

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*, S.O. 1998, c.15, Schedule. B; and in particular section 90(1) and section 97 thereof;

AND IN THE MATTER OF an Application by Enbridge Gas Inc. for an order granting leave to construct natural gas pipelines in the Municipality of Brooke-Alvinston and the Township of Warwick, in the County of Lambton.

EB-2023-0175

SUBMISSIONS

OF

THREE FIRES GROUP INC.

November 30, 2023

I. INTRODUCTION

1. We are counsel to Three Fires Group Inc. (“**Three Fires**” or “**TFG**”) in the matter of the application of Enbridge Gas Inc. (the “**Applicant**” or “**EGI**”) to the Ontario Energy Board (the “**OEB**” or the “**Board**”) for approval for an order granting leave to construct natural gas pipelines in the Municipality of Brooke-Alvinston and the Township of Warwick, in the County of Lambton (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 will proceed in three main parts as follows:
 - (a) The submissions will note the significant shortcomings of EGI’s Application in the area of Indigenous consultations, which shortcomings are most visible in its Environmental Report. The submissions will note how consultations could be made more effective moving forward in relation to this project and for future projects.
 - (b) The submissions will then address specific deficiencies in EGI’s proposed approach to mitigating environmental impacts. These concerns cover a range of issues, including issues:
 - a. arising in part from EGI’s uncertain position on First Nations jurisdiction over the project area and consequent reluctance to provide effective monitoring and related reporting mechanisms;
 - b. where TFG seeks more diligent monitoring and reporting generally; and

- c. where EGI's approach remains uncertain so further clarity is requested.
- (c) The final section of the submissions will highlight that EGI's general refusal to provide evidence relating to the initial business considerations of Waste Management Corporation of Canada ("**WM**") significantly disadvantages the Board in terms of its ability to consider the question of whether this proposed project serves the public interest. TFG will respectfully submit that a broader understanding of what constitutes the public interest is necessary to an increasing number of leave to construct proceedings in circumstances where efforts to maintain an affordable and reliable energy sector to the benefit of all Ontarians requires consideration of how to introduce new actors and new energy sources in a coordinated and efficient manner.
4. TFG will include its various requests for relief throughout its submissions, then consolidate those requests in this document's concluding paragraphs. At the highest level, TFG will request that the Board:
 - (a) Note that EGI going forward must improve its Indigenous consultation practices by being more proactive (or at a minimum EGI must be less passive) in incorporating the histories and positions of First Nations into its initial application materials, including environmental reports;
 - (b) Require EGI to supplement many of its proposed mitigation and environmental protection activities relating to the construction and longer-term impact of the proposed project; and
 - (c) Note that in the future project proponents in general should consider evidence relating to the public interest in a broader sense than EGI has in this proceeding, including evidence relating to alternatives that the underlying energy producer had available to it.

III. SUBMISSIONS

A. EGI's Consultation Efforts Must Improve

5. The Ministry of Energy identified CKSPFN, among others, as an Indigenous community that should be consulted in relation to the current Application.¹
6. The OEB has recognized that the requirement for Indigenous consultations entails a number of important procedural elements,² including:
 - (a) Meeting with Indigenous communities to share the information necessary for communities to understand and assess the potential impact on Aboriginal or treaty rights;
 - (b) Responding to questions and concerns raised by Indigenous communities;
 - (c) Discussing options to accommodate communities in respect of adverse effects on Aboriginal or treaty rights.
7. EGI's public-facing Indigenous Reconciliation Action Plan ("**IRAP**") and its Indigenous Peoples Policy ("**IPP**") appear to endorse the basic position that First Nations are entitled to appropriate consultation and accommodation. Both documents include many significant commitments concerning consultation with Indigenous peoples as well as towards respecting and upholding the rights of Indigenous peoples. Commitments and significant statements of principle from the IRAP and the IPP include:
 - (a) EGI's recognition of the importance of the United Nations Declaration on the Rights of Indigenous Peoples in the context of existing Canadian law;³

¹ Letter dated November 10, 2022, Exhibit H, Tab 1, Schedule 1, Attachment 2.

² OEB's Environmental Guidelines, page 16:

<https://www.oeb.ca/sites/default/files/uploads/documents/regulatorycodes/2023-03/OEB-Environmental-Guidelines-for-Hydrocarbon-Projects-8th-Edition-20230328.pdf>.

³ Exhibit H, paragraph 5.

- (b) EGI's recognition of the legal and constitutional rights possessed by Indigenous Peoples in Canada and the importance of the relationship between Indigenous Peoples and their traditional lands and resources;⁴
 - (c) EGI's stated principle to "engage early and sincerely through processes that aim to achieve the support and agreement of Indigenous nations and governments for our projects and operations that may occur on their traditional lands";⁵
 - (d) EGI's stated principle that it seeks "the input and knowledge of Indigenous groups to identify and develop appropriate measures to avoid and/or mitigate the impacts of our projects and operations that may occur on their traditional lands."⁶
8. As set out in the following section, EGI's consultation efforts fall significantly short of the OEB's general guidelines as well as its own corporate commitments.

EGI's Application Contains Significant Shortcomings in Area of Indigenous Consultations

9. The most notable example of EGI's shortcomings relating to Indigenous consultations is its Environmental Report (the "**Report**"). The Report contains virtually no mention of the history of First Nations in the project area, including most notably the project's location on the unceded territory of CKSPFN, as well as other Anishinaabeg First Nations. Nor does the Report reference the area's history of colonization, including policies such as the *Drainage Act*, which favoured agricultural expansion, and the displacement of First Nations peoples from their lands.
10. EGI's long corporate history in the area provides an essential context towards assessing these omissions, which are fundamental to TFG's position on many of the business, public interest, and environmental questions central to this Application. EGI promotes its

⁴ Exhibit H, paragraph 5.

⁵ Exhibit H, paragraph 5; Exhibit I, Three Fires-3, Attachment 1, page 2.

⁶ Exhibit I, Three Fires-3, Attachment 1, page 2.

long history in southwest Ontario and elsewhere in Canada,⁷ which presumably has provided EGI with the exposure necessary to understand the importance of Indigenous history, rights assertion, and understanding and stewardship of the relevant territories to an environmental review such as the one in this proceeding.

11. Given the general omission of the history and perspectives of First Nations in the Report, TFG in its interrogatories asked EGI to explain why the company and its consultants did not undertake further efforts towards understanding the history of First Nations in the area for the purposes of ensuring more comprehensive approaches to Section 4 and Section 7 of the Report. EGI declined to answer the question directly and instead referenced the following:⁸
 - (a) The “opportunity for Indigenous groups to provide information regarding their history” that EGI’s consultations have presented;
 - (b) The fact that EGI’s Stage 1 Archaeological Assessment “provides a more detailed accounting of the history of First Nations in the area”, even though the document includes only four short paragraphs on the history of First Nations in the area since 1800,⁹ contains no express reference to First Nations or Indigenous matters in its Research Methods and Sources section, and is generally cursory in its treatment of the larger history of First Nations in the area;
 - (c) Ongoing efforts to respond to comments from CKSPFN, including relating to the Report.

12. EGI’s approach is problematic both on a principled basis and in terms of the implications it presents for this proceeding. On a principled basis, EGI’s approach is deficient in at least three ways:
 - (a) First, the general lack of attention in its Archaeological Assessment or Report reflects the fact that little effort was directed towards assembling the

⁷ See, for example, EGI’s description of its corporate history on its website: <https://www.enbridge.com/about-us/our-history#:~:text=The%20roots%20of%20what%20is,and%20endures%20to%20this%20day>.

⁸ Exhibit I, Three Fires-8, Question C-E.

⁹ See page 17 of the Archaeological Assessment.

information available in the public domain on matters relating to such issues as colonization and displacement.

- (b) Second, it fails to draw upon EGI's own extensive corporate history in the area, which almost certainly has offered EGI the opportunity to become aware of the existence of these issues.
 - (c) Third, it places the onus on First Nations to raise even the most basic and accepted positions relating to their position and history, failing which such matters risk omission from application materials and other consideration. It potentially absolves EGI from a more proactive responsibility to consider (let alone investigate and improve their understanding concerning) the place and history of First Nations in relation to the projects that EGI proposes.
13. EGI's passive approach to the consideration of the history of First Nations in the area also presents significant deficiencies in their proposed approach for the construction of the proposed project. One notable example is the failure of EGI's report to reference CKSPFN's Band Council Resolution #2851 (available to EGI since May 2017) and #3132 (available to EGI since March 2023) ("**Band Council Resolutions**"), which require a company that uses or plans to use any part of the applicable subsurface area and/or water to seek express permission from the government of the First Nation for the proposed usage.¹⁰
14. EGI's deficiencies in this proceeding form part of a larger pattern of conduct, which only grows more apparent as the importance and prominence of Reconciliation increases among Ontario's priorities.
15. A better approach more consistent with the OEB's stated objectives for Indigenous consultation would be an approach that genuinely shares the onus of ensuring that the history and perspectives of First Nations are reflected in the documents that are the centrepiece to a leave to construct application and provide an essential part to the associated Indigenous consultations. This would include an earlier and more

¹⁰ Exhibit I, Three Fires-6, Question H-J. The Band Council Resolution #2851 can be found at pages 48-49 of the TFG interrogatories. See also Exhibit I, Three Fires-31 and Three Fires-36, Question C.

collaborative engagement, rather than one where First Nations bear the entire onus and must do so reactively and under constraints relating to both time and resources.

Requested Relief Relating to Indigenous Consultations

16. Based on these omissions from and deficiencies in EGI's Application materials, TFG requests that the OEB note in its decision that EGI going forward must improve its Indigenous consultation practices by being more proactive (or at a minimum EGI must be less passive) in incorporating the histories and positions of First Nations into an application for leave to construct in order to satisfy the OEB's consultation requirements and expectations.
17. These omissions and deficiencies in and omissions from EGI's Application materials also provide the basis for various requests for relief in relation to EGI's proposed construction plan and environmental safeguards, which we describe in detail in the next section of these submissions.

B. Specific Points of Environmental Concern

18. The Three Fires First Nations place significant importance on the risk of environmental impacts that the Application presents. This concern arises in part from the responsibility that these First Nations have to care for the lands, waters, and all of creation as it relates to the territories that form the subject of the Report.
19. This section of the submissions details the aspects of EGI's proposed approach for mitigating environmental impacts that are deficient and require additional measures and/or monitoring in order to ensure proper care and protection of the project area. This section also includes particulars concerning TFG's requested relief in response to the highlighted shortcomings in EGI's proposals.

Suspect Soils

20. Soil contamination is a serious concern for the Three Fires First Nations, given the impact such contamination can have on wildlife, drinking water, and the general health of an ecosystem. Extreme care should be taken for all pipeline projects, especially in proposed projects like the current case where additional risk factors such as existing petroleum wells are present.
21. EGI has declined to provide TFG with an ongoing line of sight into instances of suspected soil contamination on the traditional territories of the Three Fires First Nations and in accordance with CKSPFN's assertion of subsurface rights, as set out in the Band Council Resolutions. In particular, EGI confirmed in its interrogatory responses that it would notify the "landowner of the property" in the event that it identified suspect soils during construction activities, but declined to provide a direct response to the question of whether it would commit to notifying TFG.¹¹
22. EGI's refusal to commit to notifying TFG of environmental matters it discovers once the application phase is complete and construction begins may form part of a larger pattern whereby EGI seeks to avoid firm positions on questions of ongoing First Nations jurisdiction and entitlements. For example, EGI declined to provide a direct answer to the following question:

Q: Does EGI recognize CKSPFN's jurisdiction over its territory and over the territories that form the subject of the Environmental Report? Please explain why or why not, as well as the implications in the current Application.

A: Enbridge Gas understands that CKSPFN is of the view that it has a responsibility to care for the lands, waters and all of creation as it relates to the territories that form the subject of the Environmental Report (ER). Enbridge Gas is committed to engaging meaningfully with CKSPFN on an ongoing basis throughout the lifecycle of the Project, including the operational phase.¹²
23. In any event, it is unclear why EGI has declined to commit to disclosing to TFG instances of soil contamination once construction begins, since they are the types of matters that would properly form part of the publicly-available Report if they were known to EGI now.

¹¹ Exhibit I, Three Fires-18, Question C.

¹² Exhibit I, Three Fires-7, Question B.

24. In addition to shortcomings relating to notification, EGI's Application contains potential deficiencies and a general lack of transparency on matters relating to ongoing soil protection, general environmental protection, and associated reporting.
25. EGI confirmed in its interrogatory responses that the company's protection measures in relation to soil contamination include a "Suspect Soils Procedure that is supplied to contractors prior to construction". EGI explains that "contractors are trained in the identification of potentially contaminated soils and groundwater and the procedures for managing them if they are encountered during construction."¹³
26. EGI has not provided any materials relating to these procedures, nor has it proposed any transparency mechanisms that would ensure these processes are followed or allow insight into their quality when they do occur.
27. Potentially even more significantly, EGI has declined to provide its Environmental Protection Plan prior to its finalization for the purposes of feedback from First Nations.¹⁴ The Environmental Protection Plan is a central guidebook for how construction is managed and, among other things, is the document that contractors are required to follow as they manage environmental impacts.¹⁵
28. TFG is concerned that there is currently no evidence as to whether EGI's Environmental Protection Plan, or its Suspect Soils Procedure and associated training, are tailored to the specific risks and vulnerabilities of the project area and proposed construction, as opposed to generic materials that fail to account for the Application's specific circumstances.
29. TFG therefore requests that the OEB include the following in any order granting EGI leave to construct:
 - (a) EGI should be required to notify TFG (and other impacted First Nations), including full particulars, in the event that it identifies suspect soils during construction activities.

¹³ Exhibit I, Three Fires-18, Question A.

¹⁴ Exhibit I, Three Fires-34, Question B.

¹⁵ Exhibit I, Three Fires-22, Question C.

- (b) EGI should be required to provide TFG (and other impacted First Nations) with copies of its unfinalized Environmental Protection Plan to provide the opportunity for comment from relevant First Nations (and recourse to the OEB in the event of dispute) prior to implementation.
- (c) EGI should be required to provide TFG (and other impacted First Nations) with copies of all documentation relating to EGI's Suspect Soils Procedure. These materials should be subject to comment from relevant First Nations (and recourse to the OEB in the event of dispute) prior to implementation.
- (d) EGI should be required to provide any additional particulars relating to training of contractors on issues of environmental protection not addressed in paragraph (c) above.
- (e) EGI should be required to provide confirmation once training has taken place, as well as particulars of that training including who conducted the training, who received the training, the duration of the training, the content, and any certifications issued as a result of the training.
- (f) EGI should be required to provide particulars as to how it ensures that its contractors implement the training they receive from EGI. These details should be subject to comment from relevant First Nations (and recourse to the OEB in the event of dispute) prior to implementation.

Groundwater

- 30. The Three Fires First Nations place a high priority on the protection of groundwater and water more generally.
- 31. EGI's Report acknowledges that construction activities, such as excavation, have the potential to interact with groundwater.¹⁶
- 32. EGI confirmed in its interrogatory responses that potential effects and mitigation measures for groundwater resources are summarized in Section 6.1.4 and Table 6-2 of

¹⁶ Report, Physical, Natural, and Socio-Economic Environment Setting, Groundwater, p. 51.

the Report.¹⁷ These sections identify specific risks relating to seven petroleum wells, as well as the anticipated generation of Bentonite Slurry as part of production processes. The Report recommends, among other things, utility sweeps and confirm the location of petroleum wells prior to construction, as well as frequent monitoring of Bentonite Slurry.

33. TFG remains very concerned about the risk of contamination emanating from the petroleum wells. In particular, TFG is concerned that the petroleum wells could be sources of undiscovered but existing contamination, which could produce the additional risk that construction in the area could create new migratory pathways for contamination to spread.
34. The only way to mitigate this risk is through adequate monitoring for petroleum hydrocarbons both during and following construction. At present, EGI's Report proposes less stringent measures: it recommends the presence of an Environmental Inspector and utility sweeps as the primary safeguards.¹⁸
35. TFG is also very concerned about risks relating to the generation and discharge of Bentonite Slurry. The consequences of an accidental discharge of Bentonite Slurry into a water area, for example, can include the rapid death of aquatic life in the area.
36. TFG therefore requests that the OEB include the following in any order granting EGI leave to construct:
 - (a) EGI should be required to propose a plan for ongoing testing of well contamination risks, both during the construction phase and prior to pipeline discharge. The plan should include provisions relating to reporting and communications with relevant First Nations. It should also be subject to comment from relevant First Nations (and recourse to the OEB in the event of dispute) prior to implementation.
 - (b) EGI should be required to propose a plan for perimeter monitoring relating to the risk of well contamination in the period after excavation for at least five years. The plan should include provisions relating to reporting and

¹⁷ Exhibit I, Three Fires-9,

¹⁸ Report, page 154-155.

communications with relevant First Nations. It should also be subject to comment from relevant First Nations (and recourse to the OEB in the event of dispute) prior to implementation.

- (c) EGI should be required to propose a plan for the ongoing monitoring of and testing for the generation of Bentonite Slurry specifically during the construction phase. The plan should include provisions relating to reporting and communications with relevant First Nations. It should also be subject to comment from relevant First Nations (and recourse to the OEB in the event of dispute) prior to implementation.

Aquatic Habitats

- 37. The Three Fires First Nations place a similarly high priority on the protection of aquatic habitats and related aquatic life.
- 38. EGI's review of the project area's existing water features and potential for aquatic habitats consisted of a desktop review of available agency resources and preliminary field investigations. EGI's environmental consultant performed aquatic habitat assessments in October and February, but in no other season of the year.¹⁹
- 39. EGI takes the position that there is no need for a more expansive review of the project area's aquatic habitat in large part because "all watercourse crossings are proposed to be constructed via trenchless construction methods (i.e., [Horizontal Directional Drill]), which will significantly reduce the potential of the Project to impact aquatic species", and that construction will take place within the existing road allowance.²⁰
- 40. EGI proposes no reporting or feedback mechanisms specific to water crossings or aquatic habitat, relying instead on its general commitment "to engaging with potentially impacted First Nations throughout the lifecycle of the project."²¹

¹⁹ Report, page 72; Exhibit I, Three Fires-12.

²⁰ Exhibit I, Three Fires-12, Questions A-C and F.

²¹ Exhibit I, Three Fires-12, Question G.

41. The importance of aquatic habitats, aquatic life, and water in the project area more generally each call for a higher level of protection than what EGI currently proposes. TFG in general has serious concerns that EGI's current proposals do not adequately guard against the risk of accident or other unplanned events, which can carry immediate and significant consequences for aquatic environments.
42. TFG also has the particular concern that EGI's proposals include nothing to monitor, report, or guard against the specific risk of frac-outs, whereby drilling fluid is released into the surrounding area. Frac-outs present an acute risk to aquatic life and are therefore an outcome EGI should be required to make heightened efforts towards preventing.
43. TFG therefore requests that the OEB include the following in any order granting EGI leave to construct:
 - (a) EGI should be required to propose a plan for ongoing testing of aquatic habitats that they encounter during the construction phase. The plan should include provisions relating to reporting and communications with relevant First Nations. It should also be subject to comment from relevant First Nations (and recourse to the OEB in the event of dispute) prior to implementation.
 - (b) In addition, EGI should be required to report any time construction approaches a watercourse crossing, confirming whether any new risks have emerged and providing the basis (including what efforts were made) for the conclusion. The report should also include confirmation the EGI's proposed construction method remains trenchless construction.
 - (c) EGI should also be required to report particulars of all incidents of frac-outs, including the date of the incident, details of the resulting damage, and what mitigation efforts EGI proposes to limit the damage and prevent recurrence.

Wildlife and Wildlife Habitat

44. The Three Fires First Nations place a similarly high priority on the protection of wildlife and wildlife habitat in the project area.
45. EGI's review of wildlife and wildlife habitat in the project area has unfortunately been similarly limited. EGI's analysis consisted of a desktop review, aerial imagery, and roadside surveys. Its environmental consultant performed wildlife and wildlife habitat assessments in October and February, but in no other season of the year.²²
46. EGI committed in its answers to interrogatories to the following two precautionary measures. TFG interprets as potentially additional to the mitigation measures otherwise proposed in the Report, although significant ambiguity results from EGI's failure to provide much detail:
 - (a) The construction schedule will "take into account" applicable restricted activity periods for wildlife; and
 - (b) wildlife sweeps will be conducted during construction in accordance with EGI's understanding of regulatory guidance.²³
47. EGI proposes no reporting or feedback mechanisms specific to wildlife or wildlife habitat, relying instead (once again) on its general commitment "to engaging with potentially impacted First Nations throughout the lifecycle of the project."²⁴
48. EGI has also declined to accommodate many of the supplementary wildlife protections that TFG proposed through consultations and interrogatories. In particular, EGI has declined to commit to:
 - (a) Share with TFG details of any discoveries of active wildlife habitat that reasonably raise the question of whether to suspend construction activities.²⁵
This measure would ensure better transparency and accountability

²² Report, page 107; Exhibit I, Three Fires-14.

²³ Exhibit I, Three Fires-14, Questions A and C.

²⁴ Exhibit I, Three Fires-14, Question E.

²⁵ Exhibit I, Three Fires-23, Question A.

concerning the impact of construction on wildlife in relation to matters that the Report and EGI's Application generally do not address.

- (b) Sweep for nests within 48 hours of construction activities, as opposed to the 7 days recommended in the Report.²⁶ This measure would provide a higher level of confidence concerning the existence of wildlife in the area and associated protections, which is especially important given the shortcomings in EGI's assessments to date in terms of the types of review EGI has conducted and their time-limited nature.
- (c) Provide TFG with capacity funding to conduct bat roosting sweeps prior to tree removal.²⁷ This measure would also provide a higher level of confidence concerning the existence of wildlife in the area and associated protections.
- (d) Conduct wildlife and wildlife habitat surveys during the three seasons that have not formed the subject of any analysis to date.²⁸ This measure would provide insight as to the impact of the project on area wildlife in the three seasons that EGI has not assessed as part of its Application.
- (e) Consulting with TFG (beyond the baseline of what EGI determines as its legal requirements) during the detailed design process to support potential approvals under the *Species at Risk Act* and the *Endangered Species Act*.²⁹

49. TFG therefore requests that the OEB include the following in any order granting EGI leave to construct:

- (a) EGI should be required to provide details on how it proposes that the construction schedule will "take into account" applicable restricted activity periods for wildlife, including particulars of how the construction schedule will accommodate wildlife habitat and migration considerations.

²⁶ Exhibit I, Three Fires-23, Question B.

²⁷ Exhibit I, Three Fires-23, Question D.

²⁸ Exhibit I, Three Fires-24, Question A. See also Three Fires-21.

²⁹ Exhibit I, Three Fires-24, Question C.

- (b) EGI should be required to provide further particulars on the approach it proposes to conducting wildlife sweeps, including when and how such sweeps will be conducted. The proposal should include provisions relating to reporting and communications with relevant First Nations. EGI's proposal should be subject to comment from relevant First Nations (and recourse to the OEB in the event of dispute) prior to implementation.
- (c) A requirement for EGI to share with TFG (and other affected First Nations) details of any discoveries of active wildlife habitat that reasonably raise the question of whether to suspend construction activities.
- (d) A requirement for EGI to sweep for nests within 48 hours of construction activities, as opposed to the 7 days recommended in the Report.
- (e) A requirement for EGI to provide TFG with capacity funding (and the opportunity) to conduct bat roosting sweeps prior to tree removal.
- (f) A requirement for EGI to conduct wildlife and wildlife habitat surveys during the three seasons that have not formed the subject of any analysis to date.
- (g) A requirement for EGI to consult with TFG during the detailed design process to support potential approvals under the *Species at Risk Act* and the *Endangered Species Act*.

Ongoing Monitoring of Fugitive Emissions and Invasive Species Risk

- 50. The introduction of a pipeline to the traditional territories of the Three Fires First Nations, as well as the associated construction, will produce ongoing and permanent effects for the area.
- 51. EGI's current proposal fails to effectively mitigate the risks that the project will present in terms of the risk of fugitive emissions and the risk of invasive species.

52. An essential measure towards a reasonable mitigation of these risks is a commitment to effective monitoring. A meaningful commitment towards the monitoring of fugitive emissions would entail some form of real-time and/or daily monitoring, which would likely include an ongoing analysis of the quantity of gas entering the pipeline as compared with the quantity of gas exiting the pipeline.
53. At present, EGI's proposal falls far short of this standard. EGI proposes to survey for leaks on an annual basis and does not specify how it will report any findings.³⁰
54. EGI demonstrates a similar lack of commitment when it comes to protections against invasive species and associated reporting. A meaningful commitment would include ongoing monitoring and associated reporting for a period extending well beyond construction. The requisite period would likely be approximately five years to ensure that any resulting impacts were properly captured.
55. EGI proposes no such monitoring or reporting, relying instead on its assurances that the construction equipment it uses will be clean, and Ontario native seed species will be used for regeneration.³¹
56. TFG therefore requests that the OEB include the following in any order granting EGI leave to construct:
 - (a) EGI should be required to propose a plan for ongoing monitoring of fugitive emissions. The plan should include provisions relating to reporting and communications with relevant First Nations. It should also be subject to comment from relevant First Nations (and recourse to the OEB in the event of dispute) prior to implementation.
 - (b) EGI should be required to propose a plan for the monitoring of invasive species both during the construction period and in the five years following completion of construction. The plan should include provisions relating to reporting and communications with relevant First Nations. It should also be

³⁰ Exhibit I, Three Fires-19, Question F.

³¹ Exhibit I, Three Fires-21, Question B.

subject to comment from relevant First Nations (and recourse to the OEB in the event of dispute) prior to implementation.

Miscellaneous Notifications and Protections

57. There are additional areas where EGI declined to provide a direct answer to TFG's interrogatories, resulting in uncertainty as to EGI's intentions in matters relating to environmental protections. This section addresses those miscellaneous points and sets out TFG's requested relief.
58. The most significant areas where EGI has declined to provide a clear position include:
- (a) EGI declined to confirm whether it would implement Tree Protection Zones,³² notwithstanding the recommendation from its environmental consultant that it do so.³³ The precise nature of EGI's intentions therefore remains unclear.
 - (b) EGI has confirmed that it will share details of all "reportable spills", but declined to answer whether it will report all spills, pipeline failures, and inadvertent returns.³⁴ The precise nature of EGI's intentions and its commitment to transparency therefore remain unclear, which is especially significant given the significant environmental impacts likely to result from any problems relating to pipeline operations.
 - (c) EGI has confirmed that it will "consider" limiting outdoor work on poor air quality days, but it declined to answer whether they will commit to postponing work on poor air quality days.³⁵ The continuation of work in such circumstances would not only put the health of workers at risk, it would also exacerbate the problem of poor air quality in the area, impacting residents of the area including the vulnerable.

³² Exhibit I, Three Fires-22.

³³ Report, page 168.

³⁴ Exhibit I, Three Fires-28.

³⁵ Exhibit I, Three Fires-29

59. It is also unclear from EGI's interrogatory responses whether the company has committed to providing TFG with copies of the permits relating to linear infrastructure once they are available.³⁶ These permits and the associated applications are important towards promoting transparency in relation to EGI's construction activities and the associated impacts, including in relation to waterways and wildlife.
60. TFG therefore requests that the OEB include the following in any order granting EGI leave to construct:
- (a) EGI should be required to commit to the implementation of Tree Protection Zones. Given the uncertainty of its position and the potential tension between its interrogatory response and the Report's recommendations, EGI should provide particulars of its proposed approach to Tree Protection Zones, which should be subject to comment from relevant First Nations (and recourse to the OEB in the event of dispute) prior to implementation.
 - (b) EGI should be required to commit to sharing details of all spills, pipeline failures, and inadvertent returns with TFG and other relevant First Nations.
 - (c) EGI should be required to postpone work on poor air quality days and to provide particulars of its plan for doing so.
 - (d) EGI should be required to provide TFG (and other impacted First Nations) with copies of the permits and associated applications relating to linear infrastructure once they are available.

Site Restoration

61. EGI's responses to interrogatories included a commitment to restore the project area to its pre-construction condition or better, but it generally rejected TFG's overtures to be

³⁶ Exhibit I, Three Fires-15.

involved in related planning efforts at any stage prior to the submission of the relevant reports to the OEB.³⁷

62. EGI's reluctance to engage with TFG (or other First Nations) prior to the finalization of foundational documentation risks repeating the mistakes of its approach to the Report, whereby the history and perspectives are for the most part only included in rebuttal and not as perspectives that help to form the underlying approach.
63. The knowledge and perspectives of the Three Fires First Nations, as well as the other affected First Nations, should be considered an essential part of any effort towards establishing the pre-construction conditions of the area, as well as what constitutes an acceptable restoration plan.
64. TFG therefore requests that the OEB include the following in any order granting EGI leave to construct:
 - (a) EGI should be required as a general principle to engage in a meaningful way with TFG and the other affected First Nations on issues relating to site restoration. This engagement should take place at a minimum six weeks before any proposed site restoration, so that First Nations have the opportunity to meaningfully engage and comment. Affected First Nations should, among other things, be afforded the opportunity to propose culturally important species as part of restoration efforts.
 - (b) EGI should be required to produce a site-specific restoration plan that is the outcome of meaningful engagement with the affected First Nations.
 - (c) EGI should be required to attempt to achieve consensus with the affected First Nations on the pre-construction conditions of the project area and, in the event of disagreement after meaningful engagement, EGI should be required to include details of any such disagreement as well as the engagement efforts behind the disagreement in its Monitoring Report and Final Monitoring Report.

³⁷ Exhibit I, Three Fires-30.

C. Public Interest Increasingly Implicates Broader Context

65. TFG's final area of concern relates to the lack of a sufficiently broad and contextual body of evidence addressing the question of whether the proposed project is in the public interest.
66. Ontario has a strong interest in effective and coordinated planning across the energy sector, especially as the province increasingly engages with issues relating to energy transition. This higher-level coordination will be essential towards supporting a reliable and affordable energy system for all Ontarians, including on questions relating to the effective integration of increasingly important and different sources of energy, such as renewable natural gas.
67. Effective integration of these new sources and actors should include consideration not only of the type of energy, but also its optimal location and method of integration into Ontario's broader network. Newer actors like WM must be made aware of the full range of opportunities available to them if their integration is to serve the public interest to the maximum extent. In particular, new actors like WM should be afforded the opportunity to understand their full range of options in terms of location and available alternative service providers, in addition to large actors like EGI.
68. It is unclear from the current record what considerations WM entertained prior to partnering with EGI, in part because EGI declined to provide any evidence relating to those questions at the interrogatory stage. It is possible that WM may be familiar with the alternatives available to it apart from EGI. It is similarly possible that WM could have partnered with other entities in a way that would provide better opportunities to WM and provide greater benefit to ratepayers.
69. In other words, it will be increasingly problematic in cases like the current proceeding if applicants like EGI are not required to provide evidence concerning the underlying decision on where to locate facilities or concerning any alternatives to the EGI pipeline that were available to the underlying RNG producer.

70. This Application would have benefited from evidence on the following issues as part of the consideration of questions of public interest:
- (a) Whether WM considered any other alternatives to facilitate the injection of RNG supply volumes;
 - (b) Whether WM considered a company other than EGI for the purposes of constructing new facilities and, if not, why not;
 - (c) Whether EGI and WM accept that there are other companies capable of constructing the new pipeline facilities and, if not, why not;
 - (d) Whether there are existing pipelines in the vicinity of WM's planned facility that are not owned by EGI and whether any such pipelines could serve the needs of WM's planned facility.
71. EGI had the opportunity to address these gaps at the stage of interrogatories, but refused to obtain the requested information from WM on the basis that the questions were not relevant to determining whether the proposed pipeline is in the public interest, stating:
- This Application is set to follow the OEB standard issues list for a LTC application, and the information being sought is not relevant to determine the issues in the public interest. The pipeline in the Application is being requested by the Customer, the Customer is paying for the Project, the Project is supported by the Municipality and the Application is not for the RNG production facility itself.³⁸
72. TFG respectfully submits that EGI's position rests on an unduly narrow conception of what constitutes the public interest, especially as issues relating to energy transition become more pronounced and new partners enter the system.
73. TFG therefore requests that the OEB note in its decision that project proponents should consider evidence relating to the public interest in a broader sense, including evidence relating to alternatives that the underlying energy producer had available to it.

³⁸ Exhibit I. Three Fires-1. Questions A-E.

IV. RELIEF REQUESTED

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

- (a) Note in its decision that EGI going forward must improve its Indigenous consultation practices by being more proactive (or at a minimum EGI must be less passive) in incorporating the histories and positions of First Nations into an application for leave to construct in order to satisfy the OEB's consultation requirements and expectations.
- (b) Require EGI to notify TFG (and other impacted First Nations), including full particulars, in the event that it identifies suspect soils during construction activities.
- (c) Require EGI to provide TFG (and other impacted First Nations) with copies of its unfinalized Environmental Protection Plan to provide opportunity for comment from relevant First Nations (and recourse to the OEB in the event of dispute) prior to implementation.
- (d) Require EGI to provide TFG (and other impacted First Nations) with copies of all documentation relating to EGI's Suspect Soils Procedure. These materials should be subject to comment from relevant First Nations (and recourse to the OEB in the event of dispute) prior to implementation.
- (e) Require EGI to provide any additional particulars relating to training of contractors on issues of environmental protection not addressed in paragraph (d) above.
- (f) Require EGI to provide confirmation once training has taken place, as well as particulars of that training including who conducted the training, who received the training, the duration of the training, the content, and any certifications issued as a result of the training.
- (g) Require EGI to provide particulars as to how it ensures that its contractors implement the training they receive from EGI. These details should be

subject to comment from relevant First Nations (and recourse to the OEB in the event of dispute) prior to implementation.

- (h) Require EGI to propose a plan for ongoing testing of well contamination risks, both during the construction phase and prior to pipeline discharge. The plan should include provisions relating to reporting and communications with relevant First Nations. It should also be subject to comment from relevant First Nations (and recourse to the OEB in the event of dispute) prior to implementation.
- (i) Require EGI to propose a plan for perimeter monitoring relating to the risk of well contamination in the period after excavation for at least five years. The plan should include provisions relating to reporting and communications with relevant First Nations. It should also be subject to comment from relevant First Nations (and recourse to the OEB in the event of dispute) prior to implementation.
- (j) Require EGI to propose a plan for the ongoing monitoring of and testing for the generation of Bentonite Slurry specifically during the construction phase. The plan should include provisions relating to reporting and communications with relevant First Nations. It should also be subject to comment from relevant First Nations (and recourse to the OEB in the event of dispute) prior to implementation.
- (k) Require EGI to propose a plan for ongoing testing of aquatic habitats that they encounter during the construction phase. The plan should include provisions relating to reporting and communications with relevant First Nations. It should also be subject to comment from relevant First Nations (and recourse to the OEB in the event of dispute) prior to implementation.
- (l) Require EGI to report any time construction approaches a watercourse crossing, confirming whether any new risks have emerged and providing the basis (including what efforts were made) for the conclusion. The report should also include confirmation the EGI's proposed construction method remains trenchless construction.

- (m) Require EGI to report particulars of all incidents of frac-outs, including the date of the incident, details of the resulting damage, and what mitigation efforts EGI proposes to limit the damage and prevent recurrence.
- (n) Require EGI to provide details on how it proposes that the construction schedule will “take into account” applicable restricted activity periods for wildlife, including particulars of how the construction schedule will accommodate wildlife habitat and migration considerations.
- (o) Require EGI to provide further particulars on the approach it proposes to conducting wildlife sweeps, including when and how such sweeps will be conducted. The proposal should include provisions relating to reporting and communications with relevant First Nations. EGI’s proposal should be subject to comment from relevant First Nations (and recourse to the OEB in the event of dispute) prior to implementation.
- (p) Require EGI to share with TFG (and other affected First Nations) details of any discoveries of active wildlife habitat that reasonably raise the question of whether to suspend construction activities.
- (q) Require EGI to sweep for nests within 48 hours of construction activities, as opposed to the 7 days recommended in the Report.
- (r) Require EGI to provide TFG with capacity funding (and the opportunity) to conduct bat roosting sweeps prior to tree removal.
- (s) Require EGI to conduct wildlife and wildlife habitat surveys during the three seasons that have not formed the subject of any analysis to date.
- (t) Require EGI to consult with TFG during the detailed design process to support potential approvals under the *Species at Risk Act* and the *Endangered Species Act*.
- (u) Require EGI to propose a plan for ongoing monitoring of fugitive emissions. The plan should include provisions relating to reporting and communications with relevant First Nations. It should also be subject to comment from

relevant First Nations (and recourse to the OEB in the event of dispute) prior to implementation.

- (v) Require EGI to propose a plan for the monitoring of invasive species both during the construction period and in the five years following completion of construction. The plan should include provisions relating to reporting and communications with relevant First Nations. It should also be subject to comment from relevant First Nations (and recourse to the OEB in the event of dispute) prior to implementation.
- (w) Require EGI to commit to the implementation of Tree Protection Zones. Given the uncertainty of its position and the potential tension between its interrogatory response and the Report's recommendations, EGI should provide particulars of its proposed approach to Tree Protection Zones, which should be subject to comment from relevant First Nations (and recourse to the OEB in the event of dispute) prior to implementation.
- (x) Require EGI to commit to sharing details of all spills, pipeline failures, and inadvertent returns with TFG and other relevant First Nations.
- (y) Require EGI to postpone work on poor air quality days and to provide particulars of its plan for doing so.
- (z) Require EGI to provide TFG (and other impacted First Nations) with copies of the permits and associated applications relating to linear infrastructure once they are available.
- (aa) Require EGI as a general principle to engage in a meaningful way with TFG and the other affected First Nations on issues relating to site restoration. This engagement should take place at a minimum six weeks before any proposed site restoration, so that First Nations have the opportunity to meaningfully engage and comment. Affected First Nations should, among other things, be afforded the opportunity to propose culturally important species as part of restoration efforts.

- (bb) Require EGI to produce a site-specific restoration plan that is the outcome of meaningful engagement with the affected First Nations.
- (cc) Require EGI to attempt to achieve consensus with the affected First Nations on the pre-construction conditions of the project area and, in the event of disagreement after meaningful engagement, EGI should be required to include details of any such disagreement as well as the engagement efforts behind the disagreement in its Monitoring Report and Final Monitoring Report.
- (dd) Note in its decision that project proponents should consider evidence relating to the public interest in a broader sense, including evidence relating to alternatives that the underlying energy producer had available to it.

V. COSTS

75. 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
30th day of November, 2023

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