

March 16, 2020

Environment and Climate Change Canada
200, Sacré-Coeur Blvd, 2nd Floor
Gatineau, Quebec K1A 0H3
Canada

Attention: The Honourable Jonathan Wilkinson

Dear Minister Wilkinson:

**Re: Stoney Tribal Council Request for Designation
NOVA Gas Transmission Ltd. (NGTL) & Foothills Pipe Lines (South B.C) Ltd.
(Foothills)
2022 and 2023 West Path Delivery Projects**

NGTL and Foothills are in receipt of a letter submitted February 26, 2020 by the Stoney Tribal Council (STC), representing the three Nations of the Stoney Nakoda Nations (SNN): Wesley First Nation; Bears paw First Nation; and Chiniki First Nation. In its letter, the SNN request that the Minister designate the following projects under Section 9 of the *Impact Assessment Act* (IA Act)¹:

- **NGTL West Path Delivery 2022:** 18 km of Nominal Pipe Size (NPS) 48 pipeline (Edson Mainline Loop No. 4 Raven River Section), 6 km of NPS 48 pipeline (Western Alberta System Mainline Loop No. 2 Alberta British Columbia Section), and the ABC Border Meter Station Expansion
- **Foothills Zone 8 West Path Delivery 2022:** Approximately 4 km of NPS 48 pipeline (British Columbia Mainline Loop No. 2 Crowsnest Section) and 13 km of NPS 48 pipeline (British Columbia Mainline Loop No. 2 Yahk Section)
- **NGTL West Path Delivery 2023:** Approximately 23 km NPS 48 pipeline (Western Alberta System Mainline Loop No. 2 Turner Valley Section), 7 km NPS 48 pipeline (Western Alberta System Mainline Loop No. 2 Lundbreck Section), and 10 km of NPS 48 pipeline (Western Alberta System Mainline Loop No. 2 Longview Section)
- **Foothills Zone 8 West Path Delivery 2023:** Approximately 31 km NPS 48 pipeline (British Columbia Mainline Loop Elko Section) and the Kingsgate Meter Station modifications.

This letter constitutes NGTL and Foothills' response to the SNN's submission. NGTL and Foothills are also in receipt of the Impact Assessment Agency of Canada's (Agency) letter of March 9, 2020 requesting additional information regarding the projects. NGTL and Foothills will

¹ S.C. 2019, c. 28, s. 1.

provide the requested information separately by the applicable deadlines specified in the Agency’s letter.

The project applications have been appropriately scoped

NGTL and Foothills intend to apply to the Canada Energy Regulator (CER) for approval to construct and operate each of the proposed projects pursuant to an order or a certificate, as appropriate, under the *Canadian Energy Regulator Act* (CER Act):²

Table 1: Proposed Applications to the Canada Energy Regulator

Project	Anticipated Application Submission	CER Act - Application Reference
NGTL West Path Delivery 2022	June 2020	Section 214 (Order)
Foothills Zone 8 West Path Delivery 2022	June 2020	Section 214 (Order)
NGTL West Path Delivery 2023	October 2020	Section 182 (Certificate)
Foothills Zone 8 West Path Delivery 2023	July 2021	Section 214 (Order)

In its letter, the SNN suggests that the projects have been split to be assessed individually by the CER in order to bypass a review under the IA Act.³

NGTL and Foothills have not engaged in project splitting. Rather, the project applications have been scoped to reflect the expansions of separate and distinct pipeline systems for separate commercial in-service dates.

NGTL and Foothills are separate legal entities that own and operate their respective pipeline systems under separate authorizations. Each of NGTL and Foothills is regulated by the CER and meets the definition of “company” under the CER Act.⁴ Under the CER Act, a company must be issued a certificate or an order to construct and operate a pipeline that will form part of its respective system.

In addition, there are separate commercially required in-service dates and contractual underpinnings for each project, as listed below in Table 2.

Table 2: NGTL In-service Requirements and Supporting Contracts

Project	Commercially Required In-Service Date	Supporting Contracts
NGTL West Path Delivery 2022	November 2022	110 TJ/d
NGTL West Path Delivery 2023	November 2023	175 TJ/d

Table 3: Foothills In-service Requirements and Supporting Contracts

Project	Commercially Required In-Service Date	Supporting Contracts
Foothills Zone 8 West Path Delivery 2022	November 2022	108 TJ/d
Foothills Zone 8 West Path Delivery 2023	November 2023	162 TJ/d

² S.C. 2019, c. 28, s. 10.

³ SNN letter dated February 26, 2020, page 3.

⁴ CER Act, s. 2.

The National Energy Board (NEB or Board), predecessor to the CER, determined in past NGTL applications that separate commercial in-service dates support discrete applications:

... while pipeline systems have some physical and/or financial degrees of integration, the nature of the pipeline industry is such that incremental additions and changes may generally be made as discrete applications for staged approvals. As NGTL indicated, and the Board generally accepts, specific customer requests or system requirements tend to drive applications and the projects at issue here generally have differences in in-service dates, shippers, contracts, or supply/market areas.⁵

In December 2019, the CER issued a letter decision in response to claims of project splitting in respect of applications by NGTL and Many Islands Pipe Lines (Canada) Ltd. In its decision, the CER confirmed the factors that had previously been considered by the NEB, including whether the projects are separate responses to commercial requirements or requests. The CER found that the projects in that case were for distinct and separate pipeline systems and were “substantively separated from a commercial perspective”.⁶

For these reasons, NGTL and Foothills submit that the project applications have been appropriately scoped to reflect requests by each company for separate authorizations for each commercial in-service date.

The projects do not meet the designated project threshold

Section 41 of the *Physical Activities Regulation* (Project List) sets out the requirements for the designation of federally-regulated onshore pipelines as follows:⁷

The construction, operation, decommissioning and abandonment of a new pipeline, as defined in section 2 of the Canadian Energy Regulator Act, other than an offshore pipeline, that requires **a total of 75 km or more of new right of way** [emphasis added].

Under the Project List, “new right of way” is defined as:

...land that is to be developed for... a pipeline, as defined in section 2 of the Canadian Energy Regulator Act, ... and **that is not alongside and contiguous to an area of land that was developed for an electrical transmission line, oil and gas pipeline, railway line or all-season public highway** [emphasis added].⁸

The 75 km of new right of way (ROW) threshold was established after a lengthy consultation process with input from all stakeholders, including Indigenous groups. As was explained in the Regulatory Impact Analysis Statement released with the Project List, “the intent [of the new ROW threshold] is to address projects that are not alongside and contiguous to existing linear

⁵ NEB letter dated August 17, 2018; (NEB Filing ID: A93621-1)

⁶ CER letter dated December 2, 2019; (CER Filing ID: C03369)

⁷ SOR 2019/285

⁸ SOR 2019/285

projects”, recognizing that non-designated federally-regulated projects would continue to be assessed by a federal lifecycle regulator, where required.⁹

The proposed projects primarily involve looping of the existing NGTL and Foothills pipeline systems. None of the four proposed projects individually meet, or even approach the threshold of 75 km of new ROW. Further, even if the projects were to be considered together, the projects in aggregate do not come close to the threshold of 75 km of new ROW.

Table 4: ROW Details

Project	Approximate New ROW (km)	Approximate Contiguous ROW (km)
NGTL West Path Delivery 2022	5	19
Foothills Zone 8 West Path Delivery 2022	4	13
NGTL West Path Delivery 2023	3	37
Foothills Zone 8 West Path Delivery 2023	6	25
Total	18	94

Therefore, the projects do not meet the designation threshold under the Project List.

Ministerial designation is not warranted

NGTL and Foothills recognize that the Minister has the power pursuant to section 9 of the IA Act to designate projects that do not meet the threshold under the Project List. However, the Minister should exercise this discretion sparingly to preserve the legislative intent of the Project List.

As stated in the Regulatory Impact Statement that was published with the Project List:¹⁰

The objective of the Project List is to capture those **major** projects with the **greatest potential** for adverse effects in areas of federal jurisdiction related to the environment, so that they can enter into the impact assessment process. The Project List also **provides certainty and clarity to proponents** as to which projects are subject to the IAA [emphasis added].

The proposed projects that involve looping of existing pipeline systems do not rise to the level of a major project warranting review under the IA Act.

Nor do the projects warrant designation based on the factors the Agency has indicated it may consider when making a recommendation regarding designation.¹¹ The projects are not close to the designation threshold. The projects do not constitute a novel activity or technology that was not considered at the time the Project List was developed. The projects will employ standard,

⁹ Canada Gazette Part II, Vol 153, No. 17 at 5669; <http://www.gazette.gc.ca/rp-pr/p2/2019/2019-08-21/pdf/g2-15317.pdf>

¹⁰ Canada Gazette Part II, Vol 153, No. 17 at 5663; <http://www.gazette.gc.ca/rp-pr/p2/2019/2019-08-21/pdf/g2-15317.pdf>

¹¹ <https://www.canada.ca/en/impact-assessment-agency/services/policy-guidance/designating-project-impact-assessment-act.html>

well-understood design features and mitigations. Finally, the projects will undergo a rigorous impact assessment by the CER that will include cumulative effects, as well the following assessment factors that were introduced with the passage of the CER Act:¹²

- Potential impacts on the rights of Indigenous peoples
- Canada's commitments in respect of climate change
- Canada's environmental obligations
- Gender-based Analysis Plus (GBA+)

In accordance with the CER's *Interim Filing Guidance*, these factors, as well as the other filing requirements of the *Filing Manual*, will be assessed by the CER for each project, regardless of whether the application is for an order or a certificate. In its December 2019 letter decision (referenced above), the CER found that consultation requirements and cumulative effects assessments are not generally affected by whether project applications proceed in aggregate or individually, noting:

- consultation requirements are based on potential impacts to the exercise of Indigenous and Treaty rights, and remain the same whether or not projects are assessed in aggregate or individually
- applications to the CER for an order or a certificate always require consultation where potentially impacted parties are identified
- cumulative effects assessments are always required if a project is expected to have any residual effects after mitigation measures are applied; an aggregate assessment approach would not change this requirement.¹³

Therefore, contrary to the assertions of the SNN, potential impacts to Indigenous rights will not be "overlooked" if these projects are not assessed together.¹⁴ The First Nations represented by the SNN have been identified as potentially affected Indigenous groups by NGTL and Foothills in accordance with the CER's *Early Engagement Guide*. The CER will determine the appropriate regulatory process to assess each project after it completes its early engagement process.

Ministerial designation would be prejudicial

Based on the Project List, and in order to meet their shippers' service needs, NGTL and Foothills have planned their projects and begun to prepare their applications to the CER on the basis that their projects are not subject to the IA Act. The work to date includes initiating the CER's early engagement process for two of the projects.¹⁵ If the projects were to be designated, NGTL and Foothills would have to re-start their regulatory processes under the IA Act. Further, under the IA Act, designated federally regulated pipelines are subject to the highest level of review through an integrated review panel, which involves the longest legislated timelines.

¹² CER Act, s.183; CER Interim Filing Guidance and Early Engagement Guide (August 2019) - <https://www.cer-rec.gc.ca/bts/ctrg/gnnb/ntrmf/inggdnc/2019f/ingntrm/index-eng.html#nxxa>

¹³ CER letter dated December 2, 2019 (CER Filing ID: C033889)

¹⁴ SNN letter dated February 26, 2020

¹⁵ Project Notifications filed March 3, 2020: Foothills West Path Delivery 2022 Project (CER Filing ID: C04968) and NGTL West Path Delivery 2022 Project (CER Filing ID: C04970)

Designating these projects would be contrary to the Project List's purpose of providing certainty and clarity regarding the applicable regulatory process. It would unfairly prejudice NGTL, Foothills and their respective shippers by substantially extending the regulatory review timeline, thereby delaying the commercially required in-service date for each project.

Response to capacity funding

In its letter, the SNN raises concerns with respect to funding for Indigenous groups to participate meaningfully in engagement for a project, stating:

To-date all early engagement with TC Energy and its subsidiaries has been at cost to SNN – a capacity funding agreement between SNN and TC Energy has not been reached, and none of these projects will trigger a hearing under the CER or an impact assessment under the IAAC, which means that SNN will not have access to associated participant funding under the CER or IAAC.¹⁶

NGTL notes that the proposed NGTL West Path 2023 Delivery project, to be filed under s. 182 of the CER Act, would trigger a mandatory hearing under the CER Act, and funding may be offered through the CER's participant funding program.

Further, NGTL and Foothills have begun discussions with SNN regarding agreements for capacity funding for engagement activities, as well as funding to undertake a traditional knowledge study for each of their respective projects. It is NGTL and Foothills' practice to offer, where appropriate, and depending on the scope and scale of the project, a range of project-specific capacity funding agreements to Indigenous groups for engagement activities with the company to better understand the potential effects of the project on Indigenous or Treaty rights and interests.

Conclusion

For the above reasons, NGTL and Foothills respectfully request that the Minister not grant the designation request.

Should the Minister or the Agency require any additional information with respect to this filing, please contact the undersigned at (403) 920-2563 or matthew_ducharme@tcenergy.com.

Yours truly,

NOVA Gas Transmission Ltd. and Foothills Pipe Lines (South B.C) Ltd.

Original signed by

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cc: Ms. L. George, Secretary of the Commission, Canada Energy Regulator
Dean Cherkas, Director of Consultation, Stoney Tribal Administration
Barbara Pullishy, Regional Director, Prairie and Northern Region, Impact Assessment Agency

¹⁶ SNN letter, page 4, 2nd para.