



September 23, 2022

**VIA RESS**

Ontario Energy Board  
P.O. Box 2319,  
2300 Yonge Street, 27<sup>th</sup> Floor  
Toronto, ON M4P 1E4  
Attention: Registrar

Dear Ms. Marconi,

**Re: Enbridge Gas Inc. ("EGI")  
Dawn to Corunna Replacement Project  
Board File Number: EB-2022-0086**

We are counsel to Three Fires Group Inc. ("**Three Fires**") in the above-noted proceeding. Please find enclosed the written submissions of Three Fires, pursuant to Procedural Order No.5.

Sincerely,

A handwritten signature in black ink, appearing to read "Daniel Vollmer".

DT Vollmer

- c. Tania Persad, EGI
- Adam Stiers, Manager, Regulatory Applications, EGI
- Charles Keizer, Torys LLP
- Philip Lee, Three Fires
- Chief Mary Duckworth, Caldwell First Nation
- Larry Sault, Caldwell First Nation
- Don Richardson, Three Fires

Encl.

**ONTARIO ENERGY BOARD**

**IN THE MATTER OF** the *Ontario Energy Board Act, 1998*, S.O. 1998, c. 15, Sched. B, as amended (the “**Act**”);

**AND IN THE MATTER OF** an Application by Enbridge Gas Inc. (“**EGI**”) for an Order or Orders granting leave to construct natural gas pipelines and ancillary facilities from the Township of Dawn-Euphemia to St. Clair Township;

**AND IN THE MATTER OF** an Application by EGI for an Order or Orders approving the proposed forms of agreements for Pipeline Easement and Options for Temporary Land Use.

**EB-2022-0086**

**SUBMISSIONS**

**OF**

**THREE FIRES GROUP INC.**

**September 23, 2022**

## I. INTRODUCTION

1. We are counsel to Three Fires Group Inc. (“**Three Fires**”) in the matter of Enbridge Gas Inc.’s (**Enbridge’s** or **EGI’s**) application to the Ontario Energy Board (the “**Board**” or the “**OEB**”), for leave to construct natural gas pipelines and ancillary facilities from the Township of Dawn-Euphemia to St. Clair Township (the “**Project**”) and approval of the proposed forms of agreements for Pipeline Easement and Options for Temporary Land Use (collectively, the “**Application**”).
2. Three Fires is an Indigenous business corporation that jointly represents the interest of Chippewas of Kettle and Stony Point First Nation (“**CKSPFN**”) and Caldwell First Nation (“**Caldwell**” and, together, the “**Three Fires First Nations**”) and has full intervenor status in this proceeding. The Three Fires First Nations each have traditional territory, and associated Aboriginal rights and interests protected by the *Constitution Act, 1982*, that may be impacted by the outcomes of this proceeding.

## II. OVERVIEW

3. Three Fires’ submissions are generally that:
  - i. the Board should note that EGI failed to adequately consult and engage with impacted First Nations and Indigenous customers before rejecting alternatives to the Project and the corresponding pipeline route is inconsistent with EGI’s own internal Indigenous engagement policies and the express expectations of the Three Fires First Nations to be meaningfully consulted at an early stage in the project development process;
  - ii. the Board should ensure that meaningful engagement and consultation with Indigenous Peoples is undertaken early as there is value to all ratepayers when considering alternatives, drafting Project permit applications, considering cumulative effects assessment scope and methodology, and considering societal impacts;
  - iii. the Board should further note on the basis of EGI’s inadequate consultations that impacted First Nations and Indigenous Peoples must be provided with adequate time and resources to understand and comment on known, anticipated, and/or

potential environmental, archaeological, and species at risk impacts throughout the Project area;

- iv. further consideration should be given to the possibility of electrified compressors, since the current Project will likely result in higher fugitive methane emissions, increasing costs for ratepayers as a result of the pass through of charges under federal and provincial greenhouse gas (“**GHG**”) reduction policies, regulations, and carbon pricing schemes;
- v. the Three Fires First Nations should be provided the time and financial supports necessary to consider and respond to EGI’s proposed activities and mitigation measures related to water crossings during the construction phase of the Project, which at present do not adequately protect aquatic species and resources subject to the Three Fires First Nations’ Aboriginal and treaty rights. The lack of consultation in this regard is inconsistent with CKSPFN’s asserted and documented unceded Aboriginal rights to the waterways throughout its Treaty lands and traditional territory;
- vi. EGI should be required to consult and reconsider its use of the pre-determined 100-metre boundary limit and cumulative effects assessment study area, which it has failed to increase for the purposes of consultation with potentially impacted First Nations and Indigenous communities to date;
- vii. Three Fires requests that the Board provide further clarity as to what types of social impacts must be considered as part of the Social Impact Assessment pursuant to the Guidelines; and
- viii. the Board should reject, either in this proceeding or in any subsequent rebasing proceeding, the 100 percent allocation of project costs to the utility business where it is clear the non-utility business is likely to derive substantial benefit.

### III. SUBMISSIONS

**A. EGI Consultation and Engagement on Project Alternatives and Pipeline Route with First Nations and Indigenous customers**

4. EGI failed to engage with its Indigenous partners and customers until very late in its process. This late engagement meant that EGI had rejected and effectively precluded otherwise viable options well before potentially impacted First Nations and Indigenous customers had the opportunity to contribute to the decisions at issue.
5. EGI's failure to engage with the First Nations potentially affected by the Project at a time when it could meaningfully contribute to the full range of alternatives is inconsistent with EGI's own internal Indigenous engagement policies and the express expectations of the Three Fires First Nations to be meaningfully consulted at an early stage in the project development process.

*EGI Failed to Engage with Indigenous Partners until Very Late in Its Process*

6. EGI's failure to engage early in its process with potentially impacted First Nations and Indigenous communities is detailed in its own Indigenous Consultation Report (the "ICR").
7. EGI first engaged CKSPFN on January 20, 2021 and provided Project details and a map of the study area and advised that the Project notification had been sent to the Minister of Energy, to request a determination of the Duty to Consult with respect to the Project. EGI did not receive confirmation from CKSPFN that it had received this information.
8. On April 13, 2021, EGI proceeded to inform CKSPFN of its plans to proceed with the Project, without any engagement on the need for the Project, the potential impacts on rights and resources, or attempts to meaningfully obtain the consent of CKSPFN prior to selecting the design of the Project and corresponding pipeline route. Again, EGI did not receive confirmation that CKSPFN had received this information.
9. Caldwell's participation and involvement in EGI's consultation activities only occurred after EGI submitted the Application. EGI admitted that it did not initially consult with Caldwell until much later in the process, and only after Caldwell expressed their concerns

about the Project's activities in its traditional territory and potential impacts on Aboriginal rights.

10. Caldwell indicated to EGI its intention to participate in ongoing field studies being undertaken within their traditional territory.<sup>1</sup> Caldwell was also not provided the opportunity to be meaningfully engaged and consulted on the design of the Project and any corresponding pipeline route.
11. The ICR demonstrates that engagement did not commence until long after EGI had already considered and studied alternatives to the Project. The ICR also documents that EGI's initial contact with most of the potentially impacted communities did not occur until January 20, 2021 when it sent an email informing the communities of the pre-determined Project and a map of the study area. This demonstrates many of the challenges regarding EGI's engagement and consultation with First Nations in relation to the Project. Further, the ICR shows that many of EGI's attempts at consulting with affected First Nations were one-sided and merely provided basic information without the opportunity for meaningful consultation and input.
12. EGI has admitted that it did not discuss project alternatives with Indigenous communities (including the Three Fires First Nations) prior to its selection of the preferred option for the Project.<sup>2</sup> EGI has also conceded that the assessment of alternatives was completed prior to the commencement of Project-specific Indigenous engagement.

*EGI's Late Engagement Is Inconsistent with Its Constitutional Obligations and Internal Policies*

13. EGI's failure to consult during the Project planning stage and prior to its selection of the preferred option for the Project is at odds with the constitutional duty to consult and accommodate, as well as with its own internal policies.
14. The requirement to obtain the free, prior and informed consent ("**FPIC**") of Indigenous Peoples is increasingly entrenched in the law and policy applicable to the Project. The FPIC principle is articulated in the United Nations Declaration on the Rights of Indigenous

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<sup>1</sup> Technical Conference Day 2 transcript, p. 136.

<sup>2</sup> Interrogatory Response, Exhibit I.CKSPFN.4 c).

Peoples (“**UNDRIP**”), as incorporated into Canadian law through the *United Nations Declaration on the Rights of Indigenous Peoples Act*.<sup>3</sup>

15. UNDRIP stipulates that Indigenous peoples must be consulted in good faith prior to the adoption of the measures in question in order to obtain their FPIC. It specifically requires that such consultations take place (i) before measures are adopted that affect them or (ii) when undertaking a project that affect their rights to land, territory, and resources.
16. There is an increasing acceptance that consultations must take place at the earliest stages of project development for FPIC to be secured. This early engagement allows Indigenous communities the opportunity to express their concerns in a fully informed and meaningful way and to provide their unique knowledge regarding their traditional territories and treaty lands at the stage when the full set of options is under consideration.
17. Enbridge’s guiding internal policies adopt UNDRIP’s principles regarding early consultation. Its “Indigenous Peoples Policy”<sup>4</sup> (“**IPP**”) “recognize[s] importance of [UNDRIP] within the context of existing Canadian and U.S. law” and sets out a mandate for early engagement by requiring that consultation processes “seek to achieve early and meaningful engagement so their input can help define our projects that may occur on lands traditionally used by Indigenous Peoples.”
18. The IPP aligns with how Enbridge understands its obligations arising from other developing legal and policy contexts. EGI has stated that as part of meeting the Truth and Reconciliation Commission of Canada’s Call to Action #92 (“**TRCC #92**”), it “endeavors to engage as early as possible in the Project planning stage, taking into account the scale and scope of the Project” in order to obtain the “input and guidance” of Indigenous Peoples “as to how any potential impacts the Project may have on Aboriginal rights and interests can be avoided or mitigated”.<sup>5</sup>

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<sup>3</sup> *An Act respecting the United Nations Declaration on the Rights of Indigenous Peoples*, S.C. 2021, c. 14, section 4(a) and Schedule, available online at: <https://www.laws-lois.justice.gc.ca/eng/acts/u-2.2/page-1.html>.

<sup>4</sup> EB-2022-0086, Exhibit H, Tab 1, Schedule 1, Attachment 4, p.2

<sup>5</sup> Undertaking Response, Exhibit JT2.11, p. 2.

19. EGI has similarly confirmed that it aims to secure the FPIC of potentially impacted Indigenous groups, to the greatest degree possible,<sup>6</sup> and that it strives to achieve the FPIC of Indigenous communities at all stages of its activities<sup>7</sup>:

**MS. FERGUSON:** I am referencing back to the IRs, because the response to CKSPFN 4C was that Enbridge did not discuss alternatives with Indigenous communities, as the assessment of alternatives was completed prior to the commencement of project-specific engagement.

But for Kettle and Stony Point First Nation the idea that there could be an alternative that was a no-pipeline alternative was never presented, even once – February of this year that the consultation department had some staffing changes. But that is – that definitely would have been of interest.

So I would like to ask whether Enbridge interprets that the principle of free, prior, and informed consent should apply to all stages of its activities, not just at the point of project-specific engagement.

**MS. PENNINGTON:** Well, I think it – let's try this again and let's see if I can get my exhibit numbers right. If not, I will speak to it again more broadly.

But I think it might be actually helpful to bring forward the language around free, prior, informed consent. But I will just actually speak to something more broadly.

So I think principally Enbridge attempts to strive to achieve free, prior, and informed consent. That's the work that we do with communities, is in the spirit of achieving free, prior, and informed consent.

In regards to the question, is if it is applicable to, I believe you said all activities; is that right?

**MS. FERGUSON:** All stages of its activities. So when you are considering alternatives to a project or at the very beginning – I'm going to this because Kettle and Stony Point for the past at least six months has made it very clear, a willingness to be involved at the early stage of projects and prior to projects being filed with the OEB so that they can have the full participation of being involved in the project planning stages. (emphasis added)

20. In short, there is a clear requirement for consultations at the earliest stages of project development that arises from Enbridge's internal policies and stated objectives, as well as from the applicable law and policy concerning FPIC and engagement with Indigenous partners.

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<sup>6</sup> Undertaking Response, Exhibit JT2.11

<sup>7</sup> Technical Conference Day 2 transcript, pp 94-95.



*Enbridge's Failure to Engage at an Early Stage Deprived Its Partners of the Ability to Fully Participate with Negative Consequences for the Project*

21. Enbridge's failure to uphold the central principles of FPIC or its own internal policies through early consultations has both deprived affected Indigenous partners of the ability to participate and precluded adequate consideration of the full range of options.
22. Enbridge's decision to delay its engagement with affected Indigenous partners meant that certain alternatives were never presented to the Three Fires First Nations. The effect of this delay was to effectively exclude them from the earliest stages of the project development, depriving Enbridge of a more holistic understanding of the potential impacts, both near- and long-term, of its activities on (i) Indigenous Peoples, (ii) their rights, and (iii) their lands and how best to accommodate and mitigate these impacts. EGI did not benefit from the full range of views and informed input of potentially impacted First Nations and Indigenous customers such as the Three Fires First Nations when it developed and considered project alternatives and the corresponding pipeline route.
23. Three Fires submits that all ratepayers would benefit from Indigenous communities being engaged by EGI to collaboratively develop, review, and consider project alternatives. Among other things, this would provide opportunities for interested ratepayer groups to consider cost and benefits of alternatives and engage in formative discussions with EGI to help enable EGI to make decisions on alternatives with input from all interested ratepayers, before EGI makes unilateral decisions.
24. Three Fires submits that EGI's failures to undertake meaningful consultations at the earliest stages of project development may have significant cost consequences for ratepayers. EGI and ratepayers, are likely to face increasing costs related to the Project and construction timelines as a result of delays related to Aboriginal and constitutional rights of Indigenous Peoples when seeking to obtain the necessary permits and approvals throughout the traditional territory and Treaty lands of impacted First Nations and Indigenous customers.
25. Accordingly, to avoid any protracted delays and unnecessarily increased costs for ratepayers, Three Fires respectfully requests that the Board note EGI's failure to meaningfully engage early on in the process with potentially impacted Indigenous

Peoples and attempt to rectify this failure by holding EGI to its commitments to seek to obtain the FPIC of all impacted Indigenous Peoples and make this a condition of approval for the project.

## **B. Environmental assessment and environmental impacts charges**

### More Time Needed for Adequate Review

26. The Three Fires First Nations require additional time and resources to understand and comment on known, anticipated, and/or potential environmental, archaeological, and species at risk impacts throughout the Project area. This need for additional time and resources arises mainly from:
  - i. Enbridge's failure to engage Three Fires at an earlier date;
  - ii. a likely need for capacity support to enable Indigenous groups to engage in timely technical reviews of documents, participate in field work associated with proposed projects, and engage in meaningful consultation;
  - iii. the volume of material that Three Fires will need to consider.
27. Participation in environmental and archaeological assessments and monitoring work is an important aspect of ensuring that Indigenous communities are adequately consulted and able to provide their specific knowledge and understanding of areas of potential archaeological significance or where other significant environmental concerns may arise.

### Three Fires Expects that It Will Need to Review a Large Volume of Material

28. Three Fires expects that its full engagement in this Project will entail the review of large volumes of material. As set out in further detail immediately below, it expects that its review will include consideration of:
  - i. EGI's Natural Heritage Report, its natural heritage survey, and its environmental assessment generally;
  - ii. any applications under the *Species at Risk Act*,

- iii. any applications under the *Fisheries Act*,
  - iv. all archaeological assessments.
29. Three Fires expects that it will review EGI's Natural Heritage Report, which EGI is currently preparing as part of the environmental assessment for the Project. The Natural Heritage Report will detail the findings of the natural heritage survey conducted by EGI.
30. Three Fires continues to have concerns that the Natural Heritage Report and the Environmental Report do not adequately consider environmental impacts on moth species in the Project area. EGI indicated that it did not reference the Moth Atlas in the Environmental Report asserting that endangered, threatened and/or special concern moth species in Ontario are not expected to occur in the Project Area. EGI agreed to consult the Moth Atlas for potential presence of rare species (S1, S2 or S3) and confirmed that it will include any needed and relevant mitigation measures in the forthcoming Natural Heritage Report.<sup>8</sup>
31. The Three Fires First Nations must be provided with sufficient and timely information regarding applications for authorizations under the *Fisheries Act* and/or required permits under the *Species at Risk Act*. EGI has committed to providing CKSPFN with copies of any applications for authorizations under the *Fisheries Act* and applications for permits under the *Species At Risk Act*.<sup>9</sup> However, EGI did not commit to a date for sharing this information.
32. Three Fires understands that EGI has completed Stage 1 and Stage 2 archeological assessments and anticipates that Stage 3 and Stage 4 archeological assessments will be required. It is important that impacted First Nations and Indigenous Peoples, including the Three Fires First Nations, can meaningfully participate in archaeological assessments and any corresponding field work as it is their cultural history that is often uncovered during such studies.

### *Specific Requests for Relief in Relation to Three Fires' Review*

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<sup>8</sup> Undertaking Response, JT2.13

<sup>9</sup> CKSPFN's comments received July 5, 2022 re: Environmental Report on the Project submitted directly to EGI (included as Appendix A), p. 1.

33. EGI has acknowledged that capacity support may be required to enable Indigenous groups to engage in timely technical reviews of documents, participate in field work associated with proposed projects, and to engage in meaningful consultation.<sup>10</sup>
34. Facilitating a proper review by Three Fires also carries benefits for ratepayers more generally. That is because delays in reviewing documents and participating in field work by impacted First Nations and Indigenous Peoples is likely to have negative cost consequences for ratepayers as it will cause delays for the Project and construction timelines.
35. Accordingly, Three Fires requests that the Board:
  - i. ensure that the Natural Heritage Report is provided to Three Fires in a timely manner and that the Three Fires First Nations are each provided adequate time and reasonable financial resources to fully review and provide comments on the Natural Heritage Report;
  - ii. include as a condition of approval for the Project that EGI will share the applications for *Fisheries Act* authorizations and *Species at Risk Act* permits with Three Fires upon filing the applications with the Department of Fisheries and Oceans (“**DFO**”) and Ministry of the Environment, Conservation and Parks (“**MECP**”), as applicable, in order to allow for timely review by the Three Fires First Nations, and that the reasonable costs for review of those authorizations and permits be provided by EGI to the Three Fires First Nations; and
  - iii. ensure that the Stage 2 Archaeological Assessment Report and any subsequent Stage 3 or Stage 4 reports are provided to Three Fires in a timely manner and that the Three Fires Nations are each provided adequate time and reasonable financial resources to fully review and provide comments on the Archaeological Assessments, to the extent necessary to protect the rights, title and interests of the Three Fires First Nations.

### **C. Increased GHG Emissions and Impacts on Ratepayers**

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<sup>10</sup> Interrogatory Response, Exhibit I.CKSPFN.8 j).

36. Enbridge's proposed Project will likely lead to an increased flow of gas into the unregulated market, which raises the important question of whether ratepayers will be responsible for any additional costs that result.
37. Enbridge appears not to have properly considered the increased costs to ratepayers that will likely result from the Project, particularly should applicable laws and regulations continue to increase the price on pollution in the future. A proper consideration of these factors may have led to a possible alternative option of installing electric compressors.

*Failure to Account for Increased Emissions and Increased Costs for Ratepayers*

38. Enbridge's proposed addition of another pipeline in the Project's right-of-way will result in an increase in fugitive methane emissions emitted throughout the treaty lands and traditional territory of the Three Fires First Nations.
39. This increase to fugitive methane emissions will result, in turn, in increased costs for all ratepayers as a result of the pass through of charges under federal and provincial GHG pricing schemes. These costs will continue to increase in the future as emitters, such as EGI, will be required to pay more for their methane emissions as policies and regulations evolve to be in line with the latest climate science and as Canada works to significantly reduce methane emissions in the oil and gas sector in support of the Global Methane Pledge and as part of the proposed cap on emissions in the oil and gas sector.
40. Ratepayers continue to be burdened with the increased costs associated with policies addressing the impacts of climate change, the regulation of GHGs, including methane, and the federal government's carbon pricing regime under the *Greenhouse Gas Pollution Pricing Act*.
41. The Global Methane Pledge aims to reduce methane emissions by 30 percent below 2020 levels by 2030. Canada has committed to developing a plan to reduce methane emissions from the oil and gas sector by at least 75 percent below 2012 levels by 2030. EGI has indicated that the proposed project would result in a decrease in emissions of approximately 600 tCO<sub>2</sub>e/year over current emissions levels (methane accounting for

approximately 595 tCO<sub>2</sub>e/year).<sup>11</sup> Methane emissions have a global warming potential more than 80 times that of CO<sub>2</sub>, yet emitters are only required to pay for methane emissions at a rate of 25 times that of CO<sub>2</sub>. EGI confirmed that it will continue to comply with the Federal Methane Regulation which supports Canada's methane reduction targets. Environment and Climate Change Canada has released a discussion paper and is currently consulting on approaches to cap oil and gas emissions to hold the sector accountable for its emissions and noted that such a cap will be in line with Canada's climate ambitions and commitments outlined in the 2030 Emissions Reduction Plan.<sup>12</sup>

42. Three Fires submits that an NPS 36 pipeline is larger than what is required to replace the capacity lost due to the retirement of the seven compressors at the Corunna Compressor Station and it remains unclear to Three Fires whether EGI anticipates that the Project will result in increased gas transportation and distribution compared to the status quo.
43. The likelihood of these increased costs demonstrates the importance of proper consideration of lower-emitting alternatives. In particular, Enbridge has failed to explain why the alternative of installing electric compressors is not appropriate for the current circumstances.

*Electric Compressors Should be Considered to Reduce Emissions and Costs*

44. Installing electric compressors carries significant advantages from the perspective of reducing future emissions and related costs. Electric compressors would allow EGI to replace the full amount of capacity lost due to retiring the seven gas compressors while also reducing the GHG intensity of the compressor station. In addition, installing electric compressors would eliminate the need for a new pipeline that may cause an increase in the release fugitive emissions along the entirety of the proposed pipeline route.
45. In addition to the cost advantages, electrifying compressors is in the best interest of rate payers from the perspective of the environmental and health consequences of higher

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<sup>11</sup> Interrogatory Response, I.CKSPFN.3 c) and f)

<sup>12</sup> ECCC, "Options to cap and cut oil and gas sector greenhouse gas emissions to achieve 2030 goals and net-zero by 2050", available online at: <https://www.canada.ca/en/services/environment/weather/climatechange/climate-plan/oil-gas-emissions-cap/options-discussion-paper.html>.

emissions, which are likely to be disproportionately borne by many of the Indigenous ratepayers represented by Three Fires, given the planned path of the pipeline.

46. Three Fires submits that all ratepayers would benefit from Indigenous communities being engaged by EGI to consider to the project alternative of installing electric compressors and believes that this alternative should be seriously considered. Among other things, this would provide opportunities for interested ratepayer groups to consider cost and benefits of the alternative of installing electric compressors, and for those ratepayers to engage in formative discussion with EGI before EGI makes a decision.

#### **D. The Project's impacts on waterways, water crossings, and CKSPFN's water assertion**

##### *EGI's Proposals Do Not Provide Adequate Protections*

47. Enbridge's proposed activities and mitigation measures related to water crossings during the construction phase of the Project do not adequately protect aquatic species and resources subject to the Three Fires First Nations' Aboriginal and treaty rights.
48. CKSPFN has asserted unceded Aboriginal rights to the waterways throughout its Treaty lands and traditional territory. CKSPFN provided the Board and EGI with its Declaration to the Waterways and Lakebeds with its Traditional Territory (the "**Water Assertion**"), which affirms CKSPFN's unceded Aboriginal and Treaty rights and ownership to all waterways within its traditional territory for the management, use, and enjoyment of CKSPFN and its peoples.<sup>13</sup> Members of Caldwell rely on exercising their fishing and resource harvesting rights throughout their traditional territory in accordance with their Aboriginal rights and historical use of waterways.
49. EGI will be required to obtain approvals and permits by the DFO for its water cross activities in support of the Project. It is Three Fires understanding that EGI has not made any applications or submissions for review of any of the water course crossings impacted by the proposed project as will be required by the DFO:<sup>14</sup>

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<sup>13</sup> Interrogatory, Appendix A: CKSPFN Declaration to the Water.

<sup>14</sup> Technical Conference Day 2 Transcript, p. 107; see also Appendix A, at section Table 1.1: Summary of Potential Environmental Permit and Approval Requirements, p.1.

**MS. FERGUSON:** But I would like to move on to, again, just the DFO, and is it correct to expect that affected parties, such as Kettle and Stony Point First Nation, will be contacted by DFO regarding these permits? Or is this a piece of the delegation of procedural aspects to the duty to consult that Enbridge -- we would be expecting to be contacted by Enbridge regarding those Crown permits?

**MR. PARK:** Ryan Park, Enbridge. I wouldn't be able to comment on Fisheries and Oceans procedures regarding their contacting Indigenous communities under permits.

**MS. FERGUSON:** And otherwise for Enbridge, if a permit was required, would it be practice of Enbridge to reach out to the impacted First Nation and notify them of the permit?

**MR. PARK:** Ryan Park, Enbridge. It's my past practices and it is my understanding moving forward that if there is a permit under the purview of Fisheries and Oceans Canada that requires consultation, it is in the interests of Enbridge and the impacted Indigenous communities that we reach out for consultation on that matter in advance of Fisheries and Oceans in order to assist with the, I guess timelines of the permitting review.

50. EGI's proposed methods for crossing waters will have direct impacts on fish and species at risk in the Project area. EGI indicated that it plans to use Horizontal Directional Drilling ("HDD") on only one water crossing. HDD – when completed successfully – has the least impact on water crossings due to drilling under the water body and not restricting movement of fish and other species. For all other water crossings on the project, EGI plans to use dam and pump, which means the flow of the water will be halted and artificially pumped downstream. Three Fires requests as a condition of approval that no HDD or dam and pump activities occur without a monitor from CKSPFN and Caldwell being present.
  
51. EGI's use of electrofishing is very concerning to each of the Three Fires First Nations due to the potential for habitat destruction, burns, and spinal deformations of fish. EGI has provided its proposed standard fish rescue plans for the Project and indicated technical specialist crews may use a backpack electrofisher as a backup method or to do a final sweep once the bulk of the fish have been relocated from applicable isolation areas.<sup>15</sup> The use of this method was only disclosed to CKSPFN on August 30, 2022, well after the deadline for interrogatories and the opportunity to ask questions at the technical conference on July 27 and August 9, 2022, respectively. To date, EGI has not provided

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<sup>15</sup> *Ibid.*, at section Table 5.1 (Aquatic Features Section 4.4.1), pp. 7-8.



crossing-specific environmental protection plans to the Three Fires First Nations to ensure the protection of their respective Aboriginal rights.

*EGI's Proposal Impacts Waterways Subject to CKSPFN's Water Assertion*

52. Potential impacts on waterways within CKSPFN's Treaty lands and subject to the Water Assertion are of incredibly high importance to the Three Fires First Nations. EGI has not sought CKSPFN's express FPIC for these intrusive activities in its unceded Aboriginal rights to waterways in its Treaty lands. CKSPFN maintains that it must be fully consulted with respect to any activities that may impact waterways including the proposed water crossings or with respect to any Project activities which may impact on the Aboriginal rights related to the waterways over which it asserts Aboriginal rights.
53. Meaningful consultation with Indigenous communities in advance of submitting DFO permit applications provides all ratepayers with benefits in terms of reducing the risk of increased project costs from delays in securing permits, and increased costs of mitigation measures from future mitigation re-assessment because original planning and decision-making advanced without the benefit of Indigenous community input.
54. Three Fires requests that the Board delay granting leave to construct until EGI has obtained all necessary permits, authorizations, approvals, and the FPIC of each of the Three Fires First Nations in relation to any and all activities in and around waterways in which CKSPFN and/or Caldwell exercise their constitutionally protected Aboriginal rights, including but not limited to any DFO permits related to waterways subject to the CKSPFN Water Assertion. Further, Three Fires respectfully further requests that, for each work site, the Board require EGI to provide each of the Three Fires First Nations with the following information:
  - i. exact location and size of site;
  - ii. plans to protect the environment and sensitive watershed; and
  - iii. the contamination characteristics, dewatering details, and water treatment and discharge plans for the site.

**E. Cumulative Effects Assessment and Study Area**

55. EGI failed to consult with potentially impacted First Nations and Indigenous communities prior to a determination of the 100-metre boundary limit for the cumulative effects assessment study area.<sup>16</sup> EGI indicated that the study area for the Project's cumulative effects assessment was delineated in accordance with Section 4.3.14 the Guidelines and that the 100-metre boundary was appropriate in accordance with the "limited residual Project effects" that EGI anticipated to be "interactive with other concurrent, unrelated projects."<sup>17</sup>
56. Three Fires submits that EGI's failure to consult on this issue is inconsistent with the principles of FPIC and the Three Fires First Nations constitutional right to be consulted and accommodated and has resulted in a study area that is arbitrary and inadequate to fully identify and study the potential environmental and cumulative impacts of the Project and is at odds with the protective regime established by the *Environmental Guidelines for the Location, Construction and Operation of Hydrocarbon Pipelines and facilities in Ontario, 7th Edition (2016)* (the "**Guidelines**").
57. Three Fires continues to have concerns with EGI's default position that a 100-metre boundary is adequate and acceptable in an assessment of cumulative effects resulting from the Project. The Project's impacts are likely to extend far beyond the pre-determined and arbitrary 100-metre boundary.
58. Further, it is unfair to place the burden on impacted communities, such as the Three Fires First Nations, to assert that the study area boundary is inadequate, especially while the Environmental Assessment is already underway and would require attempting to persuade the Board to extend the study area *ex post facto*.
59. The Environmental Report noted that the 100-metre boundary is an approximate figure and impacts and projects that are beyond that distance may be considered. EGI correctly noted that the Guidelines do not prescribe a set boundary area for the Environmental Assessment and instead indicated that, based on past experience and the professional judgement of Stantec, a 100-metre boundary was determined to be sufficient.

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<sup>16</sup> Technical Conference Day 2 Transcript, pp. 127-128.

<sup>17</sup> Interrogatory Response, Exhibit.I.CKSPFN.2 j) and k).

60. Three Fires raised the issue of whether the 100-metre limit would be capable of capturing all environmental and socio-economic impacts of the Project and EGI confirmed that it believed this to be the case:<sup>18</sup>

**MR. HAMM:** Okay. So is it your view that the 100-metre boundary is able to capture all environmental and socio-economic impacts that may affect Caldwell and Kettle and Stony Point First Nations, noting that Kettle and Stony Point made a clear request to expand the study boundary?

**MR. PARK:** Yes. With respect to the cumulative effects assessment, it is of the professional opinion of STANTEC and of Enbridge that the 100-metre boundary is sufficient to capture any residual impacts resulting from the pipeline construction and operation.

61. Three Fires disagrees with EGI that the pre-determined 100-metre boundary is sufficient to capture all environmental impacts that may impact the Three Fires First Nations. The Guidelines provide that “[i]t is critical not to restrict the study area to a proposed pipeline easement and temporary work areas” and that project proponents must consider the four distinctive cumulative effects pathways when delineating the study area and analyzing and assessing the cumulative effects.<sup>19</sup>
62. Three Fires is concerned with the potential impacts of the above-noted dam and pump water crossings and the corresponding harmful alteration and destruction of fish and fish habitat will extend far beyond the arbitrarily determined 100-metre boundary. EGI’s infrastructure extends across and throughout the Treaty Lands of the Three Fires First Nations.
63. Three Fires submits that the addition of yet another pipeline in the Project’s right-of-way has the potential to further contribute to the cumulative degradation of important habitats and shorelines. Threat to these important habitats and ecosystems may solicit heightened scrutiny from many stakeholders, including the Three Fires First Nations, delaying the approval of necessary authorizations and permits and increasing the costs to ratepayers as a result.
64. Three Fires submits that EGI has not met the cumulative effects assessment criteria set forth by the Guidelines. This error may have significant future cost impacts on all

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<sup>18</sup> Technical Conference Day 2 Transcript, p. 128.

<sup>19</sup> The Guidelines, pp. 43-44.

ratepayers when Project impacts materialize beyond the arbitrarily determined 100-metre boundary, including impacts on First Nation rights and interests.

65. Three Fires requests that the Board require EGI to engage with Three Fires to ensure that the study area boundary of any ongoing cumulative effects assessments is determined in consultation with the Three Fires First Nations and other impacted First Nations and Indigenous Communities.

## **F. The Guidelines and Social Impact Assessment**

### *The Guidelines Lack Clarity on Which Social Impacts Should Be Assessed*

66. Three Fires submits that the Guidelines are insufficiently clear as to what types of social impacts must be considered as part of the Social Impact Assessment. For example, Gender-based Analysis (**GBA+**) is a requirement of the federal environmental assessment processes; however, EGI did not conduct such an analysis for the Project due to its limited scope, anticipated small workforce, and short duration of construction for the Project.<sup>20</sup>
67. EGI remarked on the lack of clarity in the Guidelines noting that “both real and perceived health and safety risks” are identified as social impacts but suggested that the Guidelines “do not speak to items such as substance abuse, impacts on women in communities, and impacts on the sex trade.”<sup>21</sup> In addition, EGI noted that it is unaware of where such an assessment would fit into the Guidelines:
- MR. HAMM:** Okay, thank you. Did Enbridge consider the social impacts of the pipeline construction workforce on the surrounding communities? And this specifically relates to the potential substance abuse, disproportionate impacts on women in communities, and impacts on the sex trade.
- MR. PARK:** Ryan Park, Enbridge. I am not specifically aware of how that assessment were done or if it was done within the confines of the environmental report and where that fits within the OEB guidelines for that report.
68. The lack of clear guidance on what social impacts are contemplated under the Guidelines resulted in an inadequate and limited consideration of the significant negative outcomes

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<sup>20</sup> Undertaking Response JT.2.21

<sup>21</sup> Undertaking Response JT.2.21

on surrounding communities and individuals, not least of all the Three Fires First Nations and its members.

69. Three Fires submits that a human rights-based approach to a social impacts assessment must include an assessment of systemic social inequalities, including gender, gender diverse people, race, ethnicity, religion, age, mental or physical disability as well as an assessment of the safety risks on the surrounding communities and vulnerable individuals, including the Three Fires First Nations, such as potential substance abuse, disproportionate impacts on women in communities, and impacts on the sex trade as a result of the expected construction workforce.
70. Three Fires respectfully requests the Board to include as a condition of approval of the project that EGI consider, monitor, and report on social impacts, including incidences of substance use, gender-based analysis, and impacts on the sex trade in the project area and throughout the construction phase of the Project.

*Need for Generic Proceeding on Social Impacts*

71. The Board, project proponents, other intervenors, and all ratepayers may benefit from a separate process to consider broader societal impacts of the transmission and distribution of natural gas as well as the construction of natural gas infrastructure throughout Ontario. This is an issue that several other jurisdictions, including Canada's energy regulator and impact assessment regime, have been seized with and incorporated into their respective environmental and impact assessments. Failure to consider such broader societal impacts in parallel with what other jurisdictions are currently doing may put Ontario ratepayers at some risk of future legislative or legal decisions which might impose future costs on today's ratepayers associated with those impacts.
72. Three Fires recognizes that the present proceeding may not be adequate for a full consideration of these issues and how best to understand and mitigate the broader negative social impacts that may result from projects such as the Project.
73. Three Fires respectfully requests that the Board hold a generic proceeding to review the Guidelines and consider, for the benefit of all ratepayers, whether there is a need for

greater clarity and/or revisions to the Guidelines with respect to ensuring that all social impacts are adequately and holistically assessed as part of the social impact assessment contemplated in the section 4.3.13 of the Guidelines.

#### **G. Allocation of Project Costs**

74. Three Fires submits that a 100 percent allocation of project costs to the utility business where it is clear the non-utility business is likely to derive substantial benefit must be rejected, either in this proceeding or in a subsequent rebasing proceeding.
75. Three Fires is unconvinced that the proposed project merely replaces existing capacity at a 1:1 ratio and that this may have serious equity issues as it relates to benefits paid for by ratepayers accruing to EGI's unregulated business and storage activities. Three Fires understands that EGI's decision to replace the compressor units to be abandoned with approximately 20 km of NPS 36 natural gas pipeline will far exceed current capacity and provide significant long-term benefits to EGI and Enbridge Inc.
76. Three Fires submits that it may be inappropriate to allocate 100 percent of the Project's costs to ratepayers. EGI has suggested that the proportion of the Project cost to be allocated to the utility business should be 100 percent as the Project replaces the existing capacity of the assets to be retired and abandoned and these assets are currently allocated 100% to the utility business.<sup>22</sup> It is unclear whether this should in fact be supported by the Board, either in this proceeding or in EGI's subsequent 2024 rebasing application proceeding.<sup>23</sup>
77. Three Fires, as a ratepayer group representing many of EGI's Indigenous ratepayers, submits that it is inappropriate to fully burden all ratepayers with the cost of the proposed project where EGI's non-regulated business stands to significantly benefit without any corresponding financial contribution.

#### **IV. RELIEF REQUESTED**

78. Therefore, Three Fires respectfully requests that the Board:

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<sup>22</sup> EGI, Argument-in-Chief, p. 28.

<sup>23</sup> EB-2022-0086, EGI Argument-in-Chief, para 61.

- i. note EGI's failure to meaningfully engage early on in the process with potentially impacted Indigenous Peoples and attempt to rectify this failure by holding EGI to its commitments to seek to obtain the FPIC of all impacted Indigenous Peoples and make this a condition of approval for the project;
- ii. note the value to all ratepayers when engagement and consultation with Indigenous Peoples is undertaken early, especially at the alternatives assessment stage, and meaningfully with respect to consideration of alternatives, when drafting Project permit applications, when considering cumulative effects assessment scope and methodology, and when considering societal impacts;
- iii. ensure that the Natural Heritage Report is provided to Three Fires in a timely manner and that the Three Fires First Nations are each provided adequate time and reasonable financial resources to fully review and provide comments on the Natural Heritage Report;
- iv. include as a condition of approval that EGI will share the applications for *Fisheries Act* authorizations and *Species at Risk Act* permits with Three Fires upon filing the applications with the DFO and MECP, in order to allow for timely review by the Three Fires First Nations, and that the reasonable costs of review of those authorizations and permits be provided by EGI to the Three Fires First Nations;
- v. ensure that the Stage 2 Archaeological Assessment Report and any subsequent Stage 3 or Stage 4 reports are provided to Three Fires in a timely manner and that the Three Fires Nations are each provided adequate time and reasonable financial resources to fully review and provide comments on the Archaeological Assessments, to the extent necessary to protect the rights, title, and interests of the Three Fires First Nations;
- vi. include as a condition of approval that no HDD or dam and pump activities occur without a monitor from CKSPFN and Caldwell being present;
- vii. that for each work site, the Board require EGI to provide each of the Three Fires First Nations with the following information;
  - (a) exact location and size of site;

- (b) plans to protect the environment and sensitive watershed;
  - (c) the contamination characteristics, dewatering details, and water treatment and discharge plans for the site;
- viii. require EGI to engage with Three Fires to ensure that the study area boundary of any ongoing cumulative effects assessments is determined in consultation with the Three Fires First Nations and other impacted First Nations and Indigenous communities;
- ix. include as a condition of approval of the project that EGI consider, monitor, and report on social impacts, including incidences of substance use, gender-based analysis, and impacts on the sex trade in the project area and throughout the construction phase of the Project; and
- x. hold a generic proceeding to review the Guidelines and consider whether there is a need for greater clarity and/or revisions to the Guidelines with respect to ensuring that all social impacts are adequately and holistically assessed as part of the social impact assessment contemplated in the section 4.3.13 of the Guidelines.

## **V. COSTS**

- 79. Three Fires respectfully submits that it has participated responsibly in this proceeding with a view to maximizing its assistance to the Board, and therefore requests that the Board order reimbursement of its reasonably incurred costs.



ALL OF WHICH IS RESPECTFULLY  
SUBMITTED THIS  
23<sup>rd</sup> day of September, 2022

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Lisa (Elisabeth) DeMarco  
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Counsel for Three Fires

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Resilient LLP  
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