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## LETTER DECISION

File OF-Fac-Gas-N081-2020-02 02  
30 April 2021

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Dear Mr. Yee and Mr. Ducharme:

**NOVA Gas Transmission Ltd. (NGTL)  
Application for the West Path Delivery 2022 (Project)  
under section 214 of the *Canadian Energy Regulator Act (CER Act)***

On 1 June 2020, the Canada Energy Regulator (CER) received NGTL's application to construct and operate the Project (Application). NGTL requested an exemption from the provisions of paragraph 180(1)(a) and section 198 of the CER Act for the Project, as well as exemption from the requirements of paragraph 180(1)(b) and subsection 213(1) of the CER Act to obtain leave to open (LTO) prior to installing tie-in assemblies on the pipeline components of the Project and to put the meter station modifications component of the Project into service.

The Commission of the CER (Commission) also considered all submissions received from interested parties, including Environment and Climate Change Canada, O'Chiese First Nation (OCFN), and Stoney Nakoda Nation (SNN).<sup>1</sup>

As discussed in the reasons that follow, the Commission has taken into account considerations that appear to it to be relevant and directly related to the Project as well as matters under section 56, and is satisfied with NGTL's engagement activities. The Commission finds that the protection of the environment and public safety have been appropriately addressed by NGTL in the Project Application and materials. In addition, the Commission evaluated the financial viability, economic justification, and proposed design and operations of the Project. The Commission finds that it is in the public interest to grant the requested relief.

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<sup>1</sup> Submissions from these parties were received on 10 August 2020, 17 November 2020, 23 November 2020, 4 December 2020, 22 January 2021, and 12 March 2021. The Commission also considered NGTL's subsequent filings dated 6 July 2020, 30 September 2020, 19 October 2020, 27 November 2020, 7 January 2021, 21 January 2021, 29 January 2021, 23 February 2021, 19 March, and 28 April 2021. Three filings made by OCFN on 4 December 2020, 22 January 2021, and 12 March 2021 as well as NGTL's 29 January 2021 response to OCFN's 22 January 2021 filing contained confidential information. Redacted versions of these documents were filed by OCFN and NGTL and are available on the CER's online public repository.

For the reasons set out below, the Commission, through its issuance of Order XG-005-2021 (Order), grants the exemption under section 214 of the CER Act, the effect of which is to approve the Project. The Commission has attached 15 conditions to the Order. A copy of the Order and its Schedule A, which together, outline the specifics of the Project as approved, is attached. As indicated in the Order, the Commission grants NGTL an exemption from the provisions of paragraph 180(1)(a) and section 198 of the CER Act for the Project.

Additionally, the Commission grants NGTL's request for an exemption from the requirements of paragraph 180(1)(b) and subsection 213(1) of the CER Act to obtain a partial LTO to install tie-in assemblies on the pipeline components of the Project and to put the meter station modifications component of the Project into service. The Commission reminds NGTL it must apply for and receive LTO for the remaining facilities pursuant to section 213 of the CER Act, prior to those remaining facilities being placed in operation.

## **1.0. Project Overview and Process**

### **1.1. Application and Project Overview**

NGTL's Application sought leave for the construction and operation of two non-contiguous pipeline loop sections of 1219 mm outside diameter pipe Nominal Pipe Size (NPS) 48 natural gas pipeline that will loop NGTL's existing Edson Mainline Loop No. 4 and NGTL's existing Western Alberta System (WAS) Mainline Loop No. 2; and expansion of NGTL's existing Alberta British Columbia Border Meter Station (ABC Border MS) (No. 1 and No. 2). The two pipeline sections are the 18 kilometer (km) Edson Mainline Loop No. 4 - Raven River Section (Raven River Section) near Sundre, Alberta and the 5 km WAS Mainline Loop No. 2 Alberta British Columbia Section (ABC Section) near Coleman, Alberta. The Project parallels existing rights-of-way (ROW) where feasible.

The proposed pipeline route will parallel existing disturbances for the majority of the route. The new permanent ROW will be between 15 and 32 m wide. Temporary workspace (TWS) will be required for the construction of the Project.

The purpose of the Project is to increase the NGTL system capacity to meet contractual obligations to provide gas transportation and delivery on the NGTL System to the ABC Border Meter Station.

### **1.2. The Process**

On 10 July 2020, the CER sent a Notice of Application letter to 27 Indigenous communities potentially affected by the Project. This included an invitation for Indigenous peoples to file a letter of comment with the CER by 10 August 2020 for any Project-related views or concerns that they have not been able to resolve with the company.

On 10 August 2020, the CER received letters of comment from SNN and OCFN, which raised, among other things, concerns about potential impacts the proposed Project may have on Indigenous and Treaty rights.

On 18 August 2020, the Commission determined the Application was complete and commenced its assessment. The Commission issued three Information Request (IR) packages to NGTL throughout its assessment of the Application.

In response to the letters received from SNN and OCFN, the Commission established a comment process in Procedural Decision No. 1, dated 23 September 2020, which asked

interested persons to submit any comments by 14 October 2020 and for NGTL to file reply comments, if any, by 21 October 2020. No comments were received during this period. Subsequently, on 4 November 2020, the Commission issued Procedural Decision No. 2 to inform the parties that because no comments had been received during the comment process by interested persons or NGTL, the Commission would continue with its routine assessment of the Application.

On 17 November 2020, OCFN filed a letter requesting that the Commission delay its decision regarding the Application and requested an extension to file evidence by 22 January 2021. NGTL advised the Commission that it did not object to the extension. On 16 December 2020, the Commission issued Procedural Decision No. 3 granting OCFN its requested extension and NGTL the right to reply by 29 January 2021.

On 22 January 2021, OCFN filed a document titled O'Chiese First Nation Violation Review Report (OCFN Report). A redacted version was filed on the CER's public repository and an unredacted version was provided to the CER and NGTL. NGTL responded to the OCFN Report on 29 January 2021 on the CER's public repository. A redacted response was provided to OCFN and the CER separately.

On 16 February 2021, the Commission issued Procedural Direction No. 4 which indicated the Commission would be releasing potential draft conditions for comment. Additionally, the Commission invited interested persons to comment on NGTL's responses to IR No. 3.

On 26 February 2021, the Commission issued potential draft conditions for comment from interested persons and NGTL. On 12 March 2021, OCFN filed comments on the potential draft conditions and proposed three additional conditions. OCFN also provided comments on NGTL mitigation measures. On 19 March 2021, NGTL filed its response. A summary of these comments and the Commission's responses are found in **Appendix I**.

## **2.0. The Assessment of the Application**

### **2.1. Engineering**

The comments received by the Commission did not raise any particular concerns regarding engineering matters. The Commission, through its own independent assessment of the Application, is of the view that NGTL's engineering for the Project is appropriate.

Pursuant to **Conditions 1 and 11** of the Order, NGTL must file any technical specification updates for the Project listed in the Application concurrently with its final LTO application. Technical specification updates are limited to differences in pipe length, diameter, wall thickness, grade or material that do not impact any other information provided in the Application. Any other changes will require advance approval from the Commission. Once filed by NGTL, the Commission will evaluate all final technical specification updates and issue an Amending Order as appropriate.

### **2.2. Land Matters**

#### *Views of NGTL*

NGTL stated that the Project is located on Crown and freehold lands and consists of two pipe sections, the Raven River Section and the ABC Section. In addition, the Project also includes the ABC Border MS Expansion.

The Raven River Section is located approximately 16 km northwest of the Town of Sundre, Alberta and consists of approximately 18 km of NPS 48 pipe. This section starts from SW 02-036-07 W5M and ends at SE 26-034-06 W5M. The section route will cross Crown (81%) and freehold (19%) land. The Raven River Section route will parallel existing disturbances where feasible, including NGTL's existing Edson Mainline Loop No. 4, for approximately 79% of the pipeline route. The Raven River Section will require the acquisition of approximately 49.3 hectare (ha) of new permanent land, 2.8 ha of which is within existing disturbances.

NGTL stated that the ABC Section is located approximately 6 km west of the Town of Coleman, Alberta and consists of approximately 5 km of NPS 48 outside pipe. The section starts from NW 11-008-05 W5M and ends at SW 17-008-05 W5M near the Alberta/British Columbia provincial border. The section route will cross Crown (38%) and freehold (62%) land. The ABC Section route will parallel existing disturbances where feasible, including NGTL's existing WAS Mainline Loop No. 2, for approximately 90% of the pipeline route. NGTL stated that the ABC Section will require the acquisition of approximately 15.9 ha of new permanent land, 0.1 ha of which is within existing disturbances.

The ABC Border MS Expansion component is located entirely on freehold land owned by NGTL in NW 11-008-05 W5M, at the existing ABC Border MS, which is approximately 6 km west of the Town of Coleman, Alberta. NGTL identified that no new permanent land rights are required and that the expansion will not require the acquisition of new land as it will be entirely within the boundaries of the existing fenced meter station site. NGTL also identified that approximately 1.8 ha of TWS is anticipated to be required for construction of the expansion, outside the fenced meter station site, however the TWS will be within NGTL-owned land.

The construction ROW will be a minimum 32 m wide with additional TWS of variable widths at staging areas, side bends, crossings, and grading. NGTL confirmed that the permanent ROW will vary between approximately 15 m to 32 m, and where feasible, will utilize existing NGTL land rights to minimize the permanent ROW. NGTL stated it will obtain Crown approval from Alberta Environment and Parks for the pipeline and facilities located on Crown lands in advance of use of the land.

NGTL further stated that additional TWS may be required on a site-specific basis, which will be finalized in the field before, and potentially during, construction. These areas, if required, are expected to be located within the lands assessed in the Environmental and Socio-Economic Assessment (ESA). In the event that TWS is required outside land surveyed in the ESA, NGTL has committed it will assess the potential effects associated with the new TWS.

NGTL confirmed that the land acquisition process for permanent and temporary land rights will begin in Q4 2020 and is expected to be completed by Q4 2021, and that the acquisition of additional TWS and third-party consent is ongoing. NGTL confirmed that it will acquire the necessary land rights prior to the scheduled start of construction. NGTL further confirmed that the lands to be acquired will be acquired pursuant to sections 321 and 322 of the CER Act.

### ***Views of the Commission***

The Commission recognizes NGTL's efforts to minimize the potential environmental impact of the Project by proposing a route that parallels existing ROWs, and minimizes the taking up of new lands wherever practicable. The Commission finds that NGTL's anticipated requirements for permanent and temporary land rights are

appropriate to allow for the construction and operation of the Project in a safe and efficient manner. The Commission also finds that NGTL's anticipated requirements for land rights, and the process for the acquisition of these land rights, are acceptable and will meet the requirements of the CER Act (including sections 321 to 323), as applicable. The Commission notes that NGTL's land acquisition process for TWS and third-party consent is ongoing, and the process for the acquisition of both permanent and temporary lands is expected to be completed late 2021. The Commission finds that NGTL's route selection, land requirements and land acquisition process are acceptable for the scale and scope of this Project.

### 2.3. NGTL's engagement with Indigenous Peoples

#### *Views of NGTL*

NGTL initially identified potentially affected Indigenous peoples based on the location of the Project within known or asserted traditional territories, regional boundaries and/or areas of interest. NGTL confirmed that this initial identification was compiled through a combination of desktop research, its own operating experience, including past projects in the region, existing agreements and an established network of contacts with Indigenous peoples in the Project area.

On 6 November 2019, NGTL stated that it contacted the CER to request the CER's preliminary list of potentially impacted Indigenous peoples for the Project and once again on 4 February 2020 due to refinements in the Project scope. NGTL confirmed it included information about the nature of the Project, a map of the Project and a list of potentially affected Indigenous peoples it intended to contact about the Project.

NGTL confirmed it engaged with the following Indigenous peoples:

Indigenous Peoples		Raven River Section	ABC Section	ABC Border MS Expansion
First Nations, Treaty 7	Blood Tribe	X	X	X
	Piikani Nation	X	X	X
	Siksika Nation	X	X	X
	Stoney Nakoda Nation	X	X	X
	Tsuut'ina Nation	X	X	X
First Nations, Treaty 6	Alexander First Nation	X		
	Ermieskin Cree Nation	X		
	Enoch Cree Nation	X		
	Louis Bull Tribe	X		
	Montana First Nation	X		
	O'Chiese First Nation	X		
	Samson Cree Nation	X	X	X
	Sunchild First Nation	X	X	X
Non-Treaty First Nations	Adams Lake Indian Band		X	X
	Akisiq'nuk First Nation		X	X
	Foothills Ojibway Society	X		

	Lower Kootenay First Nation		X	X
	Mountain Cree (Smallboy Camp)	X		
	Nakcowinewak Nation of Canada	X		
	Shuswap Indian Band		X	X
	St. Mary's Indian Band		X	X
	Tobacco Plains Indian Band		X	X
First Nation Organizations	Ktunaxa Nation Council		X	X
	Qwelminte Secwepemc		X	X
Métis Organizations	Métis Nation of Alberta	X	X	X
	Métis Nation of Alberta - Region 3	X	X	X
	Métis Nation British Columbia		X	X
	Métis Nation British Columbia - Region 4		X	X

During NGTL's engagement activities, Indigenous peoples expressed general Project-related concerns to NGTL, including:

- challenges with the deadline to provide feedback and responses
- timing of field studies
- lack of capacity funding to participate in a review
- COVID-19 pandemic challenges

NGTL stated that its engagement plans and approach underwent modifications beginning in mid-March 2020, in response to the COVID-19 pandemic-required physical distancing, subsequent business interruptions and Indigenous community office closures. In response, NGTL suspended face to face meetings with Indigenous peoples. However, NGTL indicated that it continues to progress Project engagement in a variety of ways, including electronically, by telephone, and virtually wherever possible, and engage with Indigenous peoples by providing Project information, inquiring how the COVID-19 pandemic has affected them, and continuing to progress various traditional knowledge (TK) and capacity funding agreements with Indigenous peoples.

While NGTL's Application provided an overview of engagement activities that have occurred with specific Indigenous peoples, NGTL stated it will continue to engage throughout the COVID-19 pandemic and the Project lifecycle. Further, TC Energy's Public Awareness Program will be implemented once the Project is in operations phase. NGTL stated that this program facilitates consistent, ongoing communication about safety, integrity and emergency response with Indigenous peoples, and key community stakeholders and interested parties, such as landowners, the public, government representatives, and emergency response agencies.

Submissions received from Indigenous Peoples

In its 10 August 2020 letter of comment, OCFN raised a number of concerns including concerns about the potential impacts the proposed Project may have on OCFN rights, emergency response, heritage resources, capacity funding, and environmental impacts. As discussed below, on 22 January 2021, OCFN submitted the OCFN Report which described its concerns in further detail, including its concerns about culturally sensitive sites.

In its 10 August 2021 letter to the Commission, SNN raised concerns, including impacts to its rights from the taking up of unoccupied Crown lands within the SNN traditional territory, the effects on traditional land use, impacts to wildlife, gender-based analysis, and capacity and consultation matters. Further, as noted in NGTL's response to IR No. 1.2, SNN also inquired about business engagement opportunities with NGTL in July 2020.

### NGTL's Reply

NGTL stated it has been engaging with OCFN since November 2019 and through its ongoing engagement efforts it welcomes information on OCFN's understanding of impacts on OCFN's Inherent and Treaty rights. NGTL also stated that it has negotiated an engagement capacity funding agreement with OCFN to facilitate the review of Project information and engagement with NGTL on the Project, which, NGTL noted, is inclusive of the time and effort to review condition filings.

Additionally, NGTL noted that it continues to actively engage with SNN and all potentially affected Indigenous peoples consistent with the approach described above and in the Project Application. Engagement activities will continue during all Project phases, and NGTL confirmed it will continue to respond to questions and concerns, and conduct ongoing engagement activities.

### ***Views of the Commission***

Engagement efforts undertaken by a proponent with Indigenous peoples are considered within the context of the expectations set out in the Filing Manual. The Commission expects a company to undertake its engagement activities in a manner consistent with the principles of meaningful engagement, including:

- be initiated as soon as possible in the planning and design phase of a project;
- provide clear, relevant and timely information to potentially affected persons and communities;
- be accessible to and inclusive of all potentially affected persons and communities;
- be shaped by input from potentially affected persons and communities (e.g., appropriate methods, timing, language, cultural aspects, and format);
- provide appropriate and effective opportunities for all potentially affected persons and communities to learn about a project, and to provide comments and concerns about a project to the company;
- be responsive to the needs, inputs and concerns of potentially affected persons and communities, and demonstrate how this input informed the proposed design, construction and operation of the Project; and
- continue throughout the regulatory process, as well as the construction and operation phases of a project.

The Commission is of the view that NGTL appropriately identified potentially-impacted Indigenous peoples, and is satisfied that all potentially-impacted Indigenous peoples have been notified and given the opportunity to comment on the Project. Further, the Commission is of the view that NGTL initiated engagement activities at an appropriate time, and NGTL adequately responded to the needs, inputs and concerns of Indigenous peoples. For additional information about the concerns raised during engagement activities, please refer to Section 2.4 (effects on the rights of the Indigenous peoples of Canada) and Section 2.5 (effects on the rights of OCFN).

The Commission notes that NGTL offered capacity funding to potentially affected Indigenous peoples. The Commission observes that capacity funding arrangements supported by a company are not generally shared with the CER as they may be confidential. Nonetheless, NGTL confirmed that it has negotiated an engagement capacity funding agreement with OCFN and other Indigenous peoples to facilitate the review of Project information and engagement with NGTL on the Project.

The Commission further notes NGTL's commitment to continue engagement activities during all Project phases. Given the scope and scale of the Project, the responses to-date from NGTL to the concerns of Indigenous peoples, the commitment from NGTL to continue engagement activities during all Project phases, and **Condition 10** (Commitment Tracking Table), the Commission is satisfied that NGTL has addressed the guidance and requirements outlined in the Filing Manual.

#### **2.4. Effects on the Rights of the Indigenous Peoples of Canada**

The following section describes the effects of the Project on the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*. For the Raven River Section, the Project component is located within the historic boundaries of Treaty 6 and within the areas of interest of 18 potentially affected Indigenous peoples. The majority of the Project component footprint (81%) is located on Crown lands, while the remainder (19%) is on freehold lands within Clearwater County.

NGTL notes that the ABC Section is located within the historic boundaries of Treaty 7 and is also within the areas of interest of 19 potentially affected Indigenous peoples. Approximately 33% of the Project component footprint is located on Crown lands while the remainder is located on freehold lands (67%) within the Municipality of Crowsnest Pass.

Additionally, NGTL notes that the ABC Border MS Expansion is located within the historic boundaries of Treaty 7 and is also within the areas of interest of 19 potentially affected Indigenous peoples, however, this portion of land is freehold land owned by NGTL.

##### *Potential Effects*

NGTL stated that it engaged with potentially impacted Indigenous peoples to understand how Indigenous and Treaty rights and traditional land and resources use (TLRU) activities are exercised or practiced in the Project area; the potential effects of the Project on the ability to exercise those rights and activities; to identify appropriate measures to mitigate potential adverse impacts and support or provide benefit to the exercise of Indigenous and Treaty rights; and to collect TK for consideration in Project planning.

NGTL further stated that agreements for the collection and sharing of Project-specific TK are developed between NGTL and Indigenous peoples, with consideration to the guidance provided in the CER's Interim Filing Guidance Requirements and the Canadian Environmental Assessment Agency's Considering Aboriginal Traditional Knowledge in Environmental Assessments Conducted under the *Canadian Environmental Assessment Act, 2012*, as appropriate.

NGTL noted that a literature review of publicly available information was conducted in a preliminary effort to identify information regarding the Indigenous and Treaty rights and TLRU activities exercised or practiced in the Project area and potential Project effects. NGTL shared the literature review with Indigenous peoples and invited each community to confirm the information was accurate. If not, to provide any changes and identify additional sources

of information they would like considered in the ESA. In addition, NGTL confirmed that Indigenous peoples were asked to provide input on the filing requirements pertaining to the rights of Indigenous peoples' assessment factors introduced by the CER Act and the CER's Interim Filing Guidance.

NGTL confirmed that based on its scope, setting and scale, the Project has the potential to interact with the rights of the Indigenous peoples of Canada recognized and affirmed by section 35 of the *Constitution Act, 1982*. NGTL stated that interactions may occur during construction of the Raven River Section and ABC Section due to:

- vegetation clearing
- soil stripping and grading
- trenching or excavation
- vehicle and equipment movement
- increased noise
- increased traffic
- influx of temporary workers
- increased demand for local emergency, protective and health care services
- creation of employment and business opportunities

NGTL further confirmed that the ABC Border MS Expansion will be located at an existing meter station site and the TWS area is owned by NGTL. NGTL confirmed that interactions with the rights of Indigenous peoples are not predicted during construction or operation of the ABC Border MS Expansion.

NGTL stated that the potential effects of the Project can result in a change:

- to the exercise of Indigenous and Treaty rights, such as: hunting, trapping, fishing, gathering and undertaking in other cultural pursuits due to a change to the quality, quantity or distribution of resources involved in or required for exercise of the right as a result of the loss or alteration of resources, and the loss or alteration of the habitat supporting the resources;
- in access to the resources used or required to exercise the right, due to a restriction on the ability to travel and sensory disturbances that have the potential to influence the conditions for access; and
- relating to timing and seasonality of the exercise of rights,
- to specific areas of cultural importance where Indigenous rights are exercised; and
- to an Indigenous peoples' cultural traditions, laws and governance systems that inform the manner in which they exercise their Indigenous rights.

#### *Views of NGTL*

NGTL provided the following mitigation measures for both the Raven River and ABC Sections:

- implement the measures to mitigate effects on the resources relied upon for the exercise and practice of Indigenous and Treaty rights that are provided in the Environmental Protection Plan (EPP);
- provide all workers with an orientation and information materials regarding environmental, health, safety expectations and cultural awareness and sensitivity;
- provide potentially affected Indigenous peoples with the proposed Project construction schedule and maps;

- notify registered trappers at least 10 days prior to construction;
- prior to the start of construction activities, clearly mark all sensitive resources as identified on the Environmental Alignment Sheets, Environmental Figures and/or other Project specific environmental documents, and in the Project-specific mitigation measure tables;
- restrict all construction activities to the approved construction footprint so that all construction traffic will adhere to safety and road closure regulations;
- delineate areas that have access restrictions for construction personnel only;
- post signage to discourage unauthorized public access onto the construction footprint during construction;
- if traditional land use sites not previously identified are found on the construction footprint during construction, implement the Cultural Resource Discovery Contingency Plan;
- undertake ongoing engagement with potentially affected Indigenous peoples to follow-up on any issues or concerns; and
- implement enhancement measures to support, improve or provide benefit to the rights exercised by Indigenous peoples in the Project area, including those policies and procedures that encourage diversity, inclusion and fair employment.

NGTL confirmed that should specific sites or features (e.g., trails or travel-ways, habitation, or cultural or spiritual sites) be identified by Indigenous peoples which have the potential to interact with Project activities, it will engage in discussions with the appropriate Indigenous peoples regarding the development of site-specific mitigation measures. NGTL stated these measures may include avoidance of the site by narrowing or rerouting the construction footprint, relocation of the site or other measures as appropriate under the particular circumstances and based on discussion with the potentially affected Indigenous peoples.

As confirmed by NGTL, traditional use sites or features that require site-specific mitigation will be included in the EPP and Environmental Alignment Sheets filed prior to construction.

NGTL noted that the residual effects on the Raven River and ABC Sections may result in a change to the exercise or practice of Indigenous and Treaty rights to hunt, trap, gather and undertake other cultural pursuits, such as a change:

- in the quality, quantity or distribution of resources involved in or required for exercise of the right as well as access to resources used or required to exercise the right may occur;
- in access to the resources used or required to exercise the right may occur;
- to specific areas of cultural importance where Indigenous rights are exercised may occur; and
- to an Indigenous people's cultural traditions, laws and governance systems that inform the manner in which they exercise their Indigenous rights may occur.

NGTL confirmed that both the Raven River and ABC Sections will restrict access only in the areas used for construction and will not affect the ability for Indigenous peoples to access the surrounding areas at any time of the year. NGTL also stated that the availability of harvested species may be somewhat incrementally affected, though the Raven River Section will not have disproportionately greater effects during any time of the year. Further, NGTL noted that it is unlikely for the Raven River Section to affect timing or seasonality of activities undertaken in the Raven River Section Local Assessment Area (LAA) (i.e., 1 km buffer on the Project component footprint).

NGTL stated that no information regarding each Indigenous peoples' cultural traditions, laws and governance systems that inform the manner in which they exercise their Indigenous rights was provided to it at the time of writing the Project Application.

NGTL also stated that it is unlikely that the Project's workforce will disproportionately affect the social and cultural well-being of any of the considered subgroups of the population, which includes Indigenous peoples, because the closest populated Indigenous land base is approximately 63 km away (Raven River Section) and 57 km away (ABC Section) from the Project. NGTL further stated that due to the relatively small and temporary nature of the work force, housing in existing commercial accommodations and adequacy of local infrastructure and services are also unlikely to be disproportionately affected.

NGTL added that the residual effects on employment and the economy of Indigenous peoples are predicted to be positive given NGTL's planned mitigation and enhancement measures that will encourage employment and contracting of Indigenous peoples.

NGTL confirmed that while residual effects of the Raven River and ABC Sections on the exercise or practice of Indigenous and Treaty rights are likely to occur, the overall degree to which the Project component may result in residual adverse effects on the exercise or practice of Indigenous and Treaty rights in both sections' LAA is reduced taking into account NGTL's commitment to mitigation and enhancement measures, along with ongoing engagement through the construction and operating life for both the Raven River and ABC Sections.

NGTL stated that past and present projects and physical activities have contributed to baseline conditions for the exercise or practice of Indigenous and Treaty rights in the Regional Assessment Areas (RAAs). NGTL also stated that both the Raven River and ABC Sections' residual effects of these components, combined with the residual effects of reasonably foreseeable future projects and physical activities, may cumulatively lead to further changes to the exercise or practice of Indigenous and Treaty rights in the RAA, but that these Project components are expected to make a low contribution to cumulative effects in the RAA.

NGTL confirmed that information sharing will continue until the completion of Project construction and that NGTL remains available to respond to questions or concerns about the Project. NGTL stated it continues to engage with Indigenous peoples where available and will continue to engage respectfully throughout the COVID-19 pandemic and the Project lifecycle.

### ***Views of the Commission***

The CER Act designates the CER as an agent of the Crown. For applications such as this, where the Commission is the final decision maker, the CER's intent is to fulfill the Crown's duty to consult through the Commission's regulatory process. The Commission has the technical expertise and mandate to consider and address project impacts, including those affecting the rights and interests of Indigenous peoples.

The Commission considered a number of factors when evaluating the adequacy of consultation and accommodation, including: NGTL's route selection, the scope and scale of the Project, NGTL's engagement with Indigenous peoples for the Project, including the notice and sufficiency of information about the Project being provided to Indigenous peoples, the evaluation process for the Project, participation opportunities

for Indigenous peoples, NGTL's proposed mitigation measures, commitments made throughout the process, and the Conditions imposed by the Commission in the attached Order.

The Commission has considered all of the information submitted in the regulatory process, including information regarding the effects of the Project on the rights of the Indigenous peoples of Canada, such as: the Indigenous and Treaty rights of the potentially affected Indigenous peoples in the Project area; how Indigenous and Treaty rights are exercised or practiced in the Project area; the context in which the Indigenous and Treaty rights are exercised or practiced in the Project area; the Project's potential effects on the exercise or practice of Indigenous and Treaty rights in the Project area; the measures to be implemented by NGTL to avoid, reduce or eliminate potential adverse effects of the Project on the exercise of Indigenous and Treaty rights; and the nature and extent of any residual and cumulative effects, after mitigation measures are implemented.

The Commission also carefully considered the submissions filed by Indigenous peoples in the process. The Commission considers Indigenous knowledge to be valuable, and considers and weighs all Indigenous knowledge received during the Commission's regulatory process. The Commission expects Indigenous knowledge, where obtained, to be integrated, and where appropriate, to be implemented into the design of a project, as well as throughout its lifecycle. The Commission further expects that where Indigenous knowledge is obtained, a proponent will provide an opportunity for Indigenous peoples, who provided the information, to confirm the interpretation of the information and how it was used.

The Commission is of the view that there has been adequate consultation and accommodation for the purpose of the Commission's decision on this Project. This conclusion is based, in part, on factors such as NGTL's consultation with Indigenous peoples for the Project, notice and sufficiency of information about the Project being provided to Indigenous peoples, the evaluation process for the Project, and participation opportunities within that process. Further, the Commission extended deadlines to accommodate the receipt of submissions from interested persons as well as provided several opportunities for interested persons to share their concerns with the Commission. Additionally, the Commission sought and received comments on potential draft conditions which are incorporated in Appendix I.

The Commission acknowledges NGTL's efforts to reduce impacts on the exercise of Indigenous and Treaty rights by designing its route to parallel existing disturbances wherever feasible (i.e., the Raven River Section parallels existing disturbances for approximately 79% of the pipeline route and the ABC Section for approximately 90% of the pipeline route).

The Commission is of the view that NGTL has made reasonable opportunities available to potentially affected Indigenous peoples to identify any concerns regarding Project impacts to Indigenous and Treaty rights. These opportunities included providing information such as copies of the Project ESA, Project maps and shape files, as well as offering engagement capacity funding agreements, facilitating site visits and TK studies with interested Indigenous peoples, and responding to issues raised. The Commission notes that NGTL's engagement both prior to, and throughout the regulatory process, enhanced the information flow to potentially impacted Indigenous peoples and provided opportunities for meaningful participation in the Project.

The Commission is of the view that NGTL's process was appropriate for the Project which mostly parallels existing disturbances, and where 19% of the Raven River Section and 62% of the ABC Section is located on private land and the remaining portions are otherwise located on Crown lands.

The Commission notes that NGTL entered into agreements with some potentially impacted Indigenous peoples to conduct community-directed Indigenous knowledge studies for the Project, and that some Indigenous knowledge studies are outstanding. Therefore the Commission imposes **Condition 6** (Outstanding Traditional Land and Resource Use Investigations) to ensure that NGTL incorporates any revisions necessitated by the investigations or follow-up activities into the EPP for the Project. The Commission also requires NGTL to effectively implement the suite of mitigation measures proposed in the EPP to reduce any potential Project impacts on traditional land use, harvesting, gathering and sacred sites. To further minimize impacts and to enhance transparency, the Commission imposes **Condition 10** (Commitment Tracking Table) and **Condition 13** (Post-Construction Monitoring Reports).

The Commission understands NGTL's statement that the overall degree to which the Project components may result in residual adverse effects on the exercise or practice of Indigenous and Treaty rights is diminished with consideration of NGTL's commitment to mitigation and enhancement measures. Nevertheless, the Commission also imposes **Condition 7** (Indigenous Peoples Employment, Procurement and Contracting Plan) and **Condition 12** (Indigenous Peoples Employment, Contracting, and Procurement Report) to enhance transparency regarding the availability of employment, procurement and contracting opportunities for Indigenous peoples as a result of the Project.

Having considered all the evidence submitted in this proceeding, including the consultation undertaken with Indigenous peoples, the impacts on Indigenous interests and rights, the proposed mitigation measures, including conditions to minimize adverse impacts on Indigenous interests, and the commitments to ongoing consultation, the Commission is satisfied that its decision with respect to the Project is consistent with subsection 35(1) of the *Constitution Act, 1982*.

## **2.5. Effects on the Rights of O'Chiese First Nation**

As noted in the OCFN Report, OCFN is the only Anishnaabek Nation in Alberta and is a distinct Nation with values and beliefs that are distinct and rooted within OCFN Inherent and Treaty rights. OCFN Elders and members have reported a deep historical connection to the area surrounding the proposed Project.

OCFN submitted that its Treaty rights are recognized by Treaty No. 6 and subsection 91(24) of the *British North America Act (1867)*. OCFN also stated it is bound by *Kaa-Ke-Chi-Ko-Moo-Nan*, its Great Binding Law, which operates under its own distinct set of legal principles and laws that have been in place since time immemorial; these Natural Laws are the foundation for OCFN people.

As noted above, OCFN began its participation in the CER process on 10 August 2020 when it filed a letter identifying that its Inherent and Treaty rights have the potential to be irreparably violated by the Project.

As noted above, on 17 November 2020, OCFN filed an additional letter stating that due to challenges of the COVID-19 pandemic and capacity constraints, it required additional time to submit evidence. OCFN also indicated that capacity funding from NGTL was forthcoming and the evidence would be submitted in January 2021.

The OCFN Report, which was filed on 22 January 2021, indicated that NGTL notified OCFN in March 2020 of the potential for the Project to intersect with sensitive sites, in particular OCFN-158. The OCFN Report also indicated that 19 TLRU sites intersect and/or overlap with the Project RAA, and 11 TLRU sites intersect and/or overlap with the Project Description Area (PDA) ditchline. In October and November 2020, OCFN worked with NGTL and Stantec to conduct a Historical Resources Impact Assessment (HRIA) field visit. OCFN noted that due to the direction of NGTL, Stantec's HRIA was limited to the PDA.

OCFN noted that it prepared the OCFN Report in order to identify the violations to OCFN Inherent and Treaty rights from the Project. OCFN noted that due to time and capacity constraints, one Guardianship Component was chosen to be studied to represent the violations to OCFN from the Project. In addition, OCFN noted that limitations surrounding the COVID-19 pandemic impacted the ability of OCFN to meet with Elders and members to discuss the Project.

OCFN maintained that the cultural and ceremonial activities and sites identified within the OCFN Report are integral to ensuring the continuity of OCFN's Guardianship Component of Culture and Ceremony. OCFN stated that for too long, development activities have been permitted within OCFN's Treaty territory without any regard for how they individually and collectively infringe upon their Inherent and Treaty rights or how they violate their laws and their culture.

In relation to the Guardianship Component of Culture and Ceremony, OCFN stated if the Project is approved as currently proposed it will violate the cultural and ceremonial activities and sites that have been identified within the OCFN Report, and consequently OCFN's Inherent and Treaty rights. OCFN noted that the relevant avoidance behaviour distance for OCFN cultural and ceremonial activities for the construction and operation of pipelines is 1,113.33 m.

In addition to filing the OCFN Report, OCFN filed its comments on the Commission's draft conditions on 12 March 2021 and spoke specifically about how the CER's proposed conditions and NGTL's proposed standard mitigation measures did not address their concerns of Project impacts on their Inherent and Treaty rights.

With respect to mitigation measures, OCFN stated that NGTL's reply comments to the OCFN Report did not suggest any new mitigation measures, but rather referenced existing and standard mitigation measures which OCFN has repeatedly stated are not effective. Additionally, OCFN stated that NGTL's standard mitigation measures only seek to mitigate the biophysical effects of the Project, and that no current mitigations are proposed to address the violations to its Inherent and Treaty rights.

OCFN put forward three mitigation measures that it suggests will address potential violations incurred from the Project:

- compensation for the taking up of unoccupied Crown land and new disturbance caused by the Project;
- compensation for the area of avoidance as a result of the Project; and
- identification and avoidance of all previously identified sacred sites.

Additionally, OCFN recommended the following three conditions:

- the requirement for NGTL to ensure OCFN is able to conduct a field visit of the Raven River Section and confirm site locations prior to construction;
- the requirement for NGTL to re-route the Project if sacred sites are identified to be located on the PDA, or immediately adjacent to the PDA within 1 km; and
- the requirement for NGTL to provide capacity to OCFN to engage with NGTL post Project approval.

#### *Views of NGTL*

NGTL stated that it has provided OCFN opportunities to collect and submit Project-specific information that would inform its understanding of potential Project effects on Indigenous and Treaty rights and traditional uses during engagement, including through a community-led TK study. NGTL and OCFN negotiated a TK Protocol Agreement for the collection and sharing of Project-specific TK, which includes capacity funding to facilitate the conducting of fieldwork.

NGTL further stated that it has negotiated an engagement capacity funding agreement with OCFN to facilitate the review of Project information and engagement with NGTL on the Project, which is inclusive of the time and effort to review condition filings.

NGTL noted that while the residual effects of the Raven River Section on the exercise or practice of Indigenous and Treaty rights are likely to occur, the overall degree to which the Project component may result in residual adverse effects on the exercise or practice of Indigenous and Treaty rights in the LAA is lessened with consideration of NGTL's commitment to mitigation and enhancement measures, along with ongoing engagement through the construction and operating life for the Raven River Section.

NGTL submitted that the residual adverse effects due to construction of the Project will be short-term to long-term in duration (as some portions of the construction footprint will be allowed to regrow, while part of the ROW will be maintained free of trees until the cessation of Project operation) and reversible following post-construction reclamation.

NGTL further submitted that with the implementation of mitigation measures outlined in the Project-specific EPP, including the Cultural Resources Discovery Contingency Plan, and those required by Alberta Culture, Multiculturalism and Status of Women (ACMSW), the Project is not anticipated to have residual effects on heritage resources.

On 2 December 2019, NGTL submitted a Historic Resources Application for the Raven River Section to ACMSW for their review. NGTL confirmed that ACMSW independently reviewed the Project and issued a letter of requirements on 26 March 2020 that must be fulfilled prior to final Project approval. NGTL stated that the requirements include the need for a targeted archaeological HRIA of high potential landforms within the PDA. ACMSW also noted that Indigenous traditional use sites of a historic nature, which was recorded with OCFN, are located in the vicinity of the Project area. NGTL further stated that ACMSW requires NGTL to notify OCFN about the Project and follow up with ACMSW for further direction on any response received.

NGTL committed to complete all conditions of approval issued under the *Historic Resources Act* relative to the Project, including any required additional assessment, consultation, mitigation, construction monitoring and chance find notifications. If unanticipated cultural resources are identified during construction, NGTL's Cultural Resources Discovery

Contingency Plan will be implemented. For clarification, NGTL noted that if a suspected cultural resource is identified during construction:

- work will be immediately suspended near the suspected site;
- upon the advice of the Environmental Advisor, a Heritage Resource Specialist will be consulted to aid in an initial assessment of the site, as necessary;
- depending on the outcome of the initial assessment and nature of the suspected find, NGTL will proceed with consultation and engagement with responsible authorities and potentially affected Indigenous peoples as applicable; and
- the find will be handled in accordance with all applicable requirements and permits, and in consideration of the recommendation of potentially affected Indigenous peoples.

With respect to specific sites of concern raised by OCFN, NGTL submitted that it has worked collaboratively with OCFN to facilitate the collection of outstanding information regarding identified culturally sensitive sites along the proposed route, prior to the start of construction for that segment(s) of the pipeline. Based on information received to date from OCFN through this facilitated process, it is NGTL's understanding that the two identified culturally sensitive sites, including the OCFN-158 4c site and another culturally sensitive site are currently avoided by the PDA. NGTL submitted that no sites identified by OCFN are within the PDA.

NGTL stated that it is open to further discussions with OCFN on how to further support OCFN's completion of fieldwork in consideration of the COVID-19 pandemic, including offering NGTL's consultant assistance to facilitate the fieldwork, the dissemination of information and subsequent implementation of COVID-19 pandemic health and safety protocols. NGTL further stated that it has previously provided OCFN with documents regarding best practices for conducting fieldwork in light of the COVID-19 pandemic, including how best to protect the health and safety of employees and minimize the spread of the virus.

NGTL said that it welcomes any additional information, including specific locational data, identified by OCFN via community-directed field assessments. NGTL also welcomes any suggestions OCFN may have regarding how to facilitate the collection of outstanding information. NGTL noted that capacity for any future field assessments would be captured within the existing TK Protocol Agreement between NGTL and OCFN for the collection and sharing of Project-specific TK.

NGTL acknowledged that sensory disturbance (e.g., changes to air quality, noise, and traffic during construction) could temporarily deter Indigenous land users from pursuing TLRU activities at current use sites or areas within the LAA. Construction related noise and air emissions will be addressed by established general protection measures and practices. Sensory disturbance arising from construction of the Raven River Section is expected to be short-term and is expected to return to baseline conditions immediately following completion of construction.

In response to OCFN's proposed mitigation measures, NGTL stated that financial compensation is beyond the scope of this proceeding. Further, NGTL stated that OCFN's evidence has been considered in the context of the ESA and continues to be considered in Project planning. With respect to OCFN's mitigation measure regarding the identification and avoidance of all previously identified sacred sites, NGTL committed to work collaboratively with OCFN to determine additional mitigation measures that may be required, on a case by case basis, should OCFN identify and provide NGTL with the specific location of the

OCFN-158 4c site or additional information for any other identified cultural or TLRU sites in the Project area.

In response to OCFN's proposed conditions, NGTL argued the three conditions were either not warranted or appropriate based on the following reasons:

- OCFN proposed condition: requirement for NGTL to ensure OCFN is able to conduct a field visit of the Raven River Section and confirm site locations prior to construction:
  - NGTL takes the position that the circumstances preventing OCFN from completing a field visit are beyond NGTL's control. NGTL stated that this proposed condition by OCFN is contingent on the completion of OCFN's field visit, which essentially gives OCFN the ability to indefinitely delay Project construction. NGTL restated that it facilitated OCFN's participation in fieldwork for the HRIA on the Project and has committed to provide OCFN with an opportunity to conduct a site visit prior to the start of construction, as funded and agreed upon through agreements between OCFN and NGTL.
- OCFN proposed condition: requirement for NGTL to re-route the Project if sacred sites are identified to be located on the PDA, or immediately adjacent to the PDA within 1 km:
  - It is NGTL's understanding that the two identified culturally sensitive sites are already currently avoided by the PDA. NGTL argued that a one kilometer offset is unreasonable and notes such an offset, if applied, would cover existing infrastructure and other disturbance. NGTL reiterated previously filed information which outlines its past and planned future efforts, as well as commitment to work collaboratively with OCFN to address Project-related issues or concerns regarding these and other sites, if any are identified, prior to construction. NGTL confirmed that upon receipt of any additional information from OCFN, it will also seek to work collaboratively with OCFN to address new Project-related issues or concerns prior to the start of construction. Lastly, NGTL stated that in the unlikely event that unanticipated cultural resources are discovered during construction, it has committed to implementing its Cultural Resource Discovery Contingency Plan within the EPP for the Project.
- OCFN proposed condition: requirement for NGTL to provide capacity to OCFN to engage with NGTL post Project approval.
  - In response to this proposed condition as well as OCFN's request that a number of conditions be amended to include a requirement for NGTL to provide capacity to support OCFN's efforts to meet and engage with it to review and provide comment on future condition filings, NGTL stated that it has negotiated an engagement capacity funding with OCFN to facilitate the review of Project information and engagement on the Project. NGTL further stated that this agreement is inclusive of the time and effort to review condition filings. NGTL also referenced a recent CER decision that capacity funding arrangements supported by a company are outside of the CER's mandate.<sup>1</sup>

### ***Views of the Commission***

The Commission has reviewed the information submitted regarding the effects of the Project on the rights of OCFN. The Commission has considered the anticipated

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<sup>1</sup> CER Reasons for Decision GH-1-2019 [C09740-1](#) PDF Page 185 of 390, cited in NGTL's 19 March 2021 Comments on Potential Conditions ([C12079](#))

impacts of the Project on those rights and interests and the concerns expressed by OCFN. In light of the nature of the rights and interests and the anticipated impacts, the Commission also reviewed the consultation undertaken with respect to this Project and the consultation undertaken through the Commission's project assessment process. Further, the Commission considered the mitigation measures proposed by NGTL to address the various concerns and potential impacts.

The Commission carefully considered the submissions filed by OCFN in the process. The Commission considers Indigenous knowledge to be valuable, and considers and weighs all Indigenous knowledge received during the Commission's regulatory process.

The Commission notes that while NGTL applied for a 75 m wide PDA, which includes a 32 m wide construction corridor and up to an additional 43 m for TWS, NGTL stated that not all of the construction or TWS width will be used and both types of disturbance are temporary. NGTL clarified that the ROW width associated with the pipeline during operation will vary between approximately 15 m to 32 m and will be subject to re-vegetation, excluding the valve sites. While the Project will result in new permanent footprint on Crown land, the Commission notes that, apart from a period of time during active construction, the remainder of the Crown land within the Project footprint would be available for exercising Indigenous and Treaty rights, including TLRU activities. Further, as noted above, the majority of the Project follows existing disturbances (79% for the Raven River Section).

With respect to OCFN's recommended mitigation measure to identify and avoid all previously identified cultural sites, the Commission notes the opportunities provided by NGTL and those provided through the regulatory process for OCFN to collect and submit Project-specific information concerning potential Project effects on Indigenous and Treaty rights.

The Commission also notes that the two cultural sites identified by OCFN are currently avoided by the PDA. The Commission further notes NGTL's commitment that should OCFN identify and provide NGTL with the specific location of the OCFN-158 4c site or additional information for any other identified cultural or TLRU sites in the Project area, NGTL will work collaboratively with OCFN to determine additional mitigation measures that may be required, on a case by case basis.

To further address the concerns raised by OCFN, the Commission has imposed **Condition 4** (Heritage Resources Site Construction Monitoring Plan for OCFN) to ensure that NGTL creates opportunities for the possible participation by OCFN to monitor construction activities at two identified historic sites.

The Commission has also decided to impose the following conditions to help identify and avoid cultural sites: **Condition 5** (Updated EPP), **Condition 8** (Heritage Resources Clearances) and **Condition 10** (Commitments Tracking Table).

In the addition to the above noted measures, the Commission notes that NGTL has a Cultural Resource Discovery Contingency Plan which will be implemented if unanticipated cultural resources are identified during construction activities. The Commission is of the view that NGTL's mitigation measures combined with the Commission's conditions establish reasonable layers of protection for previously identified and unidentified cultural sites.

The Commission acknowledges that sensory disturbances (e.g., changes to air quality, noise, and traffic during construction) could temporarily deter Indigenous peoples from pursuing TLRU activities within the LAA. The impact of these disturbances on the exercise of Indigenous and Treaty rights was considered by the Commission, however, in the Commission's view, these disturbances will be short-term and return to baseline conditions following completion of construction.

In its submissions regarding possible conditions and mitigation measures, OCFN suggested compensation for the taking up of unoccupied Crown land and new disturbance caused by the Project as well as compensation for the area of avoidance as a result of the Project. While subsection 214(2) of the CER Act allows the Commission in any order made under subsection (1) to impose any conditions it considers appropriate, the Commission is of the view that a condition imposing compensation is not appropriate under this provision, as matters dealing with compensation are outside the scope of this Application.

Regarding OCFN's recommended condition to conduct a field visit of the Raven River Section prior to construction, the Commission notes NGTL's openness to discuss further support for OCFN's completion of fieldwork and NGTL's indication that capacity for any future field assessments would be captured within the existing capacity agreement. Further, the Commission is persuaded by NGTL's argument that the circumstances preventing OCFN from completing a field visit are beyond NGTL's control.

Regarding OCFN's recommended condition for NGTL to re-route the Project, the Commission notes NGTL's commitment to work collaboratively with OCFN to address new Project-related concerns prior to the start of construction, and NGTL's Cultural Resource Discovery Contingency Plan to address cultural sites. Further, the Commission is persuaded by NGTL's argument that a one kilometer offset is unreasonable as it would cover existing infrastructure and other disturbances.

Lastly, regarding OCFN's recommended condition for NGTL to provide capacity to OCFN to engage with NGTL post Project approval, the Commission notes that capacity funding arrangements supported by a company are not generally shared with the CER as they may be confidential. The Commission further observes that matters of capacity funding are outside of the Commission's mandate when making a decision on an order. Nonetheless, the Commission notes that NGTL and OCFN have negotiated an engagement capacity funding agreement which NGTL has indicated is inclusive of the time and effort to review condition filings.

For the reasons noted above, the Commission has not imposed the conditions proposed by OCFN. Please see Appendix I for the Commission's response to comments from parties on conditions.

The Commission has considered the concerns as well as the mitigation measures proposed by OCFN in this proceeding. The Commission has also weighed the evidence of NGTL that there are no known cultural sites within the PDA and that NGTL has a number of mitigation measures in place if a suspected cultural resource is identified during construction, including immediately suspending work near the suspected site and proceeding with consultation and engagement with responsible authorities and potentially affected Indigenous peoples, as applicable. Lastly, the Commission is satisfied with the commitments made by NGTL to continue its ongoing engagement efforts and to work collaboratively with OCFN.

In addition, and to further mitigate the concerns raised by OCFN, the Commission has also imposed a number of conditions to help identify and avoid cultural sites: **Condition 5** (Updated EPP), **Condition 8** (Heritage Resources Clearances) and **Condition 10** (Commitments Tracking Table). The Commission notes the CER's role as a lifecycle regulator, and is of the view that the mitigation measures proposed by NGTL, along with the conditions imposed by the Commission are capable of addressing the concerns raised by OCFN.

## 2.6. Environmental Matters

NGTL filed an ESA Interactions Table and an Environmental Summary as part of its Application which summarized Project interactions, potential effects, proposed mitigation and predicted residual effects, including cumulative effects. In response to IR No. 1.4 NGTL filed its ESA which included the EPP and environmental alignment sheets for each of the Project components.

The footprint of the Raven River Section is approximately 137 hectares (ha) in size and is comprised of native upland vegetation (42.3%), wetland habitat (17.7%) and 39.9% of previously disturbed areas (e.g., industrial development, agriculture, cutblocks, roads).

The ABC Section is approximately 39 ha in size, and comprised of native upland vegetation (91.1%), wetlands (0.9%), and 8% previously disturbed areas, including industrial development and roads. The ABC Border MS Expansion is approximately 3.6 ha in size and includes native upland vegetation (49.1%) and 50.9% disturbed areas (e.g., industrial development).

The Project crosses a total of four fish bearing watercourses and 10 non-fishbearing drainages. Specifically, the Raven River Section crosses two of the four fish bearing watercourses, the Raven River and Unnamed Tributary to Beaver Creek, and the ABC Section crosses the other two fish bearing watercourses, Unnamed Tributary to the Crowsnest River and an Unnamed Tributary to Crowsnest Lake. All four watercourses will be crossed using a trenched (isolated open-cut) crossing methodology, with a trenchless crossing method as a contingency. NGTL committed to conduct these watercourse crossings in accordance with Fisheries and Oceans Canada's Measures to Protect Fish and Fish Habitat and the associated Standards and Codes of Practice.

NGTL noted that the Saskatchewan-Nelson River population of bull trout are listed as threatened under the federal Species at Risk Act, and have been documented within watercourses in the RAA for the Raven River Section and the ABC Section. In response to IR No. 1.6, NGTL referenced the Final Recovery Strategy for the Bull Trout (*Salvelinus confluentus*), Saskatchewan-Nelson Rivers populations in Canada (2020), and the Alberta Environment and Parks Bull Trout Fish Sustainability Index and Fish & Wildlife Internet Mapping Tool and which indicate that the Saskatchewan-Nelson River population of bull trout are considered functionally extirpated from within the Raven River watershed and the Upper Crowsnest River watershed. There has been only one historical occurrence observed in 2010 in North Raven River, approximately 30 km downstream of the PDA, and there have been no occurrences of bull trout documented in the Crowsnest River upstream of Lundbreck Falls, where the ABC Section is located.

NGTL identified that there are historical records of westslope cutthroat trout within the RAA for the ABC Section. The westslope cutthroat trout is listed as threatened by the federal *Species at Risk Act*, and the *Alberta Wildlife Act*. Although there is critical habitat for

westslope cutthroat trout within the ABC Section RAA, no critical habitat intersects with the Project component footprint.

NGTL conducted additional field studies for wildlife and vegetation in all three Project components. Results in the Raven River Section included the identification of active western toad breeding sites within the LAA, some of which were located within the recommended 100 m setback from the PDA and three active osprey nests within the LAA, two of which were within the recommended 750 m setback from the PDA. Results from the ABC Section and ABC Border MS include three active Columbia spotted frog breeding wetlands within the LAA, two of these wetlands are within the recommended 100 m setback from the PDA, three active raptor nests all within the recommended setback distance from the PDA, and an active American badger den complex was identified within the PDA. Observations of wildlife species at risk and species of management were also noted during the surveys in each Project component. NGTL stated that additional mitigation for the American badger den and the raptor nests within the recommended setbacks is in development with the applicable regulatory agencies. NGTL provided mitigation for amphibians within its ESA and EPP.

Results of the 2020 vegetation survey in the Raven River Section included two additional plant species of management concern and one additional county-designated weed species (wild caraway) within the PDA from those identified in the 2019 field survey. Results from the 2020 survey of the ABC Section included the identification of whitebark pine, listed as endangered under the federal *Species at Risk Act*, and limber pine, listed as endangered under the *Alberta Wildlife Act*. The 2020 survey identified a large number of limber pine trees within the PDA, and seven whitebark pine trees within the LAA, five of which were located within the limber pine stand in the PDA. Western white pine was also found on the PDA. Seven additional plant species of management concern and two additional provincially designated noxious weed species were found within the PDA from those identified in the 2019 surveys. NGTL stated that all traditionally used plant species identified in the ESA were recorded in the PDA of the Raven River and ABC Sections during the 2020 survey. NGTL stated that mitigation measures for limber pine, whitebark pine and four species of management concern are in ongoing development with the applicable regulatory agencies.

### ***Views of the Commission***

The Commission is of the view that NGTL's proposed watercourse crossing methodology of an isolated open cut and mitigation is appropriate for the four watercourse crossings. The Commission accepts that the Saskatchewan-Nelson River population of bull trout and westslope cutthroat trout are considered functionally extirpated from within the proposed PDAs.

The Commission notes the additional surveys for wildlife, vegetation and fall fish spawning habitat that were conducted after NGTL's EPP was filed with the CER in response to IR No. 1.4. NGTL has committed to updating the Project-specific EPP with the additional mitigation required based on the results of the surveys. In order to ensure that the additional site specific mitigation measures identified from the 2020 field surveys, as well as the consultation with the responsible regulators is incorporated into the EPP, the Commission imposes **Condition 4** for an Updated EPP.

The Commission notes NGTL's commitment to conduct post-construction monitoring. The Commission is of the view that a robust post-construction environmental monitoring program is key to NGTL ensuring that any potential adverse effects of the Project have been effectively mitigated. In addition, where issues are identified

post-construction, the post-construction environmental monitoring program requires that NGTL implements adaptive management to address them. To be satisfied that post-construction environmental monitoring is thorough and effective, the Commission imposes **Condition 13** which sets out requirements for NGTL to implement a post-construction environmental monitoring program for a five year period and submit Post-Construction Environmental Monitoring Reports to the CER bi-annually.

The Commission is of the view that overall, with the implementation of NGTL's environmental protection procedures and mitigation, and the conditions imposed by the Commission, the Project is not likely to cause significant adverse environmental effects. The Commission notes that existing cumulative effects from industrial developments, forestry and roads will likely persist in the Project component RAAs, but the Commission is of the view that the Project's contribution to those effects would not be significant.

The Commission directs NGTL to serve a copy of this letter decision, the attached Order and its Schedule A on all interested parties.

Yours sincerely,

*Signed by*

Jean-Denis Charlebois  
Secretary of the Commission

Attachments

**Appendix I - Comments on Conditions**

Commission's Potential Condition ( <a href="#">C11682</a> )	Party	Summary of Comments from Parties on Commission Potential Conditions	Commission Response to Comments from Parties
<b>Condition Compliance</b>	O'Chiese First Nation (OCFN) <a href="#">C11959-1</a>	OCFN notes that compliance to the draft conditions, while important in a general sense, are not relevant to the mitigation of Project-related impacts identified by OCFN.	<p>The Commission has revised certain conditions as noted below.</p> <p>The Commission notes OCFN's concerns regarding Project-related violations to its Inherent and Treaty Rights. This is discussed in the views of the Commission under Section 2.5 - Effects on the Rights of OCFN.</p> <p>The Commission will hold NGTL accountable for meeting its regulatory requirements.</p>
	NGTL <a href="#">C12079-1</a>	n/a	n/a
<b>Design, Location, Construction, and Operation</b>	OCFN <a href="#">C11959-1</a>	OCFN stated that the design, location, construction and operation of the Project as currently proposed, violates OCFN's Inherent and Treaty Rights and that NGTL has not proposed any mitigation measures or made commitments to ensure impacts to OCFN are mitigated or accommodated.	The Commission notes OCFN's concerns regarding the design, location, construction and operation of the Project. This is discussed in the views of the Commission under Section 2.5 - Effects on the Rights of OCFN.
	NGTL <a href="#">C12079-1</a>	n/a	n/a
<b>Environmental Protection</b>	OCFN <a href="#">C11959-1</a>	OCFN highlighted that environmental protection as outlined in NGTL's Project Application does not accommodate Project related violations to OCFN's Inherent and Treaty Rights and that NGTL's standard mitigation measures only seek to mitigate the biophysical effects of the Project. OCFN recommended an additional condition that would also acknowledge the Protection of the rights of Indigenous peoples.	The Commission notes OCFN's concerns regarding the protection of rights of Indigenous peoples. The Commission further notes the Commitment Tracking Table Condition where NGTL is required to report on commitments.
	NGTL <a href="#">C12079-1</a>	n/a	n/a
<b>Updated Environmental Protection Plan</b>	OCFN <a href="#">C11959-1</a>	<p>OCFN noted that the mitigation measures listed within the EPP do not speak to impacts on OCFN. OCFN recommended that this condition be amended to include a requirement for NGTL to provide rationale as to how evidence shared by Indigenous groups will be or has been integrated into the EPP</p> <p>OCFN also recommended that this condition (and all conditions) be amended to include a requirement for NGTL to provide capacity for engagement on the condition.</p>	<p>The Commission has revised the condition to require NGTL to provide rationale as to how evidence shared by Indigenous groups has been integrated into the EPP.</p> <p>See Commission response below to OCFN's proposed new condition C regarding OCFN's recommendation for capacity for engagement on conditions. This is discussed in the views of the Commission under Section 2.5 - Effects on the Rights of OCFN</p>

	<p>NGTL <a href="#">C12079-1</a></p>	<p>NGTL requested that the updated EPP be filed with the Commission 30 days prior to commencing construction on each approved Project component to account for different construction starts for each Project component and allow more time for NGTL to incorporate additional information that may be received during engagement with Indigenous peoples prior to filing.</p>	<p>The Commission has revised the condition to account for the different construction start dates for the Project components.</p> <p>The Commission is of the view that 30 days is appropriate for this condition to allow for incorporation of additional information received during engagement with Indigenous peoples.</p>
<p><b>Heritage Resources Site Construction Monitoring Plan for OCFN</b></p>	<p>OCFN <a href="#">C11959-1</a></p>	<p>OCFN noted that this condition appears to only relate to the two identified historic sites and not the entire Project and does not accommodate the violations identified to OCFN's Inherent and Treaty Rights. OCFN also noted that these conditions do not hold NGTL accountable for ensuring meaningful engagement takes place.</p> <p>OCFN also recommended that this condition (and all conditions) be amended to include a requirement for NGTL to provide capacity for engagement on the condition.</p>	<p>The Commission notes OCFN's comments regarding a monitoring plan specific to a certain segment of the Raven River Section, as opposed to the entire Project. This is discussed in the views of the Commission under Section 2.5 - Effects on the Rights of OCFN.</p> <p>See Commission response below to OCFN's proposed new condition C regarding OCFN's recommendation for capacity for engagement on conditions.</p>
	<p>NGTL <a href="#">C12079-1</a></p>	<p>NGTL requests that the condition specifies that it is for the Raven River Section only.</p>	<p>The Commission has reviewed the suggested content and has revised the condition.</p>
<p><b>Outstanding Traditional Land and Resource Use Investigations</b></p>	<p>OCFN <a href="#">C11959-1</a></p>	<p>OCFN indicated that this condition doesn't account for impacts already identified by OCFN.</p> <p>OCFN recommended that this condition (and all conditions) be amended to include a requirement for NGTL to provide capacity for engagement on the condition.</p>	<p>The Commission notes that this condition is for outstanding traditional land and resource use investigations (i.e., investigations that were not addressed in the original application or the application assessment process). A discussion about OCFN's concerns are included in the views of the Commission under Section 2.5 - Effects on the Rights of OCFN.</p> <p>See Commission response below to OCFN's proposed new condition C regarding OCFN's recommendation for capacity for engagement on conditions.</p>
	<p>NGTL <a href="#">C12079-1</a></p>	<p>NGTL requests the time period associated with this condition be reduced to 30 days prior to construction to align with similar conditions issued by the Commission and allow more time for Indigenous peoples to complete the investigations and for NGTL to address concerns and incorporate new information prior to filing.</p>	<p>The Commission has revised the condition to reflect the proposed change to 30 days.</p>
<p><b>Indigenous Peoples Employment, Procurement, and Contracting Plan</b></p>	<p>OCFN <a href="#">C11959-1</a></p>	<p>OCFN states that these plans do not guarantee accommodation of Project-related violations to OCFN's Inherent and Treaty Rights and that there is no requirement in this Condition for NGTL to sole source any employment or contracting opportunities to OCFN.</p> <p>OCFN recommended that this condition (and all conditions) be amended to include a requirement for NGTL to provide appropriate capacity for engagement on the condition. OCFN also recommended that NGTL should be required to demonstrate best efforts to hire Indigenous nations and that where this is not possible that NGTL should provide rationale for why other employers/contractors are chosen over others.</p>	<p>The Commission notes OCFN's request for enhanced transparency on NGTL's policy and processes for assessing and awarding employment, procurement and contracting opportunities to Indigenous peoples.</p> <p>The Commission also notes that NGTL has planned mitigation and enhancement measures that will encourage employment and contracting of Indigenous peoples. The Commission encourages OCFN and other interested Indigenous peoples and NGTL to explore options for employment and contracting opportunities.</p>

			See Commission response below to OCFN's proposed new condition C regarding OCFN's recommendation for capacity for engagement on conditions.
	NGTL <a href="#">C12079-1</a>	NGTL requested that the timing filing for this condition be based on different construction starts for Project components. NGTL recommended that self-identification language be applied and proposed edits to b) and removing a)iii).	<p>The Commission notes NGTL's request to align this condition with other reporting requirements based on different construction scheduled for Project components and NGTL's statement on how it received some proposals from Indigenous People.</p> <p>The Commission has reviewed NGTL's comments regarding the addition of "self-identified" and has revised the condition accordingly.</p> <p>The Commission did not agree with NGTL's rationale for the suggested deletion of iii) and accordingly has left that condition in place.</p>
<b>Heritage Resources Clearances</b>	OCFN <a href="#">C11959-1</a>	<p>OCFN states that this condition does not accommodate Project-related violations to OCFN's Inherent and Treaty Rights.</p> <p>OCFN states that while important to protect heritage resources, this condition does not reduce or remove the amount of land that will be disturbed or avoided and therefore accommodations to the violations identified by OCFN remain outstanding. OCFN also states that NGTL has acknowledged sensitive sites, but this condition does not hold NGTL accountable for having additional engagement or in providing capacity to Indigenous nations to support additional engagement on heritage resources.</p> <p>OCFN also recommended that this condition (and all conditions) be amended to include a requirement for NGTL to provide capacity for engagement on the condition.</p>	<p>The Commission notes OCFN's concerns regarding Project-related violations to its Inherent and Treaty Rights and OCFN's assertion that this condition does not hold NGTL accountable for additional engagement. This is discussed in the views of the Commission under Section 2.5 - Effects on the Rights of OCFN.</p> <p>See Commission response below to OCFN's proposed new condition C regarding OCFN's recommendation for capacity for engagement on conditions.</p>
	NGTL <a href="#">C12079-1</a>	NGTL has suggested minor wording changes that align with differences in construction schedules for each Project component and receipt of Heritage Resources Clearances.	The Commission has modified the condition to account for differences in construction schedules for each Project component and receipt of Heritage Resources Clearances with added clarification from NGTL's proposed wording.
<b>Construction Schedule</b>	OCFN <a href="#">C11959-1</a>	<p>OCFN is of the view that this Condition does not accommodate Project-related violations to OCFN's Inherent and Treaty Rights.</p> <p>OCFN also recommended that this condition (and all conditions) be amended to include a requirement for NGTL to provide capacity for engagement on the condition.</p>	<p>The Commission notes OCFN's comment that this condition does not accommodate Project-related violations to its Inherent and Treaty Rights. This is discussed in the views of the Commission under Section 2.5 - Effects on the Rights of OCFN.</p> <p>See Commission response below to OCFN's proposed new condition C regarding OCFN's recommendation for capacity for engagement on conditions.</p>
	NGTL <a href="#">C12079-1</a>	NGTL has suggested minor wording changes.	The Commission has revised the condition to reflect the proposed changes.

<b>Commitments Tracking Table</b>	OCFN <a href="#">C11959-1</a>	OCFN states that this condition does not accommodate Project-related violations to OCFN's Inherent and Treaty Rights. OCFN states that this condition does not hold NGTL accountable for considering or including Indigenous nations' input on this table and following through with these commitments. OCFN further states concerns with capacity to regarding this condition.	The Commission notes OCFN's concerns regarding Project-related violations to its Inherent and Treaty Rights. This is also discussed in the views of the Commission under Section 2.4 - Effects on the Rights of the Indigenous Peoples of Canada.  See Commission response below to OCFN's proposed new condition C regarding OCFN's recommendation for capacity for engagement on conditions.
	NGTL <a href="#">C12079-1</a>	NGTL suggested revising the source of the record and to place reliance on the Commission proceeding on the application; revising the reporting period from three to six months; revising the duration that the commitment tracking table would be held at the Project site; revising requirement for copies due to administrative efficiency.	The Commission has revised the condition to reflect the proposed changes with some clarification.
<b>Indigenous Peoples Employment, Contracting, and Procurement Report</b>	OCFN <a href="#">C11959-1</a>	See OCFN comments above on Condition "Indigenous Peoples Employment, Procurement and Contracting Plan"	
	NGTL <a href="#">C12079-1</a>	NGTL suggested Project component filings be from the last Project component being placed into service; addition of self-identification language; and providing a copy of the report to all Indigenous peoples within the vicinity of the Project upon request who have expressed an interest in receiving a copy.	The Commission has revised the condition to reflect the proposed changes, where appropriate.  The Commission has reviewed NGTL's comments regarding the addition of "self-identified" and has revised the condition accordingly.  The Commission did not agree with NGTL's rational for the suggested deletion of iii) and accordingly has left that condition in place.
<b>Post-Construction Environmental Monitoring Reports</b>	OCFN <a href="#">C11959-1</a>	OCFN states that post-construction monitoring and reporting will not correct the violations resulting from construction of the Project. OCFN states that NGTL is not held accountable to meaningfully engage with Indigenous nations or to take the necessary time to reach monitoring agreements or provide a rationale for why a nation was not engaged in monitoring activities.  OCFN requests clarity as to why the CER has not identified monitoring impacts to Inherent and Treaty Rights on par with monitoring biophysical components.  OCFN recommends that NGTL is required to collaborate with OCFN to design a monitoring plan which demonstrates metrics to monitor that would assist in the evaluation of the effectiveness of mitigation measures on the violations identified by OCFN.  OCFN also recommended that this condition (and all conditions) be amended to include a requirement for NGTL to provide capacity for engagement on the condition.	The Commission notes OCFN's concerns regarding Project-related violations to its Inherent and Treaty Rights. This is discussed in the views of the Commission under Section 2.5 - Effects on the Rights of OCFN.  The Commission also notes NGTL's commitment to ongoing engagement throughout the life of the Project and that it is open to further discussing the Post-Construction Monitoring plan with OCFN and incorporating feedback where appropriate and relevant. Further, the EPP is required to include a detailed summary of NGTL's consultation undertaken with the appropriate provincial and federal authorities, and affected Indigenous communities.  See Commission response below to OCFN's proposed new condition C regarding OCFN's recommendation for capacity for engagement on conditions.
	NGTL <a href="#">C12079-1</a>	NGTL notes its commitment to ongoing engagement throughout the life of the Project and is open to further discussing the Post-Construction Monitoring plan	The Commission has amended the condition to account for the differences in construction completion of Project components.

		with OCFN and incorporating feedback where appropriate and relevant. As such, NGTL's view is that proposed Post-Construction Environmental Monitoring Reports Condition does not require amendment.  NGTL has suggested minor wording changes that align with differences in construction completion for Project components.	The Commission has clarified the condition to ensure the Post-Construction Monitoring Reports include all Project components.
<b>Condition Compliance by the Accountable Officer</b>	OCFN <a href="#">C11959-1</a>	See OCFN Comments above on the Condition "Condition Compliance"	The Commission notes OCFN's concerns Project-related violations to its Inherent and Treaty Rights. This is discussed in the views of the Commission under Section 2.5 - Effects on the Rights of OCFN.  The Commission will hold NGTL accountable for meeting its regulatory requirements.
	NGTL <a href="#">C12079-1</a>	n/a	n/a
<b>Sunset Clause</b>	OCFN <a href="#">C11959-1</a>	n/a	n/a
	NGTL <a href="#">C12079-1</a>	n/a	n/a
<b>OCFN - ADDITIONAL PROPOSED CONDITIONS</b> [OCFN <a href="#">C11959-1</a> ]			
<b>A. Requirement for NGTL to ensure O'Chiese First Nation is able to conduct a field visit of the Raven River Section and confirm site locations prior to construction.</b>	NGTL <a href="#">C12079-1</a>	NGTL disagrees with the addition of this condition.  NGTL notes that the circumstances preventing OCFN from completing a field visit are beyond NGTL's control. A condition contingent on completion of OCFN's field visit essentially gives OCFN the ability to indefinitely delay Project construction. NGTL facilitated OCFN's participation in fieldwork for the Historical Resource Impact Assessment on the Project and has undertaken to provide OCFN an opportunity to conduct a site visit prior to the start of construction as funded and agreed upon through agreements between OCFN and NGTL.	The Commission notes NGTL's offer to OCFN to further support OCFN's completion of fieldwork, including offering NGTL's consultant assistance to facilitate the fieldwork, the dissemination of information and subsequent implementation of COVID-19 health and safety protocols.  The Commission further notes Condition 4 (Heritage Resources Site Construction Monitoring Plan for OCFN). This is discussed in the views of the Commission under the Section 2.5 - Effects on the Rights of OCFN.
<b>B. Requirement for NGTL to re-route the Project if [REDACTED] are identified to be located on the PDA, or immediately adjacent to the PDA within 1 km.</b>	NGTL <a href="#">C12079-1</a>	NGTL disagrees with the addition of this condition.  Based on the information received to date from OCFN, it is NGTL's understanding that the two identified culturally sensitive sites are already currently avoided by the PDA. NGTL views a one kilometer offset as unreasonable and notes such an offset if applied would cover existing infrastructure and other disturbance. NGTL's previously filed information outlines NGTL's past and planned future efforts and commitment to work collaboratively with OCFN to address Project-related issues or concerns regarding these and other sites, if any are identified, prior to construction. Upon receipt of any additional information from OCFN, NGTL will also seek to work collaboratively	The Commission notes OCFN's concerns regarding undiscovered sites prior to and during construction. This is discussed in the views of the Commission under the Section 2.5 - Effects on the Rights of OCFN.  The Commission notes NGTL's commitment to collaboratively working with OCFN prior to and during the construction phases for the Raven River Section, and note that Condition 4 (Heritage Resources Site Construction Monitoring Plan for OCFN), along with NGTL's EPP's Cultural Discovery Contingency Plan.

		<p>with OCFN to address new Project-related issues or concerns prior to the start of construction. In the unlikely event that unanticipated cultural resources are discovered during construction, NGTL has also committed to implementing the Cultural Resource Discovery Contingency Plan within the EPP for the Project.</p>	
<p><b>C. Requirement for NGTL to provide capacity to O’Chiese First Nation to engage with NGTL post Project approval.</b></p> <p>* Note O’Chiese First Nation believes the determination of the amount of capacity to be provided requires further guidance from the CER (in collaboration with Indigenous nations) and should not be left to the proponent to determine what “reasonable” capacity means.</p>	<p>NGTL <a href="#">C12079-1</a></p>	<p>NGTL disagrees with the addition of this condition.</p> <p>OCFN recommended a condition requiring NGTL to provide capacity (the amount to be determined by the CER) to OCFN to engage with NGTL post Project approval. In addition, OCFN requested that a number of the proposed conditions be amended to include a requirement for NGTL to provide capacity to support OCFN’s efforts to meet and engage with NGTL to review and provide comment on the condition filings. NGTL and OCFN have negotiated an engagement capacity funding agreement to facilitate the review of Project information and engagement with NGTL on the Project, which, NGTL notes, is inclusive of the time and effort to review condition filings. NGTL also notes the CER’s recent confirmation that capacity funding arrangements supported by a company are outside of the CER’s mandate here.</p>	<p>The Commission notes OCFN’s statement that it requires capacity to support the Consultation Office’s time and resources as well as any needs for community engagement support and/or monitoring, as well as any necessary technical consultant or legal support. This is discussed in the views of the Commission under the Section 2.5 - Effects on the Rights of OCFN.</p> <p>The Commission notes NGTL comments that it has an existing agreement with OCFN which provides for post-Project approval engagement and activities.</p>