recent decisions, *Clyde River (Hamlet) v. Petroleum Geo-Services Inc.*, 2017 SCC 40, and *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*, 2017 SCC 41, that the NEB, now the Commission, has the procedural powers to implement consultation and the remedial powers to impose and enforce accommodation measures as well as the requisite technical expertise.

The framework within which the Commission operates and under which decisions under the NEB Act and CER Act are made, including the requirement that a project assessment process be conducted in a procedurally fair manner, can provide a practical, effective and efficient way within which Indigenous peoples can request and receive meaningful assurances from the proponent or the Commission about project-related impacts on the rights and interests of Indigenous peoples. Hearing from Indigenous peoples about their concerns with potential project-related impacts on their rights and interests allows the Commission to impose measures to mitigate the impacts and balance, as appropriate, any residual effects with the other societal interests relevant to its assessment of a project. As a result, decisions on projects can be made in a constitutionally-appropriate manner consistent with the honour of the Crown.

This framework also provides an effective mechanism through which Indigenous peoples' concerns that are beyond the mandate of the CER can be communicated to the Governor in Council for consideration in its decision making. It also provides other government agencies with information that they may choose to use in any decisions that they may need to make, should the Project be approved.

In addition to the engagement that is to occur between a proponent and potentially impacted Indigenous peoples, it should be understood that the Commission's assessment process itself, including this Decision, is part of the overall consultative process in relation to the Crown's duty to consult.

The Commission is of the view that MIPL(C)L has been responsive to the concerns raised by Indigenous communities, including the concerns raised by CLFN about potential impacts to TLRU. However, the Commission also notes concerns expressed by CLFN based on their engagement experience that issues or concerns raised during and after construction will not be dealt with in a meaningful manner. As discussed above, the Commission expects MIPL(C)L to continue to be responsive to concerns. To that end, the Commission has imposed **Conditions 7 and 15** which require MIPL(C)L to provide a clear understanding of its engagement with CLFN and MN-S prior to, during, and after construction is complete.

Regarding opportunities for Indigenous peoples performing the role of Construction Monitor before, during and after construction, the Commission is of the view that the desire voiced by CLFN and MN-S to be involved in monitoring and determining the effectiveness of mitigation measures is based on their Indigenous peoples knowledge and connection to the land, and

is reflective of the perspectives they can provide as a part of those activities. As such, the Commission imposes **Condition 4** and **Condition 17** requiring MIPL(C)L to file its monitoring plans for Indigenous peoples related to both the Project's construction and post-construction phases. The Commission is of the view that these conditions would enhance the involvement of CLFN and MN-S to participate meaningfully in monitoring opportunities where proposed developments may have potential impacts on their rights and interests.

With respect to TLRU, the Commission notes that Indigenous peoples have not raised any outstanding specific sites, resources or activities within the Project footprint that would require specific mitigation beyond what MIPL(C)L is already proposing in the EPP. The Commission further notes MIPL(C)L has filed with the CER a copy of its EPP but that it does not contain a Traditional Land and Resource Use Discovery Contingency Plan (TLRUDCP). As a result, the Commission imposes **Condition 6** requiring MIPL(C)L to develop the TLRUDCP and submit the EPP containing the TLRUDCP. The TLRUDCP is intended to reduce any potential Project impacts on TLRU, harvesting, gathering and sacred sites in the event of any unanticipated discoveries during construction and to provide a process that Elders and Monitors can use to respond to issues raised during construction. Given MIPL(C)L's proposed mitigation and contingency plan measures, its ongoing engagement program, and the Commission's **Conditions 4, 6, 7, 15 and 17**, the Commission is of the view that the potential adverse effects of the Project on the current use of lands and resources for traditional purposes by Indigenous peoples are not likely to be significant.

In contrast to other project applications of a similar nature recently considered, the Commission takes note of MIPL(C)L's efforts at engagement and meaningful interaction with Indigenous parties in this proceeding, such as benefits and consultants agreements made, its willingness to amend its standard-form agreements, its willingness to work with Indigenous peoples to develop protocols that identify the rights and responsibilities of Elders and Monitors, and its commitment for involvement of Indigenous monitors during lifecycle stages of the Project. The Commission looks forward to continuous efforts from MIPL(C)L to reduce impacts on the rights and interests of Indigenous peoples. The Commission is of the view that not all Conditions imposed on this Project approval would have been warranted had circumstances in the later stages of the proceeding permitted more fulsome discussion and potential resolution of outstanding issues identified by CLFN and MN-S.

As a result of the above, considering all of the findings in this Decision, the Commission is of the view that an approval of this Project is consistent with section 35 of the *Constitution Act, 1982* and the honour of the Crown.

2.5. Environmental Matters

The Project includes the construction and operation of approximately 30.3 km of new pipeline and a new compressor station. It is located in both the Rural Municipality of Beaver River No. 622 (Saskatchewan) and the Municipality District of Bonnyville No. 87 (Alberta) on a mix of private land, Crown land and road allowances.

MIPL(C)L filed an ESA Interactions Table as part of its Application which summarized Project interactions, potential effects, proposed mitigation and predicted residual effects, including cumulative effects. In response to CER IR No. 1.4, MIPL(C)L also filed its ESA for the Project. MIPL(C)L noted that its ESA approach applied a framework for assessing Project-specific environmental effects, including accidents and malfunctions, as well as potential cumulative effects likely to result from the Project in combination with other projects or activities that have been or will be carried out. The ESA identified potential project related environmental effects to soil and soil productivity, vegetation, water quality and quantity, fish and fish habitat, wetlands, wildlife and wildlife habitat, air emissions, acoustic environment,

human occupancy and resource use, heritage resource, traditional land and resource use, infrastructure and services and employment and economy. MIPL(C)L identified routine design and scheduling measures, as well as standard and Project-specific mitigation for any potential adverse environmental effects identified for the Project. Standard and Project-specific mitigation measures are outlined in the Project's EPP which was filed in response to CER IR No. 1.3.

MIPL(C)L also considered any cumulative effects predicted to result from the Project in combination with the residual effects of other past, present, or reasonably foreseeable future projects or activities. MIPL(C)L noted that land uses in the region include extensive agriculture, oil and gas developments and rural residential developments. Other oil and gas and industrial uses in the Project development area included third-party pipelines and RoWs, as well as power facilities and transmissions lines. MIPL(C)L noted that the NGTL Saddle Lake Lateral Loop (Cold Lake Section) is the only reasonable foreseeable future physical activity with the 15 km biophysical regional assessment area. The Saddle Lake Lateral Loop Project consists of approximately 20 km of NPS 20 OD pipe extending from a tie-in-valve near the existing Kent Sales Meter Station located at NE 13-62-03 W4M to the replacement Cold Lake Border Sales Meter Station located at SW 12-62-01 W4M. The proposed route will primarily parallel the existing NPS 10 Saddle Lake Lateral.

In addition, MIPL(C)L indicated that Project construction will be supervised and reviewed by qualified Construction and Environmental Inspectors to ensure compliance with all applicable legislation, codes and standards, and conditions of approval. MIPL(C)L also committed to implement post-construction and reclamation monitoring programs.

MIPL(C)L is of the view that with the application of mitigation and environmental protection measures, residual Project effects and residual cumulative effects on the environment on the environment are predicted to be not significant.

Views of the Commission

The Commission has considered MIPL(C)L's Application for the Project and its subsequent filings as well as the concerns raised by Indigenous peoples throughout the engagement process for this Project.

The Commission has assessed the environmental effects of the Project and find that based on the information provided by MIPL(C)L in its Application and subsequent filings, and taking into account the mitigation proposed by MIPL(C)L and the conditions imposed by the Commission, the Commission has determined that residual effects of the Project on the environment are likely to be localized to the Project development areas and reversible in the medium term. Therefore, the Commission has determined that Project effects on the environment are not likely to be significant.

The Commission has also considered MIPL(C)L's cumulative effects assessment and note that there are existing and proposed projects and activities that have the potential for spatial and temporal interaction of Project effects, and therefore the potential for cumulative effects, including: agriculture; energy transmission; oil and gas; industrial; settlement and rural and urban development; and transportation and infrastructure. Although there are possible cumulative effects for a number of biophysical elements, the Commission is of the view that these cumulative interactions and effects are limited to the duration of construction, are fairly localized and are minor in nature. The Commission is of the view that any potential cumulative effects would also be mitigated by MIPL(C)L's environmental protection and mitigation measures. Therefore, the Commission concludes that the Project would not likely result in significant adverse cumulative effects.

The Commission is further of the view that a robust post-construction environmental monitoring program is key to MIPL(C)L ensuring that potential adverse effects of the Project have been effectively mitigated and, where issues are identified post-construction, requiring that MIPL(C)L implements measures to address them. To be satisfied that post-construction environmental monitoring is thorough and effective and that CLFN, MN-S and other interested Indigenous peoples have been consulted regarding post-construction monitoring, the Commission has imposed conditions as set out in **Sections 2.3 and 2.4** and also imposes **Condition 19** which sets out requirements for MIPL(C)L to implement a post-construction environmental monitoring program for a five year period and submit Post-Construction Environmental Monitoring Reports to the CER, CLFN, MN-S and other interested Indigenous peoples bi-annually.

The Commission directs MIPL(C)L to serve a copy of this letter, the attached Order and its Schedule A on all interested parties.

Yours sincerely,

Original signed by

Jean-Denis Charlebois
Secretary of the Commission

July 2020
Calgary, Alberta

Attachment