

CROWN CONSULTATION AND ACCOMMODATION REPORT
for the
2017 NGTL SYSTEM EXPANSION PROJECT
(NOVA GAS TRANSMISSION LTD.)
(GH-002-2015)

Prepared by the Major Projects Management Office

October 14, 2016

Disclaimer

If there is any inconsistency or ambiguity between this report and the National Energy Board Report (GH-002-2015), the National Energy Board Report (GH-002-2015) shall prevail.

Table of contents

1.0	Introduction	1
1.1	Purpose of the report	1
1.2	Project description	2
1.3	Crown’s approach to Aboriginal consultation and accommodation	5
2.0	Engagement by NGTL with Aboriginal groups on the Project	7
3.0	Regulatory review and Environmental Assessment Process	9
3.1	Participation of Aboriginal groups in the regulatory review process	10
3.2	National Energy Board Report conclusions	11
3.3	Governor in Council decision-making process	13
4.0	Crown consultation with Aboriginal groups on the contemplated Crown conduct	13
4.1	Potential, asserted or established section 35 rights	13
4.1.1	Historic treaties	14
4.1.2	Métis Nations	15
4.1.3	Non-Treaty rights	15
4.2	Aboriginal groups identified for consultation	16
4.2.1	Establishing the depth of duty to consult in Phase IV	17
4.2.2	Phase IV consultation activities	19
4.3	Funding provided to support consultation	20
4.3.1	Federal funding	20
4.4	Crown consultation record and tracking of key issues	21
5.0	Potential Impacts of contemplated Crown conduct on section 35 rights and Interests	22
5.1	Issues raised by Aboriginal groups during the regulatory review and Crown consultation processes	22
6.0	Conclusion	41

List of figures

Figure 1 Location of 2017 NGTL System Expansion Project..... 3
Figure 2 Review process timeline for 2017 NGTL System Expansion Project including Crown consultation..... 6
Figure 3 Depth of consultation determination framework 18

List of tables

Table 1 Overview of proposed pipeline loops and compressor stations..... 3
Table 2 Allocation of funds for participation in the NEB hearings for 2017 NGTL 10
Table 3 Aboriginal groups included in the Crown list 16
Table 4 Allocation of funds for participation in the Phase IV consultation on the 2017 NGTL Project..... 20

1.0 Introduction

The Government of Canada is committed to renewing the relationship with Aboriginal Peoples to one based upon recognition of rights, respect, cooperation and partnership. This commitment places a new emphasis on ensuring that the Crown's constitutional duty to consult, and where appropriate, accommodate Aboriginal peoples is undertaken meaningfully, effectively, and in a manner that upholds the Honour of the Crown.

A duty to consult arises when the following three conditions are present:

- the Crown contemplates conduct;
- the Crown has actual or constructive knowledge of established or potential Aboriginal or treaty rights, as defined under section 35 of the *Constitution Act*, 1982 (section 35 rights);
- that conduct or decision may have adverse effect on these section 35 rights.

Since June 2016, following the receipt of a recommendations report on the 2017 NGTL System Expansion Project (the Project) by the National Energy Board (NEB), the Crown has been undertaking consultations with Aboriginal groups. The Major Projects Management Office (MPMO) within Natural Resources Canada has been acting as the Crown Consultation Coordinator for the Project. The MPMO is responsible for ensuring the Crown's duty to consult is carried out in a way that upholds the Honour of the Crown, with an emphasis on respect and cooperation.

To the extent possible, the Crown relies on existing consultation mechanisms from the NEB's process. The Crown's objective throughout this process was to understand how the Crown's contemplated conduct (i.e., the potential Governor in Council decision to direct the NEB to issue a Certificate, subject to terms and conditions) could potentially impact section 35 rights and to solicit input on how to address or otherwise accommodate these potential impacts, where appropriate.

1.1 Purpose of the report

This report documents the Crown's consultation with Aboriginal groups, including any potential accommodation measures, with respect to the potential impacts of the Project on section 35 rights.

This report:

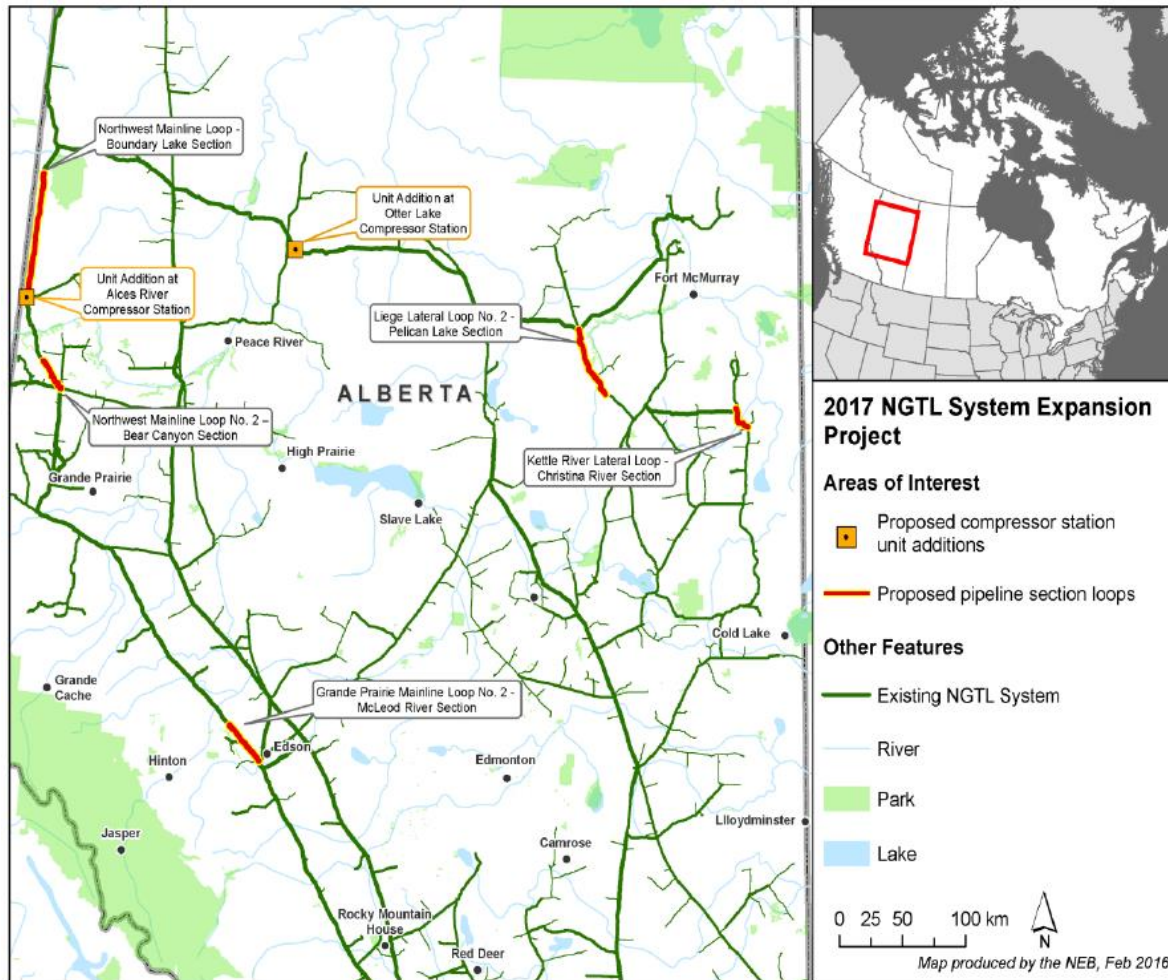
1. Describes the consultation process undertaken by the Crown with Aboriginal groups;
2. Reports the views of Aboriginal groups on how the Crown conduct may potentially impact their rights;

3. Explains the Crown's findings regarding the potential impacts of the Crown conduct on section 35 rights;
4. Outlines accommodation measures proposed to address potential impacts on Aboriginal rights; and,
5. Presents the Crown's conclusion on the adequacy of consultation and whether that the duty to consult was met.

1.2 Project description

On March 31, 2015, NOVA Gas Transmissions Ltd. (NGTL), a subsidiary of TransCanada Pipelines Ltd., filed an application under Parts III and IV of the *National Energy Board Act* seeking approval for the Project with the NEB. The Project is a "designated project" pursuant to subsection 2(b) of the *Canadian Environmental Assessment Act, 2012*, for which the NEB is the responsible authority. The Project represents a \$1.29 billion proposal to expand the existing NGTL system to receive and deliver sweet natural gas in northern Alberta. The Project consists of approximately 230 kilometres (km) of new pipeline in five pipeline section loops (together, the Pipeline) and two compressor station unit additions (Figure 1).

Figure 1 Location of 2017 NGTL System Expansion Project



An overview of the characteristics of the proposed pipeline and compressor stations is provided in Table 1.

Table 1 Overview of proposed pipeline loops and compressor stations

Pipeline loops	
Northwest Mainline (NWML) Loop – Boundary Lake section	Approximately 91 km of 914 mm (36 inch) outside diameter (OD) pipeline, of which approximately 85 km (representing 93 per cent) will be parallel to or contiguous with existing right-of way (RoW) or other linear disturbances
NWML Loop No. 2 – Bear Canyon section	Approximately 27 km of 914 mm (36 inch) OD pipeline; of which approximately 21 km

	(representing 77 per cent) will be parallel to or contiguous with existing RoW or other linear disturbances
Grande Prairie Mainline (GPML) Loop No. 2 – McLeod River section	Approximately 37 km of 1219 mm (48 inch) OD pipeline, of which approximately 34 km (representing 92 per cent) will be parallel to or contiguous with existing RoW or other linear disturbances
Liege Lateral Loop No. 2 – Pelican Lake section	Approximately 55 km of 762 mm (30 inch) OD pipeline, of which approximately 51 km (representing 93 per cent) will be parallel to or contiguous with existing RoW or other linear disturbances
Kettle River Lateral Loop – Christina River section	Approximately 20 km of 610 mm (24 inch) OD pipeline, of which approximately 18 km (representing 90 per cent) will be parallel to or contiguous with existing RoW or other linear disturbances
Compressor stations	
Alces River compressor station unit addition – Alces River unit addition	A 16.5 megawatt (MW) compressor unit addition located partially within the existing footprint of the Alces River compressor station
Otter Lake compressor station unit addition – Otter Lake unit addition	A 30 MW compressor unit addition located entirely within the existing footprint of the Otter Lake compressor station

Approximately 91 per cent of the proposed pipeline section loops will parallel NGTL’s existing RoW or existing disturbances. The majority of the Project (more than 90 per cent) will be on provincial Crown lands.

The Project will also include temporary infrastructure required for the construction of the Pipeline and certain RoW preparation activities in select areas along the proposed route. Temporary infrastructure may include stockpile sites, contractor yards, access roads and travel lanes, helicopter landing pads, borrow pits/dugouts, laydown yards, and construction camps. NGTL said the planned in-service date is April 1, 2017, and work on the temporary infrastructure for the Project is scheduled to begin in the third quarter of 2016.

1.3 Crown's approach to Aboriginal consultation and accommodation

The Government of Canada takes a whole-of-government approach to Aboriginal consultations in the context of the environmental assessment and regulatory review of major projects.

As the coordinator of Crown consultations, the MPMO has led the Crown consultations with Aboriginal groups in four phases:

- **Phase I: Early engagement phase**

From the submission of the project description by NGTL to the start of the NEB project review process, the NEB held early engagement sessions with 14 Aboriginal groups to discuss the hearing process, the participant funding program and how to participate in the hearing. The Crown participated in these meetings either in person or by phone and outlined for Aboriginal groups its consultation approach on the Project. At the same time, the Crown encouraged groups to participate in the NEB's hearing process to understand and consider the rights and interests of Aboriginal groups that may be impacted by the Project.

- **Phase II: NEB hearing phase**

During this time, Aboriginal groups were encouraged and funded to participate in the NEB hearings and to provide information to help inform the NEB recommendation report. Through its own participation in this process, the Crown developed a stronger understanding of the interests and concerns of Aboriginal groups related to the proposed project.

- **Phase III: NEB recommendation phase**

On June 1, 2016, following the closing of the NEB hearings on March 9, 2016, the NEB delivered its recommendation report to the Minister of Natural Resources. The report included a recommendation to the Governor in Council to direct the NEB to issue a Certificate of Public Convenience and Necessity to NGTL for the Project subject to 36 terms and conditions, including a condition that NGTL fulfill all commitments made during the hearing and in the filings. During this time, the Crown contacted potentially impacted Aboriginal groups by phone and email to identify the appropriate contacts and discuss the upcoming Phase IV consultation process.

- **Phase IV: Post-NEB recommendation report phase**

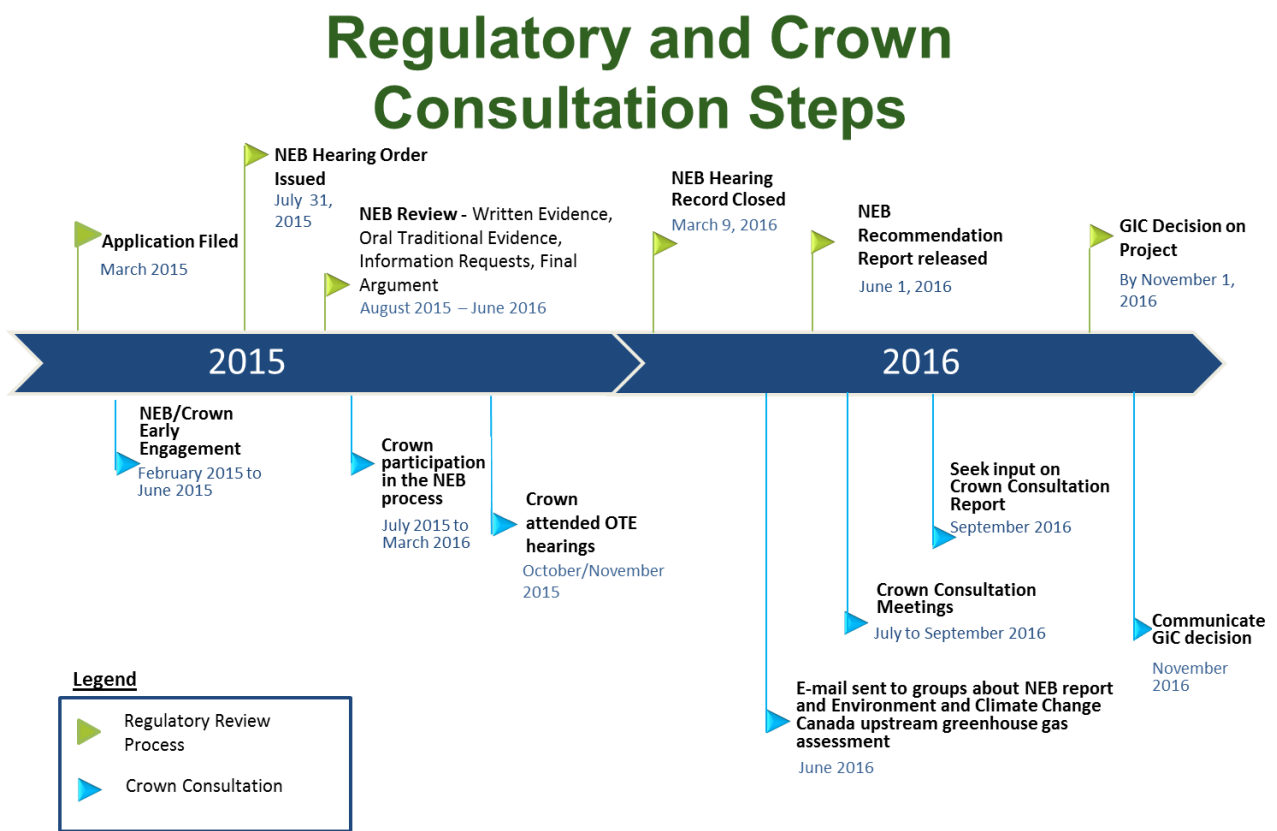
Following receipt of the NEB recommendation report, the Governor in Council extended the legislated time limit by two months to ensure adequate time to consult Aboriginal groups. The Crown consulted Aboriginal groups on the NEB recommendations to

understand the impacts of the project that were not addressed in the NEB recommendation report and conditions; where those impacts could be mitigated and where they could not be mitigated; and how any outstanding impacts could be accommodated.

The NEB’s regulatory review process and subsequent report supported the Crown in helping identify how the Crown’s conduct in relation to the Project might adversely impact section 35 rights and how the recommended conditions in the report may accommodate potential impacts on those rights. However, the responsibility for ensuring the legal duty to consult is appropriately discharged ultimately rests with the Crown.

Figure 2 shows how the Crown consultation phases relate to the NEB regulatory review process, which is described in further detail in Section 3.0. Timelines associated with the various activities and decisions are also shown.

Figure 2 Review process timeline for 2017 NGTL System Expansion Project including Crown consultation



2.0 Engagement by NGTL with Aboriginal groups on the Project

This section summarizes NGTL's engagement process and the distinction between NGTL's engagement and the Crown consultation process.

Under the NEB Filing Manual, NGTL was required to identify, engage and consult with potentially impacted Aboriginal groups prior to filing an application with the NEB. NGTL was also required to report to the NEB on these activities and to describe any issues or concerns raised by these Aboriginal groups as part of its application.

Further to this requirement, NGTL outlined the following purpose and goals of its Aboriginal Engagement Program:

- to build and maintain positive long-term relationships with Aboriginal communities and organizations potentially affected by the Project;
- to develop and share timely information to allow for informed, effective, and meaningful engagement with communities;
- to identify acceptable community engagement protocols and practices;
- to respond promptly to commitments and communications with respect to the needs, interests, and concerns identified by each community;
- to support the participation (e.g., capacity funding and information sharing) of Aboriginal communities and organizations who may be affected by the Project;
- to use traditional knowledge to inform the Project design, where feasible;
- to ensure that input and concerns gathered from Aboriginal communities and organizations are gathered, understood, and considered in the Project design and execution, including the Environmental Socio-Economic Assessment, as appropriate;
- to ensure that Aboriginal communities and organizations are aware of how their participation has influenced project planning;
- to ensure that issues and concerns with respect to potential effects related to Aboriginal interests are identified and addressed; and,
- to identify education, training, employment, and contracting opportunities.

NGTL began consultations in July 2014 with 64 Aboriginal groups in total based on input provided by the NEB, the MPMO, the Alberta provincial Aboriginal Consultation Office, and by Aboriginal groups themselves requesting to be engaged by the Proponent.

NGTL provided these Aboriginal groups with information about the project, opportunities to meet with NGTL to discuss the Project and express any concerns they might have, and

opportunities to provide details of Traditional Land and Resources Use activities and other site-specific information to inform Project planning.

NGTL tracked efforts made to provide these Aboriginal groups with opportunities to participate in its planning of the Project. NGTL engaged with these groups to determine how they preferred to contribute to the Project, and NGTL provided funding to assist groups that elected to conduct community-directed Traditional Land and Resources Use studies for the Project.

NGTL invited interested Aboriginal groups to participate in a series of biophysical field studies to support its Environmental and Socio-Economic Assessment as an opportunity for Aboriginal groups to learn about the Project and provide input.

While proponents do not have a constitutional duty to consult, they need to consider a project's potential impact on section 35 rights just as they would consider the project's impact on any other rights holder (e.g., private property rights, Crown land). Where there is a potential for adverse impacts, a proponent may need to reach additional contractual or other agreements with Aboriginal title holders to secure consent before a project can proceed.

As part of its engagement with Aboriginal groups near to the Project area, NGTL negotiated engagement agreements with communities in order for groups to participate in and benefit from the 2017 NGTL System Expansion Project. Generally, these agreements include funding to support collaboration between the group and the Proponent, to build capacity within the community, and for other initiatives.

The Crown is typically not party to those agreements unless the Crown has a direct material interest in the Project, which is not the case for this Project. When the Crown is not a party to an agreement, it is also generally not privy to the parameters of any such agreement, even if it may have a general awareness of its existence. As such, while the Crown does consider the existence of agreements between NGTL and section 35 rights holders, the report can only consider what Aboriginal groups or proponents have voluntarily shared with the Crown. Where the Crown had no information about an agreement between NGTL and section 35 rights holders, this report assumes that no such agreement exists.

3.0 Regulatory review and Environmental Assessment Process

This section provides an overview of the NEB regulatory review process, including the participation of Aboriginal groups in the process, leading to the NEB recommendation report to the Governor in Council.

In March 2015, the NEB received NGTL's application and on May 29, 2015, the NEB announced that it would undertake an environmental assessment and public hearing to determine, amongst other things, whether the Project is likely to cause significant adverse environmental effects.

On May 29, 2015, the NEB issued a Notice of Public Hearing and Application to Participate for Aboriginal groups and other stakeholders along with funding to support their engagement in the review process. This was to allow those that may be impacted by the Project to share with the NEB any concerns or comments they wanted to register and inform the environmental and socio-economic analysis undertaken by the NEB. Information sessions were also organized, along with online sessions to provide more information on participating in the hearing process.

Of the 45 applications to participate in the hearing process the NEB received and considered, 44 applicants were granted participant standing: 37 were Intervenors (15 Aboriginal groups, 20 commercial parties, one federal government department, and one provincial government department); and seven were Commenters (one Aboriginal group, four commercial parties, and two federal government departments)¹. The NEB provided participant funding, totalling \$311,125 to 16 Aboriginal groups to enhance their capacity to participate in the review.

On July 31, 2015, the NEB issued its original hearing order which established the process for a public hearing in writing. The NEB conducted its public hearing from July 2015 to March 2016. The hearing included two rounds of written evidence, several rounds of Information Requests (IR), letters of comment, collection of oral traditional evidence from Aboriginal participants, and the submission of final arguments.

On November 30, 2015, the NEB released draft conditions for the Project. The draft conditions were circulated to hearing participants for comment. The NEB considered all comments it

¹ Intervenors and Commenters are a person, company or group who applied to participate in the hearing and was granted standing by the Board to participate. An Intervenor may submit various forms of written evidence and oral presentations. A Commenter is allowed to file one Letter of Comment that will be placed on the online public registry (record) and will form part of the official hearing record.

received from NGTL, Intervenor and Commenters before finalizing and setting out the final terms and conditions it would impose if the Project were approved by the Governor in Council.

Following the closure of the hearing record on March 9, 2016, and receipt of final arguments, the NEB considered all evidence presented to prepare its recommendation report.

The regulatory review and environmental assessment by the NEB is the initial part of the NEB's broader role as a lifecycle regulator. The NEB also regulates all elements of the construction, operation, and abandonment of pipelines that cross international borders or provincial boundaries, as well as the related pipeline tolls and tariffs. As such, the NEB is in a good position to ensure that the conditions are fully adhered to by NGTL throughout the Project's lifecycle. Should the Project be approved, and NGTL decide to proceed with it, the NEB will use this same oversight to regulate the Project facilities and components going forward.

3.1 Participation of Aboriginal groups in the regulatory review process

Under the NEB's Enhanced Aboriginal Engagement process, the NEB engaged with Aboriginal groups potentially impacted by the Project to ensure they were aware of how to participate in the hearing process and how to obtain funding to support that engagement.

In February 2015, the NEB sent letters to Aboriginal groups to advise them of the start of the review of the Project. This letter included an offer to meet with Aboriginal groups to provide further information on the regulatory process and the role of the NEB in the review. The NEB held pre-hearing meetings with 14 groups.

In total, 16 Aboriginal groups applied for, and were granted, participation status in the NEB hearing, including 15 as Intervenor and 1 as a Commenter. All Aboriginal Intervenor received funding from the NEB to support their capacity to participate in the review. Table 2 below provides a breakdown of the funding by applicant.

Table 2 Allocation of funds for participation in the NEB hearings for 2017 NGTL

Aboriginal Intervenor applicant	Amount awarded
Alexis Nakota First Nation	\$20,000
Athabasca Chipewyan First Nation	\$21,625
Bigstone Cree Nation	\$27,000
Chard Métis Society	\$23,000
Chipewyan Prairie Industry Relations	\$15,000

Doig River First Nation	\$22,500
East Prairie Métis Settlement	\$15,000
Gift Lake Métis Settlement	\$15,000
McMurray Métis	\$28,000
Métis Nation of Alberta Association #55 Gunn	\$23,000
Paul First Nation	\$20,000
Peavine Métis Settlement	\$20,000
Samson Cree Nation	\$18,000
Swan River First Nation	\$28,000
Woodland Cree First Nation	\$15,000
Total	\$311,125

Aboriginal groups provided comments, views, and evidence through written submissions and oral traditional evidence to the NEB during the hearing. Of the 11 Aboriginal Intervenors scheduled to provide oral traditional evidence to the NEB, 6 groups attended the sessions and made presentations in Fort McMurray, Grande Prairie, and Edmonton, Alberta in October and November 2015.

The Crown incorporated the information gathered during the NEB early engagement sessions and submitted by groups either intervening or commenting in the hearing process as part of the assessment and mitigation of the effects of the Project.

3.2 National Energy Board Report conclusions

On June 1, 2016, the NEB released its final report on the Project, finding that the Project is in the present and future public convenience and necessity, and that with the implementation of NGTL's environmental protection procedures, mitigation measures, and the NEB's recommended terms and conditions, the Project is not likely to cause significant adverse environmental effects. The NEB recommended that the Governor in Council direct the NEB to issue a Certificate of Public Convenience and Necessity, subject to the 36 Certificate Conditions and a section 58 exemption order, subject to 12 Order Conditions, set out in the NEB's Report that NGTL would have to meet should the Project go ahead.

The 36 Certificate Conditions are categorized as follows:

- 4 applying generally to the proposed activity;
- 13 applying prior to construction;
- 9 applying during construction; and,
- 10 applying post-construction.

The 12 Order Conditions are categorized as follows:

- 4 applying generally to the proposed activity;
- 6 applying prior to construction;
- 1 applying during construction;
- 1 applying post-construction.

The proposed conditions cover a wide range of matters identified by Aboriginal groups during the hearing process, including, but not limited to, environmental protection, habitat reclamation and restoration, emergency response, traditional land use, monitoring, *Fisheries Act* authorizations, and watercourse crossings. Several conditions relate specifically to the concerns raised by Aboriginal groups to the NEB:

- caribou and caribou habitat;
- a reclamation plan for a temporary workspace in K'ih tsaá'dze Tribal Park;
- a requirement that outstanding traditional land use investigations be completed in advance of construction. These investigations are critical to identifying specific areas of concern or interest to the Aboriginal community;
- a requirement for NGTL continue to consult with Aboriginal groups in advance of construction and throughout operation of the Project, including identifying how outstanding concerns may be addressed; and,
- a requirement that NGTL facilitate the participation of groups in monitoring the construction of the Project.

In addition, NGTL made a number of commitments throughout the NEB process. These commitments strengthen the conditions by ensuring Indigenous participation in the fulfilment of the conditions. Condition 5 requires NGTL to compile and publish its commitments.

3.3 Governor in Council decision-making process

After the NEB has submitted its report, the Governor in Council has three months to render a determination on the report. The Governor in Council may, on recommendation of the Minister of Natural Resources:

- 1) order the NEB to issue a certificate to allow the Project to proceed;
- 2) order the NEB to dismiss the application; or,
- 3) refer the NEB recommendation or conditions back to the NEB for reconsideration.

In January 2016, the Minister of Natural Resources and the Minister of Environment and Climate Change announced interim measures to be applied to projects already undergoing regulatory review as part of a longer-term plan to review the environmental assessment process and to modernize the NEB.

One of the interim measures called for the Government of Canada to “**undertake deeper consultation with Aboriginal peoples and provide funding to support participation in these consultations**”. To ensure sufficient time to apply this measure to the review of the 2017 NGTL System Expansion Project, the Minister of Natural Resources sought an extension to the legislated time limit for the Governor in Council decision-making timeline, increasing it from three months to five months.

The Governor in Council’s new legislated time limit to make a decision on the NEB recommendations is November 1, 2016. This Crown Consultation and Accommodation Report will be provided to the Minister of Natural Resources for consideration in preparing a recommendation to inform the decision by the Governor in Council, and shared with relevant colleagues to support a decision on the Project.

4.0 Crown consultation with Aboriginal groups on the contemplated Crown conduct

This section outlines how the Crown identified Aboriginal groups potentially impacted by this Project and how the consultation was conducted and how information was tracked.

4.1 Potential, asserted or established section 35 rights

This section summarizes the historical and contextual information related to Aboriginal groups whose rights and title, or other interests, have the potential to be adversely affected by the Project should it be allowed to proceed.

4.1.1 Historic treaties

Many of the Aboriginal groups potentially impacted by the Project are signatories to the numbered historic treaties negotiated with the federal government between 1871 and 1921 (specifically Treaties 6, 7, 8 and 10). These treaties and the associated oral promises provide for certain gathering, hunting and fishing rights within each treaty's territory. Specifically, in exchange for a surrender of rights, titles and privileges whatsoever to the lands, the Crown agreed to set aside land as reserves, to provide both one-time and annuity payments, and to allow the First Nations to pursue their "usual vocations of hunting, trapping and fishing."

In understanding the scope and nature of the rights and obligations under historic treaties, the Crown is guided by the text of the treaty, as well as the understandings and intentions of the First Nations and Crown participants to the making of the treaty or subsequent adhesions, following rules of treaty interpretation articulated by the Supreme Court of Canada.

The Crown also understands that in Alberta, the treaty rights were modified following the conclusion of the Natural Resource Transfer Agreements, restricting the hunting, trapping and fishing right for the purpose of food.

The Crown views these aspects as being consonant with the terms of historic treaties insofar as the mode of life and livelihood referred to in the report were the hunting, trapping and fishing activities protected by the treaty. Rights protected under these historic treaties may also include harvesting activities undertaken for spiritual and cultural purposes.

As stated by the Supreme Court of Canada in *Mikisew Cree*, and recently reaffirmed in *Grassy Narrows First Nation*², the Crown's right to take up lands under historic treaties is not absolute, and is subject to the duty to consult and, if appropriate, accommodate the treaty First Nations' interests before reducing the area over which their members may continue to pursue hunting, trapping and fishing rights.

Although all historic treaty First Nations are entitled to engage in hunting, fishing and trapping activities within the whole of their treaty area, where a treaty First Nation no longer has a meaningful right to hunt, trap or fish in relation to the territory over which it traditionally hunted, trapped or fished, this could result in a treaty infringement.

² *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388 at para. 56 and *Grassy Narrows First Nation v. Ontario (Natural Resources)*, [2014] 2 SCR 447 at paras. 50-3.

While treaty adherents have rights to hunt, trap and fish throughout their entire treaty area, land use information and other evidence filed with the NEB was reviewed to understand key interactions between the Project and Aboriginal group's traditional use areas, including for spiritual and cultural use.

The Crown assessed a depth of consultation owed to each potentially affected Aboriginal group.

4.1.2 Métis Nations

Métis are Aboriginal peoples of Canada. Section 35 of the *Constitution Act, 1982* protects the customs, practices and traditions that were historically important features of Métis communities, who emerged subsequent to European "contact", and prior to the exercise of "effective control" by the European settlers. For Métis to be able to exercise section 35 rights, they must be able to demonstrate they are members of a modern Métis community that has ancestral linkages to an historic rights bearing Métis community. The test for establishing Métis section 35 rights was set out by the Supreme Court of Canada decision in *R. v. Powley*³.

In 2004, the Métis Nation of Alberta signed an Interim Métis Harvesting Agreement with the Government of Alberta. The Agreement recognizes the Métis' right to harvest for food through hunting, trapping and fishing, and applies to animals, fish and fowl in their Harvesting Lands. The Métis Harvesting Agreement recognizes that Alberta Métis can harvest year-round (unless there is a closure for conservation reasons) on all unoccupied provincial Crown lands unless there is activity or development on the lands that would make harvesting unsafe. Alberta Métis can harvest on all occupied Crown lands, such as wild land parks, natural zones and some types of provincial parks and other provincial protected areas that have areas designated as harvesting zones. Alberta Métis can also harvest on private lands with permission from owners or occupants. The Crown identified several Métis settlements potentially impacted by the Project.

4.1.3 Non-Treaty rights

Non-treaty Aboriginal groups may have section 35 rights, including in relation to traditional territories. While the contemplated action relates to a Project that is proposed largely for areas covered by historic treaties, the Crown identified several non-treaty Aboriginal groups with actual or asserted section 35 rights that could be potentially impacted by the contemplated action.

³ *R. v. Powley*, [2003] 2 SCR 207

As such, the Crown consultation process ensured that all potentially affected Aboriginal groups could assert any Aboriginal right, even if that right was not grounded in a treaty, when they believed the right could potentially be impacted by the contemplated action.

4.2 Aboriginal groups identified for consultation

In February 2015, and following receipt of the project description by NGTL, the Crown worked with information from the NEB, NGTL and Aboriginal and Northern Affairs Canada (INAC) to develop a list of potentially affected Aboriginal groups. A list of 44 individual Aboriginal groups and organizations were initially identified as potentially impacted by the Project. Upon further review, the list was amended to 49 in July 2016. Ten of the 49 groups identified are organizations that represent a collective of individual Aboriginal groups

This list was developed through the consideration of groups and organizations representing multiple groups, whose traditional territories, treaty areas, or traditional territory and use fall within a 100 km buffer on either side of the zone of impact represented by the Project, and therefore potentially impact on their established or potential Aboriginal or treaty rights, as defined under section 35 of the *Constitution Act*, 1982 (section 35 rights).

The following table lists the Aboriginal groups and organizations included in the final Crown list.

Table 3 Aboriginal groups included in the Crown list

Aboriginal groups	
Alberta	
Alexander First Nation	Métis Nation of Alberta Region 4
Alexis Nakota Sioux Nation	Métis Nation of Alberta Region 5
Asini Wachi Nehiyawak Traditional Band	Métis Nation of Alberta Region 6
Athabasca Chipewyan First Nation	Métis Settlement General Council
Beaver First Nation	Mikisew Cree First Nation
Beaver Lake Cree Nation	Nakcowinewak Nation of Canada
Bigstone Cree Nation	O'Chiese First Nation
Chard Métis Society	Paddle Prairie Métis Settlement
Chipewyan Prairie Dene Nation	Paul First Nation
Christina River Dene Nation	Peavine Métis Settlement
Dene Tha' First Nation	Peerless Trout First Nation
East Prairie Métis Settlement	Saddle Lake Cree First Nation
Enoch Cree Nation	Samson Cree First Nation
Fort McKay First Nation	Sawridge First Nation

Aboriginal groups	
Fort McMurray #468 First Nation	Stoney Nakoda First Nation
Gift Lake Métis Settlement	Sturgeon Lake Cree Nation
Heart Lake First Nation	Sucker Creek First Nation
Horse Lake First Nation	Sunchild First Nation
McMurray Métis	Swan River First Nation
Métis Nation of Alberta	Tallcree First Nation
MNA Gunn Métis Local 55	Tsuu T'ina First Nation
Métis Nation of Alberta Region1	Woodland Cree First Nation
British Columbia	
Blueberry River Nation	
Doig River First Nation	
Ktunaxa Tribal Council	
Saskatchewan	
Buffalo River Dene Nation	
Clearwater River Dene Nation	

The Crown’s approach to Phase IV of the consultation process is described below.

4.2.1 Establishing the depth of duty to consult in Phase IV

The Crown undertook a depth of consultation analysis for each Aboriginal group on the Crown list potentially impacted by the Project to determine the extent of consultation owed by the Crown. This analysis took account of the following factors for each Aboriginal Group:

- strength of the case for any section 35 rights that may be adversely affected; and
- degree of potential impact of contemplated Crown action or activity to adversely impact section 35 rights.

The Crown considered these two factors for each Aboriginal Group’s use of lands and resources in proximity to areas potentially impacted by the Project. To assess the potential severity of impacts on section 35 rights, the Crown considered such factors as areas of traditional use by Aboriginal groups; the past, present and anticipated future uses; the baseline conditions of these areas; the context through which rights and traditional practices are exercised; the availability of other lands where the meaningful exercise of interests could occur; residual effects of the Project; the extent to which the Project could impact Aboriginal groups’ use of the Project area; and the measures proposed to mitigate adverse impacts. The Crown then consulted each Aboriginal group in a manner consistent with the conclusions of its depth of

consultation analysis. Figure 3 illustrates how the Crown tailored its consultation with each Aboriginal group.

The Crown compiled information to conduct this analysis from a number of sources, including:

- Submissions to the NEB by NGTL
- Submissions to the NEB by Aboriginal groups
- Correspondence between the Crown and individual groups; and,
- The Federal Government’s Aboriginal and Treaty Rights Information System.

Figure 3 Depth of consultation determination framework

	Anticipated Negligible/ Very Weak Rights Claim	Anticipated Weak Rights Claim	Anticipated Moderate Rights Claim	Anticipated Strong Rights Claim	Modern Treaty Settlement, (including in process); Reserve Lands
Low Degree of Potential Adverse Impact	Nothing Required - opportunity to participate through public consultations	Recommended Letter, Info, Request for Aboriginal group to identify interest in contemplated conduct	Letter, Info, Input Welcomed on Project	Letter, Info, Consultation Session if Requested	Letter, Info, Consultation Session Anticipated
Moderate Degree of Potential Adverse Impact	Nothing Required - opportunity to participate through public consultations	Recommended Letter, Info, Request for Aboriginal group to identify interest in contemplated conduct	Letter, Info, Consultation Session if Requested	Letter, Info, Consultation Session Anticipated	Letter, Info, Consultation Session Most Likely Required
High Degree of Potential Adverse Impact	Recommended Letter, Info, Request for Aboriginal group to identify interest in contemplated conduct	Letter, Info, Input Welcomed on Project	Letter, Info, Consultation Session Anticipated	Letter, Info, Consultation Session(s) Most Likely Required	Possible Collaborative Development of Consultation Model (Protocol Agreement)

Source: Aboriginal Consultation Interactive Guidebook, Natural Resources Canada, January 2011

4.2.2 Phase IV consultation activities

Following the release of the NEB recommendations report, the Crown corresponded with the 49 Aboriginal groups and organizations on the Crown list to advise them of the publication of the NEB's report and of the start of the 30-day comment period on a draft upstream greenhouse gas assessment on the Project, conducted by Environment and Climate Change Canada.

The Crown also initiated the post-hearing consultation process by sending letters and applicable funding applications to 49 Aboriginal groups and organizations on the Crown list to seek their input on the NEB recommendations report and for their input in identifying any outstanding issues or concerns about the Project.

For Aboriginal groups that were owed a moderate or high duty to consult, the Crown invited those groups to apply for funding specifically allocated in Budget 2016 to support their participation in Phase IV consultations. The Canadian Environmental Assessment Agency followed up with groups to offer assistance in filling out the funding application in advance of the June 24, 2016, deadline. In responding to several groups' requests for more time, in particular those groups that were impacted by the wildfires in Fort McMurray, the deadline was extended to August 5, 2016. A funding review committee was convened to review the funding applications received. The Crown also followed up with groups to identify convenient dates to hold consultation.

During this time, the Crown followed up with groups on the low range of the consultation spectrum and responded to several requests for more information.

Of the 24 Aboriginal groups offered funding, 15 groups submitted a completed funding application and the Crown met with 11 of these groups on the Project. The remaining 4 chose to submit written comments to the Crown. The objectives of these meetings was to solicit from groups any outstanding issues and concerns as they pertain to the Project, and identify any potential accommodation measures for Government's consideration with their decision on the Project. A representative from the NEB accompanied the Crown during these meetings to answer questions related to the NEB hearing process, NEB compliance activities and enforcement tools available in cases on non-compliance. Meeting summaries were developed by the Crown and shared with the Aboriginal groups to ensure accuracy.

This Crown Consultation and Accommodation Report was also shared with Aboriginal groups for review and comment to help ensure that the Crown has adequately understood groups'

participation in the consultation process, their strength of claim, potential impacts on interests and any outstanding concerns, including whether they are addressed by the NEB conditions, Proponent commitments or other measures.

In addition to reviewing and commenting on this report and the group-specific annexes developed by the Crown, groups were also offered the opportunity to provide a submission to directly describe any outstanding concerns, issues or other views with respect to the Project.

4.3 Funding provided to support consultation

The Proponent, NEB and Crown all offered funding to support the engagement of Aboriginal groups during various stages of early project planning, the regulatory hearing and environmental assessment process, and Crown consultation.

4.3.1 Federal funding

The federal Participant Funding Program supported Aboriginal participation in consultation activities in the post-NEB hearing phase. Based on an interdepartmental agreement, administration of the Participant Funding Program was carried out by the Canadian Environmental Assessment Agency (CEAA).

Funds were provided for these consultations in Budget 2016 based on the government’s interim strategy. The Crown invited groups to apply for funding, offering \$8,500 to high groups and \$4,250 to medium groups, with more funding offered to groups operating as a collective, pro-rated according to the duty owed for the groups represented. These funds were identified to support groups’ review of the NEB recommendation report and their meaningful discussion with the Crown on any issues that may remain outstanding, along with the consideration of measures to mitigate potential impacts, if necessary.

As of October 2016, the Crown had allocated the following funding (Table 4):

Table 4 Allocation of funds for participation in the Phase IV consultation on the 2017 NGTL Project

Applicant/Recipient name	Funding amount approved (\$)
Bigstone Cree First Nation	\$8,500.00
Chipewyan Prairie Dene First Nation	\$8,500.00
Doig River First Nation	\$8,500.00

Applicant/Recipient name	Funding amount approved (\$)
Alexander First Nation	\$4,250.00
Alexis Nakota Sioux Nation	\$4,250.00
Asini Wachi Nehiyawak Traditional Band	\$4,250.00
Athabasca Chipewyan First Nation	\$4,250.00
Beaver Lake Cree Nation	\$4,250.00
Blueberry River	\$4,250.00
Chard Métis Society	\$4,250.00
Dene Tha' First Nation	\$4,250.00
East Prairie Métis Settlement	\$4,250.00
Fort McMurray #468 First Nation	\$4,250.00
Gift Lake Métis Settlement	\$4,250.00
Heart Lake First Nation	\$4,250.00
Horse Lake First Nation	\$4,250.00
McMurray Métis	\$4,250.00
Métis Nation of Alberta Gunn Métis Local 55	\$4,250.00
Mikisew Cree First Nation	\$4,250.00
Paul First Nation	\$4,250.00
Peavine Métis Settlement	\$4,250.00
Samson First Nation	\$4,250.00
Swan River First Nation	\$4,250.00
Woodland Cree First Nation	\$4,250.00
Bigstone Cree First Nation	\$8,500.00
Total	\$110,500.00

4.4 Crown consultation record and tracking of key issues

Following each meeting with an Aboriginal group, Crown officials developed a draft meeting record and shared it with the Aboriginal group to ensure that the conversation was captured correctly and to seek concurrence on any outstanding action items. The meeting records informed the development of group-specific annexes. The Crown also reviewed, responded to and retained all correspondence with each Aboriginal group. The Crown further considered the engagement logs as filed by NGTL in the NEB hearing process.

An issue tracking table was developed to identify issues raised by Aboriginal groups during the NEB hearing process and was then updated during Crown consultations. The table also included an analysis by the Crown of the extent that proposed conditions by the NEB would be likely to address the concerns of Aboriginal groups or if a gap existed. The tool was updated as consultation progressed and informed areas where accommodation measures may be considered. This tool was also informed by the analysis provided by the NEB to the Crown in June 2016, as per the Project Agreement between departments, of the issues raised by all Aboriginal groups throughout the hearing process.

5.0 Potential Impacts of contemplated Crown conduct on section 35 rights and Interests

This section summarizes the issues raised by Aboriginal groups through the NEB regulatory review process and during Crown consultations. Annexed to this report is a separate document detailing the issues raised by each consulted group. Each annexe will be shared with the respective Aboriginal group. These annexes will not be published with the report because they contain third-party information.

5.1 Issues raised by Aboriginal groups during the regulatory review and Crown consultation processes

Aboriginal groups raised the following views:

- A. Pipeline watercourse crossings will have an impact on waterways during construction
- B. Inability to participate fully in NEB review process due to lack of financial and human resources
- C. Crown's consultation process was inadequate
- D. NGTL's emergency response capability is inadequate
- E. NGTL's engagement with Aboriginal groups was inadequate
- F. Insufficient economic participation by Aboriginal groups
- G. Direct environmental impacts on vegetation, wetlands, wildlife and wildlife habitat, including from pesticide and herbicide use, during construction phase
- H. NEB recommendations did not fully reflect the input of Aboriginal intervenors
- I. Direct impacts during construction phase on caribou and caribou habitat
- J. Direct environmental impacts during construction phase on traditional land and resource use
- K. Direct and cumulative impacts during operational and decommissioning phases on environment (water crossings, vegetation, wetlands, wildlife and wildlife habitat), including from pesticide and herbicide use, and on traditional land use (including resources)

A. Pipeline watercourse crossings will have an impact on waterways during construction

Issue: The construction of each water crossing could potentially hurt fish populations through contamination, fish mortality or blockage.

NGTL Commitments

NGTL made specific commitments during the NEB hearing process that are most relevant to mitigating the project's potential impact on waterways during construction (these commitments will become certificate conditions by virtue of Certificate Condition 5):

- continue to follow Fisheries and Oceans Canada's Self-Assessment Process and Measures to Avoid Causing Harm to Fish and Fish Habitat, including the avoidances of restricted activity period or restricted timing window.
- obtain a *Fisheries Act* authorization if serious harm is likely as a result of the work or implementation of a contingency plan. In such instances, NGTL would have to submit offset proposals to DFO to mitigate serious harm. In the event that a *Fisheries Act* authorization is required, further engagement with potentially affected Aboriginal groups would be expected.
- adhere to all regulations, standards and guidelines set by provincial and federal regulatory authorities for watercourse crossings.
- include measures to minimize impacts to fish and fish habitat in its environmental protection plans and will implement, when warranted, the emergency response plan, Directional Drilling Procedures and Instream Drilling Mud Release Contingency Plan, Soil Erosion Contingency Plan, and Flood and Excessive Flow Contingency Plan.
- develop water quality monitoring plans to monitor for sediment events during instream construction activities and take corrective actions when necessary. If corrective actions not successful, construction activities would be temporarily suspended until effective solutions are identified.

Conditions proposed by the NEB that serve to address this issue

The NEB proposed a number of certificate conditions to mitigate the project's watercourse crossings' potential direct effects:

- **Certificate Condition 12** requires NGTL to file a plan for Aboriginal participation in the monitoring of construction activities.
- **Certificate Condition 19** requires NGTL to file its execution programs for water crossings.
- **Certificate Condition 23** requires NGTL to provide confirmation that any required authorizations under the *Fisheries Act* were obtained.

- **Certificate Condition 22** requires NGTL to finalize watercourse crossing site-specific information within their watercourse crossing inventory prior to construction, and **Certificate Condition 24** requires NGTL to notify the NEB of any changes or alternatives.

Crown's conclusion

We understand that waterways, fish, and fish habitat play a critical role in the Aboriginal use and enjoyment of the land. As we heard many times, water is what gives us life and connects us all. The Crown is of the view that the commitments made by NGTL and the NEB recommended conditions provide assurance that any adverse impacts to waterways during construction will be minimized. NGTL's commitment to seek authorizations under the *Fisheries Act* and to include measures within the Environmental Protection Plan will minimize and mitigate impacts on fish and fish habitat. Aboriginal groups will also have the opportunity to comment on the Environmental Protection Plan and voice their concerns. NEB Condition 12 ensures that Aboriginal monitors can participate in the monitoring of the construction activities to make sure that activities are carried out in a way that reduces any adverse impacts to waterways. Taken together, the Crown is satisfied that the concerns raised have been appropriately accommodated by the NEB conditions and commitments.

B. Inability to participate fully in NEB review process

Issue: Inadequate time allocated for submissions and the lack of financial resources and internal capacity to effectively engagement in the NEB review process.

In filings to the NEB, three groups requested more time to provide or respond to information requests, and submit written evidence. It was noted that the inadequate time allocated for submissions, the lack of financial resources and internal capacity made it very difficult to effectively respond before the NEB deadline. The NEB granted extensions in response to each request from an Aboriginal group. The NEB's Oral Traditional Evidence hearings also limited groups' ability to present traditional knowledge and the participation of elders.

The participant funding offered by the NEB and the Crown was viewed as low compared to the effort required to substantively review and respond to the materials filed, and participate in the process.

Delays in concluding engagement agreements with NGTL limited the ability to produce and provide traditional land use studies in time to address the hearing requirements, thereby limiting the ability to share information about traditional use of lands. Also, focusing on the completion of traditional land use studies for individual groups limited the consideration of the

holistic potential impact of the Project, and perpetuated the potentially incorrect view of the Crown that traditional territories can be easily defined.

Conditions proposed by the NEB that serve to address this issue

The NEB proposed a number of certificate conditions that are most relevant to ensuring the ongoing involvement of potentially affected Aboriginal groups.

- **All filing conditions** contain a requirement for NGTL to provide, upon request, relevant information concerning the Project to affected Aboriginal groups.
- **Certificate Condition 8** requires NGTL to file with the NEB at least 60 days before commencing construction, a report on any outstanding traditional Aboriginal land uses investigations for the Project.
- **Certificate Condition 12** requires NGTL to file a plan for Aboriginal participation in monitoring construction activities, which would set out further opportunity for Aboriginal groups to identify any specific adverse effects of the Project and mitigation measures.
- **Certificate Condition 13** requires NGTL to file Aboriginal Engagement Reports before and during construction of the Project.

Crown's conclusion

The Crown greatly values the views of Aboriginal groups and the depth of their traditional knowledge. However, the Crown also understands that in order to meaningfully participate in the review process and in consultations, financial resources are required for staff, expertise and the completion of traditional land use studies. Aboriginal participation is critical in being able to move forward with this Project while protecting our environment. For these reasons, the NEB offered participant funding to those groups who applied to participate and the Crown offered additional funding to Aboriginal groups for Phase IV consultations. Moving forward, the Crown encourages NGTL to work closely with potentially affected Aboriginal groups to complete their traditional land use studies as captured in Certificate Condition 8 and for Aboriginal groups to voice any outstanding concerns that they may have throughout the Project. NGTL has committed to continuing to engage with Aboriginal groups and Certificate Conditions 12 and 13 require that NGTL address the concerns raised and file a plan for Aboriginal participation in monitoring. The Crown is of the view that taken together, these conditions and commitments will ensure that Aboriginal groups are meaningfully engaged throughout the Project.

C. Crown's consultation process was inadequate

Issue: Crown consultation process was considered as taking place too late in the review process.

While the intention to pursue meaningful consultation is appreciated, face-to face meetings during the phase IV of the consultation process was considered too late in the review process. There was a view that Canada is limited in how it can respond to groups' concerns and provide accommodation measures.

Crown's conclusion

The Crown sought to consult potentially-affected Aboriginal Peoples in a manner consistent with the government's commitment to renew the relationship with Aboriginal peoples on a nation to nation basis.

To ensure transparent consultations, the Crown provided a preliminary strength of claim and depth of consultation assessment to each Aboriginal group. To avoid errors in this report and record, the Crown consulted with each group on individual meeting summaries, and sent a draft of this report and a relevant annex to each group containing a detailed summary of the group's input on the potential impacts of the project on Aboriginal rights and any proposals for accommodation measures.

In May 2016, to provide more time for consultations with Aboriginal groups, the Governor in Council approved an extension of two months to the legislated time limit. In September 2016, based on requests from three groups, the Crown further extended the deadline for providing comments on this draft report (all Aboriginal groups had until October 11, 2016 to provide any final comments on this report or to raise other issues).

In seeking to balance interests and in recognition of the importance of input from Aboriginal groups, the Crown believes that it has met its duty to consult owed to Aboriginal groups for this Project. To ensure that input and concerns from all potentially affected Aboriginal groups were meaningfully considered, the Crown provided timeline extensions, offered participant funding and offered to meet in person. The Crown also contacted all potentially affected Aboriginal groups by phone and email in order to ensure that all those who wanted to, had the opportunity to express their views.

D. NGTL's emergency response capability inadequate

Issue: Concerns related to potential pipeline failures or accidents.

NGTL commitments

NGTL made the following specific commitments during the NEB hearing process that are most relevant to verifying the adequacy of the Project's emergency response capability (these commitments will become certificate conditions through Certificate Condition 5):

- apply the TransCanada's management system throughout the entire lifecycle of the Project including: Emergency Management Program, Integrity Management Programs, Safety Management Program, and Security Management Program. The TransCanada management system complies with Canadian Standards Association Standard Z731 – Emergency Preparedness and Response.
- complete a project-specific written Emergency Response Plan approximately six months prior to the Project's in-service date.
- develop Emergency Response Plans by each prime contractor to cover potential emergencies at its worksite and while travelling and hauling to and from its worksite during construction.
- consult with emergency response agencies to ensure that appropriate communications, understanding and cooperation is in place for the Project during construction. Communication protocols would include contact information for a potentially affected Aboriginal groups and registered trapline holders who would be contacted in the event of an emergency in their area.
- make available emergency response personnel 24 hours a day, seven days a week to respond to emergencies.
- conduct a follow-up investigation once a leak is detected to confirm and locate the leak and the pipeline section is isolated for repair and maintenance.
- include Aboriginal groups in the NGTL Public Awareness and System-wide Emergency Management Plans during the operation phase of the Project and provide information about steps to take in the event of an emergency.
- continue dialogue with affected Aboriginal groups regarding emergency response.

Conditions proposed by the NEB that serve to address this issue

The NEB proposed a number of certificate and order conditions that appear most relevant to ensuring an appropriate emergency response capability:

- **Certificate Condition 9** and **Order Condition 9** require NGTL to file with the NEB a Project-specific Emergency Response and Management Plan that would be implemented should an emergency occur during the construction phase of the Project.
- **Certificate Condition 15** requires NGTL to have updated Emergency Procedures Manuals.
- **Order Condition 5** requires NGTL to have updated Construction Safety Manuals.
- **All filing conditions** contain a requirement for NGTL to provide, upon request, relevant information concerning the Project to affected Aboriginal groups.

Crown's conclusion

Pipeline failures and accidents can have a detrimental effect on the physical and mental well-being of Aboriginal communities if not addressed quickly and efficiently. The Crown is of the view that NGTL's emergency response capability is adequate for this Project in that it will be subject to TransCanada's management system throughout the entire lifecycle of the Project. NGTL has also committed to making available emergency response personnel 24 hours a day, seven days a week. Further, NEB conditions 9 and 15 require NGTL to file emergency response plans and procedures manuals to ensure that should an emergency occur, NGTL will be able to respond quickly and effectively. Aboriginal groups are able to review these plans and manuals and raise any concerns they may have with NGTL or the NEB. Taken together, the Crown concludes that the commitments and conditions provide assurance that concerns about pipeline failures and accidents are appropriately addressed.

E. NGTL's engagement with Aboriginal groups inadequate

Issue: Not being meaningfully consulted by NGTL and that NGTL had not conducted negotiations with them on economic benefits agreements in good faith.

NGTL commitments

NGTL made the following specific commitments during the NEB hearing process that are most relevant to its engagement with Aboriginal groups to date (these commitments will become certificate conditions though Certificate Condition 5):

- engage with Aboriginal groups throughout the lifecycle of the project.
- consider any feedback provided by Aboriginal groups on the post-construction monitoring reports and incorporate as appropriate into future post-construction monitoring or operation plans as necessary.

Conditions proposed by the NEB that serve to address this issue

The NEB proposed a number of certificate and order conditions that appear most relevant to ensuring an appropriate level of engagement by NGTL with Aboriginal groups.

- **Certificate Condition 5 and Order Condition 6** require NGTL to provide, upon request, NGTL's filings with the NEB related to its Commitments Tracking Table programs and manuals. The Commitments Tracking Table lists all the commitments made by NGTL in its Project Application or in its related submissions.
- **Certificate Condition 13** requires NGTL to file Aboriginal Engagement Reports before and during construction of the Project.
- **Certificate Condition 34** requires NGTL to notify Aboriginal groups when Caribou Habitat Offset Measures Implementation Report for the Project is filed.

Crown's conclusion

The Crown is of the view that the relationship between NGTL and potentially affected Aboriginal groups is an important one. Aboriginal groups should be engaged both well in advance and throughout the life of the Project and be able to voice their concerns. NGTL has made the commitment to continue engaging with groups throughout the lifecycle of the Project and as the regulator, the NEB has the tools to enforce conditions and commitments made by NGTL that relate to this issue. The NEB Condition 13 requires NGTL to file with the NEB a description of the concerns raised by Aboriginal groups and how the concerns have or will be addressed. The Crown has asked the NEB to ensure that NGTL provides copies of these reports to potentially affected Aboriginal groups and encourages groups to bring forward any concerns they may have to the NGTL and the NEB. The Crown therefore concludes that taken together, along with our request, these conditions and commitments will ensure that Aboriginal groups are meaningfully engaged by NGTL throughout the life of the Project.

F. Insufficient economic participation by Aboriginal groups

Issue: The inability to compel NGTL to share in revenues derived from the Project as well as concerns about the inability to guarantee that communities have the opportunity to participate in and benefit from the Project.

NGTL commitments

NGTL made the following specific commitments during the NEB hearing process that are most relevant to Aboriginal economic participation (these commitments will become certificate conditions through Certificate Condition 5):

- track all commitments to education and training for Aboriginal groups on the Project and seek opportunities to link program participants to further training, employment and/or

contracting opportunities should the skills, qualifications and experience of the individual participants meet those required by NGTL and the company's prime contractors.

- offer to local Aboriginal service providers employment opportunities related to right-of-way clearing, log hauling, medical and security services, and incorporate it into the contract between NGTL and its prime contractor. Once a prime contractor is selected and its Aboriginal Participation Plan is reviewed by NGTL, any additional contracting and employment opportunities that might be available to the 154 local Aboriginal communities would be determined and communicated to the communities.
- consider all businesses put forward by the Aboriginal communities, including Aboriginal-owned businesses and joint venture partnerships.
- commit that its prime contractor would work with local Aboriginal communities to identify additional opportunities based on their business capacity and Project requirements. Also provide feedback to Aboriginal communities in order to help build their overall capacity and gain a better understanding of contracting requirements for future projects.
- regularly meet with Aboriginal communities to solicit feedback on its Aboriginal Contracting and Employment Program. NGTL indicated that post-construction debrief meetings would be held with communities at the completion of the Project to better understand the successes and challenges regarding their economic participation.

Conditions proposed by the NEB that serve to address this issue

Certificate Condition 5 requires NGTL to file with the NEB a list of all the commitments made by NGTL in in Project Application or in related submissions, including those commitments as listed above.

Crown's conclusion

The Crown heard many times during consultations that Aboriginal groups want to benefit from the economic opportunities that this Project will generate. As Aboriginal communities feel they are assuming much of the risk associated with the Project, the Crown is of the view that they should also benefit. With respect to these concerns, NGTL has made a number of commitments that will ensure potentially affected groups will benefit from training; employment opportunities; business opportunities; and, capacity building within their community. Specifically, NGTL has committed to consider all business put forward by Indigenous communities, to regularly meet with Indigenous communities to solicit feedback on its Aboriginal Contracting and Employment Program and to offer local Indigenous services providers employment opportunities related to right-of-way clearing, log hauling, medical and security services. The Crown believes that these conditions and commitments appropriately

accommodate the concerns raised by Aboriginal groups regarding ongoing economic participation in the Project.

G. Direct environmental impacts during the construction phase on vegetation, wetlands, wildlife and wildlife habitat, including from pesticide and herbicide use

Issue: The ongoing loss, alteration, access to and fragmentation of the natural landscape in the region as well as potential contamination of traditional foods, medicines and agricultural food crops resulting from the use of pesticides and herbicides.

All Aboriginal groups that participated in the NEB hearings noted a need for greater involvement in monitoring during the construction phase of the Project in order to ensure that specific adverse effects of the Project on the environment are identified and appropriate mitigation measures are implemented in sensitive cultural and environmental areas.

Commitments made by NGTL

NGTL made the following specific commitments during the NEB hearing process that are most relevant to mitigate adverse effects on the environment, including vegetation, wetlands, wildlife and wildlife habitat (these commitments will become certificate conditions through Certificate Condition 5):

- reduce disturbance of vegetation and the surficial organic layer, where feasible, in areas of discontinuous permafrost during construction.
- restrict the general application of herbicides on a site-specific basis near discrete traditional land use sites. Specific sites will be identified in collaboration with Aboriginal groups.
- employ standard weed management procedures outlined in TransCanada's Integrated Vegetation Management Program, TransCanada's Invasive Vegetation Weed Control Management TransCanada Operating Procedure.
- implement NGTL's Environmental and Socio-Economic Assessment, Environmental Protection Plans, Environmental Alignment Sheets, Spill Contingency Plan, and Chemical and Waste Management Plan.
- ensure all equipment arrives at the Project site clean and free of soil or vegetative debris.

Conditions proposed by the NEB that serve to address this issue

The NEB proposed a number of certificate and order conditions that appear most relevant to limit the potential environmental impacts of the Project, including:

- **Certificate Condition 6** and **Order Condition 7** require NGTL to file an updated Project-specific Environmental Protection Plan to communicate all environmental protection

procedures and mitigation measures to employees, contractors and regulators and a Post-Construction Monitoring Program. These procedures and mitigation measures must be clear, unambiguous and comprehensive to cover general and site-specific mitigation to all environmental elements.

- **Certificate Condition 12** requires NGTL to file a plan describing participation by Aboriginal groups in monitoring Project construction activities.
- **Certificate Conditions 16 and 18, and Order Condition 10** require that construction activities and reporting include information on the activities carried out during the reporting period; any environmental, socio-economic, safety and security issues and issues of non-compliance; and the measures undertaken for the resolution of each issue and non-compliance.

Crown's conclusion

Throughout the NEB process and consultations, the Crown heard accounts of how resource development had negatively affected the environment. The land is not only physically important, it is spiritually and culturally important to all groups. Aboriginal groups raised concerns relating to the adverse effects on vegetation, wetlands, wildlife, and wildlife habitat during the construction phase of the Project.

In regards to these issues, the NEB has recommended Certificate Conditions 6, 12, 16 and 18 as well as Order Conditions 7 and 10, to limit the potential negative environmental impacts. Specifically, Certificate Condition 6 requires NGTL to file an updated Project-specific Environmental Protection Plan to communicate all environmental protection procedures and mitigation measures to employees, contractors and regulators. Indigenous groups will have an opportunity to view and comment on the plan as well as bring forward any outstanding concerns. NGTL has also made a commitment to restrict the general application of herbicides on a site-specific basis near discrete traditional land use sites, and to monitor and evaluate the effectiveness of its environmental mitigation during its post-construction monitoring program. The Crown believes that these conditions and commitments appropriately accommodate any adverse effects on the environment during construction phase of this Project.

H. NEB recommendations did not fully reflect the input of Aboriginal Intervenors

Issue: Information and evidence presented by Aboriginal groups to the NEB was not appropriately considered and reflected in the NEB report.

Commitments made by NGTL

NGTL made the following specific commitments during the NEB hearing process that are most relevant to strengthening NGTL's mitigation measures (these commitments will become certificate conditions through Certificate Condition 5):

- incorporate any additional mitigation measures resulting from its ongoing engagement with Aboriginal groups for specific sites identified into its final Environmental Protection Plans and Environmental Alignment Sheets to be filed with the NEB prior to construction. NGTL indicated additional cultural, heritage, or traditional land and resource use sites identified prior to or during construction would be addressed through NGTL's Traditional Land Use Sites Discovery Contingency Plan and Heritage Resource Discovery Contingency Plan.

Conditions proposed by the NEB that serve to address this issue

The NEB proposed a number of certificate and order conditions that appear relevant to strengthening NGTL's mitigation measures, particularly:

- **Certificate Condition 8** requires NGTL to file with the NEB a report on any outstanding traditional land uses investigations for the Project at least 60 days before commencing construction.
- **Certificate Condition 12** requires NGTL to file a plan for Aboriginal participation in the monitoring of construction activities.
- **Certificate Condition 13** requires NGTL to file Aboriginal Engagement Reports before and during construction of the Project.

Crown's conclusion

During the NEB hearing process, 16 Aboriginal groups filed written evidence, gave oral traditional evidence, commented on the Project proposal, and filed information requests. The Crown is aware of the time, effort and resources that the groups have invested to participate in the NEB process and consultations, and it has been highly valued in the review of this Project. Through consultations, the Crown heard that groups may feel that their evidence was not taken into account or appropriately addressed by the NEB conditions. The Crown believes that NEB Conditions 8, 12 and 13 will ensure that any outstanding information and evidence is taken into account moving forward. Specifically, Condition 8 requires NGTL to report on any outstanding traditional land uses investigations and Condition 12 requires NGTL to file a plan

for Aboriginal participation in the monitoring of construction activities. NGTL has also committed to incorporate any additional specific information provided by Aboriginal groups to help strengthen the mitigation measures. The Crown believes that these conditions will help ensure that Aboriginal groups can participate in the Project and voice any outstanding concerns.

I. Direct impacts during construction phase on caribou and caribou habitat

Issue: The construction of two of the five proposed pipeline loops could have long-term negative effects on caribou, a species that is important to their communities. Construction of these two loops may temporarily affect habitat and movement patterns and leave long-term consequences on the affected herds. As context, the boreal woodland caribou is listed as Threatened on Schedule 1 of the *Species at Risk Act* (SARA).

Commitments made by NGTL

NGTL made the following specific commitments during the NEB hearing process that are most relevant to mitigating effects on caribou and caribou habitat (these commitments will become certificate conditions through Certificate Condition 5):

- develop a Caribou Habitat Restoration and Offset Measures Plan for the portions of the Project within the ranges of boreal woodland caribou.
- enable construction activities to occur primarily during the winter season to take advantage of frozen ground conditions for access to and along the pipeline RoW. The proposed schedule would help reduce overall environmental impact by avoiding caribou and migratory bird restricted activity periods, as well as meeting timing restrictions associated with watercourse crossings.
- include measures for wildlife and wildlife habitat that would also be beneficial for caribou, additional mitigation measures specific for caribou ranges. This mitigation is listed in the Environmental Protection Plans and in NGTL's preliminary Caribou Habitat Restoration and Offset Measures Plan. Key mitigation categories are identified as follows: limit disturbance, control access, revegetation with non-high value forage habitat for ungulates, maintain or restore connectivity, and work outside of the restricted activity period or restricted timing window.
- continue discussions with Alberta Environment and Parks on the identification of priority offset locations.

Conditions proposed by the NEB that serve to address this issue

The NEB proposed a number of certificate and order conditions that appear relevant to mitigating the direct impact on caribou and caribou habitat, including:

- **Certificate Condition 6** requires NGTL to include a list of measures to be taken during construction to minimize disturbance to caribou and caribou habitat and help accelerate habitat restoration.
- **Certificate Condition 7** requires NGTL to file a revised Caribou Habitat Restoration and Offset Measures Plan, and to notify Aboriginal groups who have expressed to NGTL an interest in this filing.
- **Certificate Condition 18** and **Order Condition 11** require NGTL to file construction progress reports which include how it is avoiding working, where feasible, within the restricted timing window set by Alberta Environment and Parks from February 15 to July 15 to reduce impacts to pregnant cows and their calves.
- **Certificate Condition 31** requires NGTL to file a Caribou Habitat Restoration Implementation Report and Status Update on habitat restoration measures. NGTL must notify Aboriginal groups who have expressed to NGTL an interest in this filing.
- **Certificate Condition 32** requires NGTL to file a Caribou Habitat Restoration and Offset Measures Monitoring Program on monitoring and verifying effectiveness of habitat restoration measures which NGTL must file and notify Aboriginal groups who have expressed to NGTL an interest in this filing.
- **Certificate Condition 33** requires NGTL to prepare Caribou Monitoring Reports on the results of the habitat program which NGTL must file and notify Aboriginal groups who have expressed to NGTL an interest in this filing.
- **Certificate Condition 34** requires NGTL to Caribou Habitat Offset Measures Implementation Report demonstrating how the direct and indirect effects have been offset, which NGTL must file and notify Aboriginal groups who have expressed to NGTL an interest in this filing.

Crown's conclusion

Aboriginal groups raised concerns that construction of two of the five proposed pipeline loops could have long-term negative effects on caribou, an important species to their communities. Aboriginal groups expressed how in the span of a lifetime, they have seen the caribou population decrease significantly. The Crown believes that the protecting the caribou is of the utmost importance given its status as threatened under the *Species at Risk Act*.

The Crown is of the view that NEB Certificate Conditions 6, 7, 18, 31, 32, 33, and 34 will directly ensure that potential impacts to caribou and caribou habitat are minimized and mitigated. More specifically, NGTL is required to file and implement a Caribou Habitat Restoration Implementation Report, a Caribou Habitat Restoration and Offset Measures Monitoring Program, Caribou Monitoring Reports, and a Caribou Habitat Offset Measures Implementation

Report. NGTL is also required to file construction progress reports which include how work on the Project will be avoided, where feasible, during the restricted times to reduce impacts to pregnant cows and their calves. Other commitments include mitigation measures specific to caribou ranges and continuing discussions with Alberta Environment and Parks on the identification of priority offset locations.

Furthermore, in the event that restoration and offset activities by NGTL are not successful, the Minister of Environment and Climate Change could take further steps under the *Species at Risk Act* to protect critical habitat on provincial lands, including caribou habitat. A protection order, if approved, could halt development activities in the region while further conservation efforts are put in place.

The Crown believes that these conditions, commitments and provisions under the *Species at Risk Act* will ensure adverse impacts to caribou and caribou habitat are minimized.

J. Direct environmental impacts during construction phase to traditional land and resource use

Issue: The construction of the project would impact traditional land and resource use, including ability to use sacred sites, burial grounds and gathering places during the construction phase.

Commitments made by NGTL

NGTL made the following specific commitments during the NEB hearing process that are most relevant to mitigating impacts on traditional land and resource use (these commitments will become certificate conditions through Certificate Condition 5):

- adopt techniques to help achieve prompt, natural revegetation following construction. NGTL indicated revegetation success would be assessed and documented through its post-construction monitoring program and that it can review the results with Aboriginal groups if desired. NGTL stated its post-construction monitoring program would ensure the lands disturbed by the Project would return to equivalent land capability, which is the standard for reclamation in Alberta.
- use traditional knowledge to inform the Project design, where feasible.
- continue engaging with potentially affected Aboriginal groups throughout the construction phase and develop additional mitigation, as warranted.
- consider any additional information gathered during ongoing traditional land use studies and incorporate into Project planning as appropriate.
- apply general mitigation measures to the entire proposed pipeline route to avoid or minimize potential effects on traditional plant harvesting and resources.

- incorporate any additional mitigation measures resulting from ongoing engagement with Aboriginal groups for specific sites identified into its final Environmental Protection Plans and Environmental Alignment Sheets to be filed with the NEB prior to construction. NGTL indicated that additional cultural, heritage, or traditional land and resource use sites identified prior to or during construction would be addressed through NGTL's Traditional Land Use Sites Discovery Contingency Plan and Heritage Resource Discovery Contingency Plan.
- any other commitments as included in NGTL's Commitment Tracking Table to be filed with the NEB within 90 days of the Certificate date, and at least 30 days prior to commencing construction of the section 52 facilities, as per Certificate Condition 5.

Conditions proposed by the NEB that serve to address this issue

The NEB proposed a number of certificate conditions that appear relevant to mitigating the direct impact on traditional land and resource use:

- **Certificate Condition 8** requires NGTL to file a report outlining NGTL's plan for any outstanding traditional land use investigations for the Project.
- **Certificate Condition 36** requires access management measures to be monitored and reported on in Post-Construction Monitoring reports, including access management in caribou habitat (as discussed above).

Crown's conclusion

During the NEB hearing process and consultations, the Crown had the opportunity to hear firsthand the spiritual and cultural connection that Aboriginal peoples have to the land. As one Elder said: "I have a connection to [the land]. To me, it has sentimental value. It's not what I can take out of the trapline that motivates me. I go there for my healing. I go there for my herbs, for subsistence living."⁴

Concerns were raised about the potential adverse impacts the Project may have on traditional land and resource use. Conditions 8 and 36 require NGTL to file any outstanding traditional land use investigations for the Project as well as monitor and report on access management measures. The Crown believes that these measures will ensure that impacts to traditional land and resources use are mitigated. NGTL has also made several commitments which will further mitigate impacts on traditional land and resource use, including using traditional knowledge to inform the Project design where feasible, and incorporating any additional mitigation measures

⁴ Elder Clement Auger, paragraph 1230, NEB Transcript Volume 3

that come out through ongoing engagement with Aboriginal groups. The Crown believes that these conditions and commitments will ensure that the direct environmental impacts during the construction phase to traditional and resource use will be minimized and mitigated.

K. Direct and cumulative impacts during the post-construction phase on the environment (water crossings, vegetation, wetlands, wildlife and wildlife habitat), including from pesticide and herbicide use, and on traditional land use (including resources)

Issue: Potential adverse direct and cumulative effects on the environment and traditional land and resource use, including those on water crossings, vegetation, wetlands, wildlife and wildlife habitat.

In terms of direct effects, groups expressed concern that the ongoing operation of the project would result in a potential risk to water sources, wildlife, fish and fish habitat in the case of a leakage, to traditional land use from maintenance operations, and to vegetation from the ongoing use of pesticides and herbicides.

In terms of cumulative effects, groups expressed concern that the ongoing operation of the project would contribute negatively to an already strained environment. For instance, groups noted that, over approximately the last 70 years, there have been severe losses of wildlife and wildlife habitat, decreasing access to land, growing levels of contamination in wildlife habitat and water systems in the project area and the surrounding area. Groups noted that these existing cumulative effects have led to significant changes in traditional land use and expressed concern about the project's contribution to this trend.

Commitments made by NGTL

NGTL made the following specific commitments during the NEB hearing process that are most relevant to mitigating the project's potential direct and cumulative impacts on the environment and traditional land use during the post-construction phase (these commitments will become certificate conditions through Certificate Condition 5):

- continue to engage Aboriginal groups during the post-construction period. NGTL stated it will provide potentially affected Aboriginal groups with notification of scheduled field programs and provide notification and post information when Post-Construction Monitoring reports are filed with the NEB. NGTL indicated that any feedback provided by Aboriginal groups on the Post-Construction Monitoring reports will be considered and incorporated as appropriate into future post-construction monitoring or operation plans as necessary. NGTL submitted it will continue to engage with potentially affected Aboriginal groups through the construction and operation of the Project, and will

continue to evaluate whether additional mitigation measures are necessary to reduce or avoid effects on traditional land uses.

- continue to engage with each interested Aboriginal group through the operation phase of the Project to share information about construction and post-construction monitoring activities and to address any concerns that arise.
- restrict the general application of herbicides on a site-specific basis near discrete traditional land use sites. Specific sites will be identified in collaboration with Aboriginal groups.
- employ standard weed management procedures outlined in TransCanada's Integrated Vegetation Management Program and TransCanada's Invasive Vegetation Weed Control Management TransCanada Operating Procedure.
- implement NGTL's Environmental and Socio-Economic Assessment, Environmental Protection Plans, Environmental Alignment Sheets, Spill Contingency Plan, and Chemical and Waste Management Plan.
- implement an Access Management Plan to maintain and control access to traditional territory.
- ensure that the required reclamation plan describes how the regeneration of vegetation would be enhanced for all or part of the total 23.7 ha temporary workspace footprint within the K'ih tsaa?dze Tribal Park.
- monitor and evaluate the effectiveness of its environmental mitigation during its post-construction monitoring program.
- ensure all equipment arrives at the Project site clean and free of soil or vegetative debris.

Conditions proposed by the NEB that serve to address this issue

The NEB proposed a number of certificate and order conditions that appear most relevant to mitigating the project's potential direct and cumulative impacts on the environment and traditional land use during the post-construction phase:

- **Certificate Condition 6** and **Order Condition 7** require NGTL to file an updated Project-specific Environmental Protection Plan communicating all environmental protection procedures and mitigation measures to employees, contractors and regulators. These procedures and mitigation measures must be clear, unambiguous and comprehensive to cover general and site-specific mitigation to all environmental elements.
- **Certificate Condition 11** requires NGTL to file a reclamation plan for temporary workspace in the K'ih tsaa?dze Tribal Park to enhance the regeneration of vegetation in the temporary workspace. This condition also requires NGTL to confirm that the status of

reclamation will be reported in the Post-Construction Monitoring report, as required in Certification Condition 36.

- **Certificate Condition 36** requires NGTL to file Post-Construction Monitoring reports that must include, but is not limited to, information specific to the effectiveness of mitigation applied to minimize effects to the following items: soils, weeds, watercourse crossings, wetlands, rare plants, wildlife and wildlife habitat, wildlife species at risk and of special concern, including western toad habitat and caribou habitat, fish and fish habitat, Key Wildlife and Biodiversity Zones, trumpeter swan waterbodies, Grizzly Bear Secondary Area, and Special Access Zones. This condition also requires NGTL to notify Aboriginal groups who have an expressed an interest in this filing.

Crown's conclusion

During the NEB hearing process and subsequent consultations, Aboriginal groups raised concerns regarding the direct and cumulative adverse effects post-construction on water crossings, vegetation, wetlands, wildlife and wildlife habitat. They are worried that the continued development of resources will lead to long-term negative impacts on the environment and the well-being of their communities. The Crown believes that any development of our resources must be done in a way that goes hand-in-hand with protecting the environment, both now and for future generations. Therefore, in regards to concerns raised about potential adverse direct and cumulative effects on the environment and traditional land and resource use, NEB Certificate Conditions 6, 11, and 36 as well as Order Condition 7 will ensure that potential adverse impacts are minimized. NGTL has also made commitments to help mitigate the Project's impacts, including continuing to engage groups during the post-construction phase to address any outstanding concerns, restricting the general application of herbicides on a site specific basis, and monitoring and evaluating the effectiveness of its environmental mitigation during its post-construction monitoring program. The Crown believes that these conditions and commitments will appropriately accommodate the concerns raised.

The Crown also heard that Aboriginal groups would like to be more formally involved in monitoring the project during the post-construction phases, as a way of: (1) identifying impacts to the environment and traditional land use quickly; and (2) to ensure Aboriginal groups' comfort with NGTL's response and mitigation measures. The Crown notes that the NEB's conditions (including proposed Certificate Condition 5, which requires NGTL to fulfill its commitment to engage with interested groups, including Aboriginal groups, throughout the post-construction phases) do not specifically guarantee the formal involvement of Aboriginal groups or representatives in monitoring the project during the post-construction phases. At the

same time, the Crown sees a benefit to the formal involvement of Aboriginal groups in post-construction monitoring of the larger NGTL system and has committed to considering this issue during the NEB modernization process.

6.0 Conclusion

The Crown heard a range of concerns from Aboriginal groups. These views reflect groups' commitment to stewardship of the land and traditional territories, as well as a strong desire to ensure development does not impede the ability of future generations to carry out those activities. During the interim period, the Government's decisions on major projects will be guided by five principles:

1. No project proponent will be asked to return to the starting line — project reviews will continue within the current legislative framework and in accordance with treaty provisions, under the auspices of relevant responsible authorities and Northern regulatory boards;
2. Decisions will be based on science, traditional knowledge of Indigenous peoples and other relevant evidence;
3. The views of the public and affected communities will be sought and considered;
4. Indigenous peoples will be meaningfully consulted, and where appropriate, impacts on their rights and interests will be accommodated; and
5. Direct and upstream greenhouse gas emissions linked to the projects under review will be assessed.

The Government has committed to a renewed relationship with Aboriginal peoples based on a nation-to-nation engagement. Some of the concerns presented to the Crown in the course of consultations on the Project, will be addressed by the Government's commitment to reconciliation. Other concerns will be addressed by the Government's commitment to modernize the National Energy Board and to review the environmental assessment legislation. In relation to concerns directly linked to the project's potential impact on Aboriginal interests, the Crown has assessed those concerns against the conditions proposed by the NEB and commitments made by NGTL. The Crown concludes that those conditions are responsive to, and appropriately accommodate, the concerns raised. Most notably, the NEB has proposed a condition that will provide a formal role for Aboriginal groups in enabling them to participate as project monitors during the Project's construction phase. The Crown welcomes this condition as recognition of the strong desire of Aboriginal groups to be involved in the development of natural resources in their traditional territory and one that is consistent with the level of impact presented by this project.