

**ATTACHMENT: Life Cycle Regulator Advice Record: Designation Request under IAA
Response due by March 30, 2020**

NGTL and Foothills West Path Delivery 2022/2023 Projects

Ministry	Canada Energy Regulator
Lead Contact	Shannon Vollema, Director Facilities Adjudication, Central/North
Full Address	Canada Energy Regulator Suite 210, 517 Tenth Avenue SW Calgary, AB T2R 0A8
Email	Shannon.Vollema@cer-rec.gc.ca
Telephone	403-390-8634
Alternate Ministry Contact	Kurt McAllister, Director Facilities Adjudication, West

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1. In general terms, please confirm and describe your ministry's role (if applicable) in the review of the Project.

The Canada Energy Regulator (CER) is an independent energy regulatory body that is responsible for ensuring that pipeline, power line and offshore renewable energy projects within Parliament's jurisdiction are constructed, operated and abandoned in a safe and secure manner that protects people, property and the environment. The CER regulates pipelines, energy development and trade in the Canadian public interest.

The Commission of the CER (the Commission) is responsible for adjudicative decisions, operating as a quasi-judicial body that is arm's length from other parts of the CER governance structure and Natural Resources Canada.

The four proposed pipeline projects (the Projects) and associated facilities are subject to the requirements of the Canadian Energy Regulator Act (CER Act) and its regulations. The CER is a lifecycle regulator, and has regulatory oversight of the Projects through all lifecycle phases. This includes:

- Early Engagement and Planning Phase
- Application Phase
- Construction Phase
- Operation Phase
- Abandonment Phase
- Post-Abandonment Phase

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2. Please provide the contact information of the person or persons responsible for managing your ministry's oversight of the Project (if different from lead contact above).
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Same as above

3. Describe the provincial legislative or regulatory process or approvals administered by your ministry that may assess or manage the potential adverse effects of the Project. For each mechanism or approval, please provide information regarding the following:
- Name of the process or authorization (e.g. certificate, licence, permit or approval) and the associated legislative framework;
 - Whether (for each) the authorization would set conditions and if yes, what issues would those conditions address;
 - Whether (for each) the authorization would require public and/or Indigenous consultation and if yes, provide information on the approach to be taken; and
 - Whether (for each) your ministry has guidance material that would be helpful to the proponent or the Agency (please provide these as attachments or hyperlinks in your response).

The designation request referenced four proposed projects:

- NOVA Gas Transmission Ltd. (NGTL) West Path Delivery 2022;
- Foothills Pipe Lines (South B.C.) Ltd. (Foothills) Zone 8 West Path Delivery 2022;
- NGTL West Path Delivery 2023; and
- Foothills Zone 8 West Path Delivery 2023.

The CER has not yet received applications for any of these Projects. Project Notifications, as required by the Early Engagement Guide have been filed for two of these Projects, NGTL West Path Delivery 2022 and Foothills Zone 8 West Path Delivery 2022. Based on the information currently filed with the CER for these Projects, the CER anticipates the following authorizations may be required:

- Section 183 of the CER Act (Certificate) - (NGTL West Path Delivery 2023) - Project assessments under section 183 of the CER Act must include a public hearing and, following the assessment, the Commission will make a recommendation to the Governor in Council as to whether or not a Certificate should be issued for all or any part of the pipeline, taking into account whether the pipeline is and will be required by the present and future public convenience and necessity, including specific factors set out in subsection 183(2) of the CER Act (described below). Regardless of the Commission's recommendation, the Commission must include conditions that it considers necessary or in the public interest, to which a Certificate would be subject. The Governor in Council must make a decision on the recommendation as set out in section 186 of the CER Act
- Section 214 of the CER Act (Order) - (NGTL West Path Delivery 2022, Foothills Zone 8 West Path Delivery 2022, Foothills Zone 8 West Path Delivery 2023) For pipelines under 40 km in length, the Commission may issue an Order under section 214 of the CER Act, exempting a company from the requirements listed therein. The effect of this exemption is to allow the company to construct and operate those pipelines. In this case, the Commission is the decision maker.
- Sections 201 - 210 of the CER Act (Detailed Route) - After the company receives its Certificate under section 183 of the CER Act from the Commission, the company must seek approval for the detailed route of the project.
- Section 213 (Leave to Open) - The company must obtain leave to open a pipeline from the Commission, and it must not open that pipeline for transmission until the Commission grants an order granting that leave.

The recommendation under section 183 (Certificate) must include all considerations that appear to it to be relevant and directly related to the pipeline, including:

- The environmental effects, including any cumulative environmental effects;
- the safety and security of persons and the protection of property and the environment;
- the health, social and economic effects, including with respect to the intersection of sex and gender with other identity factors;

- the interests and concerns of the Indigenous peoples of Canada, including with respect to their current use of lands and resources for traditional purposes;
- the effects on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the Constitution Act, 1982;
- the availability of oil, gas or any other commodity to the pipeline;
- the existence of actual or potential markets;
- the economic feasibility of the pipeline;
- the financial resources, financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity to participate in the financing, engineering and construction of the pipeline;
- the extent to which the effects of the pipeline hinder or contribute to the Government of Canada's ability to meet its environmental obligations and its commitments in respect of climate change;
- any relevant assessment referred to in section 92, 93 or 95 of the Impact Assessment Act; and
- any public interest that the Commission considers may be affected by the issuance of the Certificate or the dismissal of the application.

The Commission uses this same decision structure for section 214 of the CER Act.

Whether (for each) the authorization would set conditions and if yes, what issues would those conditions address;

If a project is approved, there will be conditions on that approval. The Commission imposes conditions that it considers to be necessary or in the public interest. Conditions are put in place to keep companies responsible for making sure their pipelines and power lines are planned, built, operated, and abandoned safely; protecting the environment and respecting the rights of those affected by their presence. Conditions are project-specific. The Commission sets them during the application process to reduce risks and ensure safety for the construction and operation of a company's project. Some examples of conditions that may be imposed include requiring a company to submit:

- environmental protection plans
- consultation updates
- heritage resources clearances
- construction schedules
- species-specific studies
- mitigation and monitoring documentation
- employee training programs and manuals

The conditions can be associated with different phases in the pipeline lifecycle e.g. those that must be complied with before construction, those that must be complied with during construction and post construction, and those that must be complied with during the operation and maintenance phase. Some conditions impose requirements for the last phase of the lifecycle, that is, the abandonment phase. The company will have to comply with any conditions attached to its authorization. The CER's specialists will review all the filings related to the conditions, and certain conditions must be approved by the Commission before the project can proceed.

Throughout the lifecycle of an approved project, the CER holds the pipeline company responsible for satisfying its regulatory requirements so that it operates and maintains pipelines and facilities safely and protects people, property and the environment. For this purpose, the CER:

- reviews and assesses the filings related to conditions;
- tracks conditions to verify compliance;
- verifies compliance with regulatory requirements and legislation; and
- conducts compliance verification activities, such as inspections and audits, to promote safety and security, environmental protection, emergency management, damage prevention.

Whether (for each) the authorization would require public and/or Indigenous consultation and if yes, provide information on the approach to be taken; and

The preamble of the CER Act states “The Government of Canada is committed to using transparent processes that are built on early engagement and inclusive participation and under which the best available scientific information and data as well as Indigenous knowledge are taken into account in decision-making”

Subsection 56 (1) of the CER Act states “ When making a decision, an order or a recommendation under this Act, the Commission must consider any adverse effects that the decision, order or recommendation may have on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982.*”

Section 74 of the CER Act states “The Regulator must establish processes that the Regulator considers appropriate to engage meaningfully with the public – and, in particular, the Indigenous peoples of Canada and Indigenous organizations – when public hearings are held”

Section 183(3) of the CER Act states “Any member of the public may, in a manner specified by the Commission, make representations with respect to an application for a Certificate”.

The CER sets out expectations for company engagement in the Filing Manual and the Interim Filing Guidance and Early Engagement Guide. The CER expects an applicant to have a company-wide Engagement Program that establishes a systematic, comprehensive and proactive approach for the development and implementation of project-specific engagement activities.

The CER also expects companies to continue effective engagement activities with the public and Indigenous communities during the construction and operation phases of a project.

After submitting an application for an order under section 214, a company is expected to notify, as soon as reasonably possible, potentially affected persons and communities that the application has been filed with the CER. The notice should indicate that people can raise any project-related concerns with the CER. The CER encourages people to submit any concerns about the project as soon as possible and preferably within 14 days after they receive notice of the application. The Commission will consider all comments made regarding the applications.

As the CER holds public hearings for Certificates under section 182, companies are not expected to proactively notify potentially affected persons and communities for applications, although early engagement is still required. In these situations, the Commission will specify the form of notice (for example, a hearing order, or a notice of application) that companies must provide to all potentially affected persons and communities. A process will be laid out that allows for participation of the public and Indigenous communities, and is appropriate to the scope and scale of the proposed project.

Crown Consultation

The Canada Energy Regulator (CER) strives to build meaningful relationships with Indigenous peoples across the country who are potentially impacted by the infrastructure we regulate. Crown Consultation is just one part of our relationship with Indigenous peoples. Where the CER has Crown consultation responsibilities, the CER will engage with potentially affected Indigenous peoples early in the process. The scope and nature of the Crown Consultation activities will be tailored to the complexity of the proposed project and its potential effects, and the needs of affected Indigenous peoples.

The CER conducts consultation with Indigenous Peoples recognizing the [ten Principles Respecting the Government of Canada’s Relationship with Indigenous Peoples](#).

The CER has Crown consultation responsibilities as part of project reviews for new pipeline, powerline or offshore renewable energy projects, as well as for activities it regulates over the lifecycle of energy infrastructure.

The CER will reach out to those potentially affected Indigenous peoples early in the review process. In early engagement, the CER will offer to meet with Indigenous groups to understand the potential impacts to their rights and interests and to explain the CER's regulatory process, how to participate in it and provide information on the CER's Participant Funding Program. Where it is possible that an issue or concern could be addressed early in the review process, CER staff will assist. This may involve arranging meetings with the company or considering collaborative options for resolution.

Where issues or concerns cannot be addressed early in the review process, the CER encourages Indigenous peoples to bring them forward to a review process where they can be considered by Commissioners. All relevant issues and concerns that are brought forward by Indigenous groups will be considered by Commissioners and mitigated or accommodated, where possible. To ensure Commissioners have all the information needed to address issues and concerns raised, it is important for Indigenous groups to participate in available review processes.

Whether (for each) your ministry has guidance material that would be helpful to the proponent or the Agency (please provide these as attachments or hyperlinks in your response).

References:

Canadian Energy Regulator Act (S.C. 2019, c. 28, s. 10)
<https://laws-lois.justice.gc.ca/eng/acts/N-7/>

National Energy Board Onshore Pipeline Regulations
<https://laws-lois.justice.gc.ca/eng/regulations/SOR-99-294/index.html>

The CER's Lifecycle Approach to Protecting the Environment
<https://www.cer-rec.gc.ca/sftnvrnmnt/nvrnmnt/lfcclpprch/index-eng.html>

National Energy Board Filing Manual
<https://www.cer-rec.gc.ca/bts/ctrng/gnnb/flngmnl/index-eng.html>

CER Interim Filing Guidance and Early Engagement Guide
<https://www.cer-rec.gc.ca/bts/ctrng/gnnb/ntrmfinggdnc/2019flngntrm/index-eng.html>

CER Participant Funding Program
<https://www.cer-rec.gc.ca/prtcptn/hrng/pfp/prtcpntfndngprgrm-eng.htm>

Fact Sheet: Compensation Disputes Process
<https://www.cer-rec.gc.ca/bts/nws/fs/cmpnstndsptsprcss-eng.html>

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4. Confirm whether any authorization listed above would contemplate the following matters and if yes, discuss, in general, the benchmarks or standards to which a project of this nature may be held (be specific in relation to each point below that may be applicable to your ministry's mandate):
- Project splitting
 - Impacts to Aboriginal rights
 - Capacity funding

Consideration of Projects as applied for to the Commission

As part of any project assessment, the Commission may, on request or on its own initiative, consider what process is most appropriate for assessing the application, including whether or not to evaluate

multiple applications in aggregate. Sometimes this is referred to as “Project Splitting” (refer to the response to Question 6). The Commission has previously made decisions on whether to consider applications in aggregate, a selection of which are referenced below. These letters provide examples of some criteria the Commission has previously considered in making those decisions.

The Commission has decided that there is a very high bar to considering projects in aggregate (refer to the links below). Moreover, the Impact Assessment Act, at section 9 makes reference to designation of “a physical activity” that is not prescribed in regulations. No reference is made to physical activities in aggregate being designated.

References:

National Energy Board Letter to O’Chiese First Nation - NGTL Applications

<https://apps.cer-rec.gc.ca/REGDOCS/File/Download/3593584>

Canada Energy Regulator - Letter re Request of Cold Lake First Nation - Many Islands Pipe Lines (Canada) Limited Pierceland Project and NOVA Gas Transmission Ltd. Saddle Lake Project

<https://apps.cer-rec.gc.ca/REGDOCS/Item/View/3892300>

National Energy Board - Letter to Duncan First Nation – NOVA Gas Transmission Ltd. – North Central Corridor Loop

<https://apps.cer-rec.gc.ca/REGDOCS/File/Download/3801581>

Impacts to Aboriginal rights

Pursuant to subsection 183 (2) of the CER Act, the Commission must consider the following factors (among others) in relation to applications for new pipeline facilities:

- (d) the interests and concerns of the Indigenous peoples of Canada, including with respect to their current use of lands and resources for traditional purposes;
- (e) the effects on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*

These factors apply to applications for exemption orders made under section 214 of the CER Act for new pipeline facilities involving less than 40 kilometres of new pipeline. The Commission considers the factors set out in subsection 183(2) of the CER Act when evaluating applications made under section 214, which includes the proposed projects that are the subject of the designation request by the Stoney Nakoda Nations.

The CER has issued Interim Filing Guidance for project proponents, which contains information requirements and guidance relating to the factors contained in subsection 183(2) of the CER Act. For applications made under both section 183 and section 214 of the CER Act, applicants are required to file information about the potential effects of a proposed project on the rights of Indigenous peoples. The Commission considers this information, as well as any other relevant information submitted by proponents, stakeholders, Indigenous peoples and relevant government authorities as part of its assessment of the potential effects of a project on the rights of Indigenous peoples. In making its decisions on applications made under section 214 of the CER Act, the Commission makes a determination on the effects of the proposed project on the interests and rights of Indigenous peoples.

As outlined in the Interim Filing Guidance, proponents are required to provide the following information:

1. Describe the Indigenous and Treaty rights of the potentially affected Indigenous peoples in the project area;
2. Describe how Indigenous and Treaty rights are exercised or practiced in the project area;
3. Describe the context in which the Indigenous and Treaty rights are exercised or practiced in the project area;

4. Describe the project's potential effects on the exercise or practice of Indigenous and Treaty rights in the project area; and
5. Describe the measures to be implemented by the applicant to avoid, reduce or eliminate potential adverse effects of the project on the exercise of Indigenous and Treaty rights. Also describe any measures that would enhance or support the exercise or practice of Indigenous rights in the project area. Where there may be any residual effects, after mitigation measures are implemented and that are related to the project, describe the nature and extent of these, including their contribution to any potential cumulative effects.

The Interim Filing Guidance includes detailed guidance to proponents for each of the filing requirements listed with respect to the rights of Indigenous peoples.

In addition, the Filing Manual contains detailed information requirements and accompanying guidance to proponents with respect to the environmental and socio-economic effects of a proposed project, which apply, as applicable to each proposed project, to the interests and concerns of Indigenous peoples that may be affected by a project. This includes required information (found in Table A-3) regarding potential project effects on:

- Traditional land and resource use;
- Heritage resources;
- Human occupancy and resource use;
- Social and cultural well-being;
- Human health;
- Infrastructure and services;
- Navigation and navigation safety; and
- Employment and economy.

Table A-2 of the Filing Manual sets out the information requirements relating to a project's potential effects on the biophysical elements in the project area. This includes, among others:

- Vegetation;
- Water quality and quantity
- Fish and fish habitat;
- Wetlands;
- Wildlife and wildlife habitat;
- Species at risk;

The Filing Manual also provides guidance to proponents for information on the cumulative effects of a project.

Participant funding

The CER has a Participant Funding Program to facilitate the participation of the public — and, in particular, the Indigenous peoples of Canada and Indigenous organizations — in public hearings under section 52 or subsection 241(3) of the CER Act, and any steps leading to those hearings. More specifically this includes non-designated projects such as:

- Certificate applications for pipelines (section 183) or power lines (section 262) less than 75 km
- Exemption orders for pipeline facilities pipelines less than <40 km (section 214)
- Authorizations for offshore renewable energy projects or offshore power lines (section 298); and
- Pipelines abandonments (subsection 241(3))

Under the CER Act, the Participant Funding Program has two types of funding, each is commensurate with the level of participation.

- Early Engagement funding – is offered to Indigenous peoples that have accepted CER-led meetings as per the approved Early Engagement plan for each project. Depending on the

scope/size of the meeting recipients will qualify for 2-5k per meeting, it is assumed that the Crown list will require approximately 3 meetings for each group.

- Hearing funding – is offered to Indigenous peoples, Landowners, and non-profits. CER typically offers \$80k for groups participating as Intervenor in Certificate hearings and \$40k for smaller written hearings with few participants. For more information on this part of the program go to www.cer-rec.gc.ca/pfp.
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5. Have you received public comments/concerns in relation to the Project? If yes, provide an overview of the key issues and the way in which (in general terms) your ministry intends to address (or would normally manage) these matters.

The CER has not received any public comments or concerns in relation to these projects. The Project Notification filed by NGTL for the West Path Delivery 2022 Project noted that Landowners/Land Users and Other Potentially Affected Persons raised the following as issues:

- Reclamation;
- Drainage;
- Access to water during construction;
- Loss of trees;
- Vehicle washing/ weed contamination;
- Vehicle access concerns;
- Routing concerns;
- Impact to waterbodies;
- Impact to water wells;
- Compensation concerns; and
- Increased access for recreational users and other conflicting land uses;

The Project Notification filed by Foothills for the Zone 8 West Path Delivery 2022 Project noted that Landowners/Occupants raised the following issues:

- Survey access and timing;
- Damage to or removal of trees;
- Business interruption and insurability;
- Impacts to land and property
- Weed control
- Impact to business operation; and
- Increased traffic.

As no applications have been filed for these Projects, and only two Project notifications have been received, there is limited information available on the specifics of the issues listed above relating to these Projects. The CER requires companies to conduct Environmental and Socio-Economic Assessments (ESA) for their projects, which would include these items listed above (with the exception of compensation). The Commission will conduct an ESA that factors in the information provided by the company, as well as information from Indigenous communities, stakeholders, government departments and any participants in the process. The ESA considers the likely environmental and socio-economic effects, the adequacy of proposed mitigation measures, and the significance of effects after mitigation measures would be implemented. The Commission imposes additional conditions on projects to ensure protection measures will be implemented and will be sufficient. For additional details, refer to guide A-2 in the Filing Manual, referenced in the response to question 3.

For compensation, landowners and companies are encouraged to work together to negotiate agreements on compensation (including impacts of construction, such as damages) and the size and location of the land rights required for the project. If parties are unable to resolve a compensation

dispute, the CER can support the resolution in two ways: Alternative Dispute Resolution or Commission Adjudication (Hearing and Decision). For additional details, refer to the Fact Sheet: Compensation Disputes Process, referenced in the response to question 3.

References:

NOVA Gas Transmission Ltd. - NGTL West Path Delivery 2022 - Project Notification
<https://apps.cer-rec.gc.ca/REGDOCS/Item/View/3910209>

Foothills Pipe Lines (South B.C.) Ltd. - Foothills Zone 8 West Path Delivery 2022 Project Notification
<https://apps.cer-rec.gc.ca/REGDOCS/File/Download/3909863>

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6. Have you received Indigenous community comments/concerns in relation to the Project? If yes, provide an overview of the key issues and the way in which (in general terms) your ministry intends to address (or would normally manage) these matters.

The Project Notification filed by NGTL for the West Path Delivery 2022 Project noted that Indigenous Groups raised the following as issues:

- Cumulative effects;
- Project splitting;
- Potential interaction with traditional land and resource use sites, areas and resources (ie. hunting, fishing, plant harvesting, camping);
- Water pollution;
- Air pollution; and
- Access to undisturbed areas for the exercise of Indigenous and Treaty rights.

The Project Notification filed by Foothills for the Zone 8 West Path Delivery 2022 Project noted that Indigenous Groups raised the following issues:

- Project splitting;

As with the response to Question 5, these areas (with the exception of project splitting) will be considered as part of the ESA for the projects. Information on project splitting is provided in the response to Question 4, along with additional information on how the Commission considers effects on Indigenous Rights.

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7. Do you have any other information about the Project in relation to potential adverse effects or impacts to the public, or Indigenous peoples and their rights as protected under section 35 of the *Constitution Act, 1982*?

Given that the Project applications have not been filed yet, there is no additional information to provide at this time.

Shannon Vollema

Name of responder

Director Facilities Adjudication Central/North
Title of responder

30 March 2020

Date