



Ontario  
Energy  
Board | Commission  
de l'énergie  
de l'Ontario

**BY E-MAIL AND WEB POSTING**

February 8, 2024

**To: All rate-regulated natural gas distributors  
Intervenors in Current Leave to Construct Natural Gas Proceedings**

**Re: EB-2024-0079: Invitation to comment on proposed revisions to the  
Indigenous consultation provisions of the *Environmental Guidelines for the  
Location, Construction and Operation of Hydrocarbon Projects and  
Facilities in Ontario***

The Ontario Energy Board (OEB) is inviting comment on proposed revisions to the Indigenous consultation provisions of its [Environmental Guidelines for the Location, Construction and Operation of Hydrocarbon Projects and Facilities in Ontario](#). (Environmental Guidelines) from natural gas distributors and other interested parties.

The Environmental Guidelines provide direction to applicants that are seeking certain OEB approvals for natural gas or other hydrocarbon projects. Currently, the Indigenous consultation requirements related to these applications are found in section 3.2 of the Environmental Guidelines.

## **Background**

The most recent (8<sup>th</sup>) edition of the Environmental Guidelines was issued on March 23, 2023. In its [March 23, 2023](#) letter, the OEB noted that it had initiated a separate review of the provisions of the Environmental Guidelines that relate to Indigenous consultation and the Duty to Consult, and that it was committed to engaging with and seeking feedback from representatives of Indigenous groups and other interested parties on any updates to those provisions.

Although the Environmental Guidelines have provided a solid framework to assist the OEB in considering the adequacy of Indigenous consultation in respect of hydrocarbon projects, the OEB is proposing some revisions to reflect the experience that the OEB

and the Ministry of Energy (Ministry) have gained through the consideration of dozens of hydrocarbon project applications since 2016.

The key proposed revision to the Indigenous consultation requirements relates to the role of the Ministry after it has delegated the procedural aspects of the Duty to Consult to proponents. Under the current version of the Environmental Guidelines, the Ministry is, among other things, responsible for providing the applicant with a letter expressing the Ministry's view on the adequacy of Indigenous consultation based on the materials it has reviewed. The applicant files this letter with the OEB. Under the proposed revisions, the Ministry would no longer provide this letter. The OEB is the approval authority for hydrocarbon projects, and it is responsible for reviewing the complete record and determining whether the Duty to Consult has been adequately discharged. As the Ministry is not the approval authority, a formal indication of its views on Indigenous consultation for a hydrocarbon project is not necessary and could potentially lead to confusion regarding who is responsible for approving (or denying) the application.

In addition to this key revision, there are other proposed revisions, including more detail on what must be provided in the Indigenous Consultation Report that a project proponent must file with its application and other edits intended to improve clarity.

A copy of section 3.2 of the Environmental Guidelines that includes the proposed revisions is attached as Appendix A.

### **Separate Consultation Activities with Indigenous Groups and Cost Awards for those Activities**

On February 7, 2024, the OEB sent a letter to a large number of Indigenous communities and organizations ("Indigenous groups") inviting them to comment on the proposed revisions to the Environmental Guidelines. At the same time, the OEB invited their responses to certain questions regarding participation by Indigenous groups in OEB hearings. A copy of that letter is attached as Appendix B.

As indicated in that letter, the OEB has determined that:

- Indigenous groups who received the letter will be eligible for an award of costs for up to 15 hours under section 30 of the *Ontario Energy Board Act, 1998* to assist in preparing their comments on the Environmental Guidelines and their responses to the questions. Cost awards will also be available for participating in any virtual meeting(s) that the OEB may hold. Because of the targeted nature of the consultation, the OEB has determined that it is appropriate to deviate from its standard practice in determining eligibility for costs.

- Costs awarded will be recovered from all rate regulated natural gas distributors. The OEB may reassess from whom costs awarded will be recovered based on the nature of the responses to the questions regarding participation by Indigenous groups in OEB hearings that it receives.

### **Invitation to Comment**

The OEB invites written comments on the proposed changes to the Environmental Guidelines by March 25, 2024. The OEB requests that these filings be submitted in accordance with the instructions set out in Appendix C, including with regards to personal information in filings.

The OEB does not intend to make cost awards available in relation to this consultation other than to Indigenous groups as noted above.

The OEB will consider any next steps after consideration of all comments that it receives on the proposed revisions to the Environmental Guidelines from Indigenous groups, natural gas distributors and other interested parties.

Any questions relating to the proposed changes to Environmental Guidelines should be directed to [EGConsultation@oeb.ca](mailto:EGConsultation@oeb.ca). The OEB's toll-free number is 1-888-632-6273.

Yours truly,

Nancy Marconi  
Registrar

## **Appendix A – Proposed Revised Version of Section 3.2 of the Environmental Guidelines**

### **3.2 Indigenous Consultation**

The OEB is committed to ensuring that Indigenous communities have an opportunity to bring their views forward and to participate in any proceedings that may impact their rights or interests. This includes potential adverse impacts on established or credibly asserted Aboriginal or treaty rights (“Section 35 Rights”).

Section 35 of the *Constitution Act, 1982* recognizes and affirms the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada.<sup>1</sup> The Duty to Consult is the Crown’s constitutional obligation to consult and, where appropriate, accommodate Indigenous communities when contemplating conduct that may adversely affect their Section 35 Rights (“Duty to Consult”).

The Supreme Court of Canada has confirmed that, subject to certain conditions, regulatory tribunals such as the OEB can play an important role in fulfilling the Duty to Consult for projects that require their approval. In respect of applications for Hydrocarbon Projects (other than well licence referrals under section 40(1) of the OEB Act), the OEB is the primary approval authority for the Hydrocarbon Project as a whole. As such, the Crown relies on the OEB’s regulatory process to fulfill the Duty to Consult where it arises in relation to such approvals. For these applications, the OEB must be satisfied based on the evidence before it that, where triggered, the Duty to Consult has been adequately discharged prior to issuing any approval (or, in the case of a well

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<sup>1</sup> The *Constitution Act, 1982* refers to “Aboriginal peoples” and defines that term as including “the Indian, Inuit and Métis peoples of Canada”. These Environmental Guidelines use the term “Indigenous” interchangeably with “Aboriginal”.

licence referral under section 40(1) of the OEB Act, prior to issuing a report to the Minister of Natural Resources and Forestry).<sup>2</sup> All OEB decisions in respect of Hydrocarbon Project proceedings will include a determination on whether the Duty to Consult, if triggered, has been adequately discharged in respect of the Hydrocarbon Project. The OEB has significant remedial authority to address the Duty to Consult in this context, through its power to impose conditions under section 23 of the OEB Act when it grants an application, or by denying an application altogether. Indigenous communities that have outstanding concerns about the impact of a Hydrocarbon Project application before the OEB on their Section 35 Rights are encouraged to seek intervenor status in the proceeding. Further information regarding the OEB's role and how to participate in such proceedings is set out on the OEB's "Consultation with Indigenous Peoples" [webpage](#) and "Intervenor Information" [webpage](#)<sup>3</sup>

To ensure the OEB has the information it needs to make a determination regarding whether the Duty to Consult has been adequately discharged in respect of a Hydrocarbon Project, the OEB, in consultation with the Ministry of Energy, has developed the following process and requirements.

### **Indigenous Consultation Process for Hydrocarbon Projects**

#### *Ministry of Energy's Determination of Whether the Duty to Consult is Triggered*

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<sup>2</sup> Under section 40 of the OEB Act, the OEB makes a report to the Minister of Natural Resources in relation to an application to the Minister for a licence relating to a well in a designated gas storage area. The Minister is then required to grant or refuse the licence in accordance with the OEB's report. For convenience, a referral under section 40 is also referred to as an "application" in these Environmental Guidelines.

<sup>3</sup> To ensure that funding is not a barrier to participation in our hearings, the OEB can reimburse eligible participants for certain costs as set out in the OEB's [Practice Direction on Cost Awards](#)

Hydrocarbon Project applicants must contact the Ministry of Energy early in the Hydrocarbon Project planning process and provide the Ministry with a description of the proposed Hydrocarbon Project, including (as applicable) the need for the Hydrocarbon Project, the terminal points of the Hydrocarbon Project, the characteristics of the Hydrocarbon Project (such as the length and diameter of a proposed pipeline), and the proposed route of the Hydrocarbon Project. The applicant must also provide any additional information requested by the Ministry of Energy.

The Ministry of Energy will assess whether the proposed Hydrocarbon Project triggers the Duty to Consult.

If the Ministry of Energy is of the view that the Duty to Consult is not triggered by the proposed Hydrocarbon Project, it will provide a letter to the applicant confirming that this is the case within 35 business days of having been informed about the Hydrocarbon Project by the applicant.

#### *Delegation of Procedural Aspects of Consultation to the Applicant*

Where the Ministry of Energy considers the Duty to Consult to be triggered, it will identify the Indigenous communities whose Section 35 Rights may be adversely affected by the proposed Hydrocarbon Project and expressly delegate the procedural aspects of consultation to the applicant through a Delegation Letter, or other instrument as determined appropriate by the Ministry of Energy, within 35 business days of having been informed of the Hydrocarbon Project by the applicant. The Ministry of Energy will also notify the potentially impacted Indigenous communities that the Crown has delegated the procedural aspects of the Duty to Consult to the applicant.

The Hydrocarbon Project applicant should include either the Delegation Letter or the letter providing the Ministry of Energy's view that the Duty to Consult is not triggered, as applicable, as part of the evidence supporting its application.

The procedural aspects of the Duty to Consult generally include:

- Sharing the information required for communities to understand and assess the potential impacts on their Section 35 Rights
- Meeting with Indigenous communities
- Providing reasonable resources for Indigenous communities to participate in consultation, where appropriate
- Responding to questions and concerns raised by Indigenous communities and keeping the Crown apprised of rights assertions by communities
- Maintaining a complete record of all Indigenous consultation activities
- Discussing options to accommodate communities in respect of adverse effects on their Section 35 Rights

The Delegation Letter will provide detailed instruction to the applicant on the procedural aspects of consultation it is required to undertake. Potentially affected Indigenous communities should be provided with a clear description of the proposed Hydrocarbon Project, including (as applicable) the need for the Hydrocarbon Project, the terminal points of the Hydrocarbon Project, the characteristics of the Hydrocarbon Project (such as the diameter of a proposed pipeline), and the proposed route of the Hydrocarbon Project, including a map. The applicant is expected to be responsive to Indigenous

communities' requests for information and both the applicant and Indigenous communities are expected to participate in consultation in good faith.

It is important that the Hydrocarbon Project applicant begin consultation early in the Hydrocarbon Project planning process so that Indigenous communities whose Section 35 Rights may be adversely impacted by the project have sufficient time to review materials and understand how the proposed Hydrocarbon Project may affect those rights, and so that, where appropriate, the applicant and Indigenous communities have sufficient time to identify options for accommodating (for example avoidance or mitigation measures) any such affected rights or interests.

#### *Indigenous Consultation Report (ICR)*

In cases where the Ministry has issued a Delegation Letter, Hydrocarbon Project applicants are required to file an Indigenous Consultation Report (ICR) with their Hydrocarbon Project application.

The purpose of the ICR is to inform the OEB of what consultations have taken place and with whom, what if any rights-based concerns have been raised, what if any accommodations have been made, and the extent to which the applicant understands that there are outstanding concerns about the Hydrocarbon Project from Indigenous communities.

The ICR should include, at a minimum:

- A copy of the Delegation Letter



- A summary of how the applicant carried out the delegated aspects of the Crown's Duty to Consult as set out in the Delegation Letter
- A chronology of meetings, other communications and actions with each Indigenous community with whom the applicant has consulted
- Copies of all written communications between the applicant and Indigenous communities, and detailed summaries of any and all meetings or phone calls between the applicant and Indigenous communities (such as notes or meeting minutes)
- A description of the efforts made where an Indigenous community has not responded to communications from the applicant
- Identification of specific concerns raised by Indigenous communities
- A description of how the specific rights-based concerns or issues raised by the Indigenous communities were addressed, mitigated or otherwise accommodated. In cases where the applicant could not or did not take steps to address, mitigate or otherwise accommodate a stated rights-based concern or issue, an explanation should be provided
- An indication of the extent to which (to the applicant's knowledge) Indigenous communities have any outstanding concerns with respect to the potential impact of the Hydrocarbon Project, together with any relevant documentation
- Confirmation that potentially affected Indigenous communities were informed by the applicant that the Hydrocarbon Project would be the subject of an application before the OEB, that they could seek to participate in any process that the OEB

holds in respect of the application and that they were directed to the Registrar for further information on participating in OEB hearings

- A description of what, if any, future consultations with Indigenous communities are contemplated after the filing of the application.

The Hydrocarbon Project applicant is expected to keep the ICR up to date at least until the OEB renders its decision. The OEB may require that updates be filed during the proceeding.

In Hydrocarbon Project proceedings, the OEB will consider the ICR and any additional evidence before it related to the Duty to Consult, such as responses to interrogatories or evidence, letters of comment, and submissions filed by an Indigenous community that has intervened in the proceeding. The OEB is committed to ensuring that it has sufficient evidence to allow it to make an informed decision regarding whether the Duty to Consult, if triggered, has been adequately discharged for the Hydrocarbon Project.

## **Appendix B**



Ontario  
Energy  
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de l'Ontario

BY EMAIL

February 7, 2024

To: Indigenous Communities and Organizations Listed in Appendix G

Re: **EB-2024-0079: Invitation to comment on proposed revisions to the Indigenous consultation provisions of the *Environmental Guidelines for the Location, Construction and Operation of Hydrocarbon Projects and Facilities in Ontario***

**AND**

**EB-2022-0011: Request for responses to questions related to participation by Indigenous groups in OEB hearings**

The Ontario Energy Board (OEB) is seeking comments from Indigenous communities and organizations (“Indigenous groups”) on two matters. First are proposed revisions to the Indigenous consultation provisions of its [\*Environmental Guidelines for the Location, Construction and Operation of Hydrocarbon Projects and Facilities in Ontario\*](#) (Environmental Guidelines). The second is on the process for participation by Indigenous groups in OEB hearings. Other parties will be consulted through separate communications.

The Environmental Guidelines provide direction to applicants that are seeking certain OEB approvals for natural gas or other hydrocarbon projects. Currently, the Indigenous consultation requirements related to these applications are found in section 3.2 of the Environmental Guidelines. An overview of the proposed revisions is set out in Appendix A to this letter, the current section 3.2 of the Environmental Guidelines is set out in Appendix B and the proposed revisions to section 3.2 are set out in Appendix C.

Through this letter, the OEB is also seeking responses to certain questions the OEB has prepared as an initial step in identifying opportunities to facilitate participation by Indigenous groups in the OEB hearing process more generally. The questions are set out in Appendix D to this letter.

The OEB would welcome written comments on the proposed changes to the Environmental Guidelines and written responses to the questions regarding Indigenous

participation by March 25, 2024. The OEB requests that these filings be submitted in accordance with the instructions set out in Appendix E, including with regards to personal information in filings. All filings to the OEB will be publicly available. The OEB may also hold virtual meetings to discuss these initiatives. If you are interested in such a meeting, please send an email indicating your interest to the OEB at [Registrar@oeb.ca](mailto:Registrar@oeb.ca) by February 21, 2024.

The OEB will also seek input on the proposed revisions to the Environmental Guidelines from natural gas utilities and other interested parties through a separate process and will consider any next steps after consideration of all comments that it receives from Indigenous groups and other interested parties. The OEB will consult with Indigenous groups and other interested parties as appropriate on any changes that the OEB may propose to make to the process for participation by Indigenous groups in OEB hearings as a result of the responses received from Indigenous groups to the questions set out in Appendix D.

To assist in preparing comments and responses Indigenous groups who are recipients of this letter will be eligible for an award of costs for up to 15 hours under section 30 of the *Ontario Energy Board Act, 1998* (OEB Act). Cost awards will also be available for participating in any virtual meeting(s) that the OEB may hold. Costs awarded will be recovered from all rate regulated natural gas distributors. The OEB may reassess from whom costs awarded will be recovered based on the nature of the responses to the questions regarding participation by Indigenous groups in OEB hearings that it receives. Further information regarding cost awards is set out in Appendix F.

Any questions relating to the proposed changes to Environmental Guidelines should be directed to [EGConsultation@oeb.ca](mailto:EGConsultation@oeb.ca). Any questions relating to the OEB's questions regarding Indigenous participation in hearings should be directed to [Registrar@oeb.ca](mailto:Registrar@oeb.ca). The OEB's toll-free number is 1-888-632-6273.

Yours truly,

*Original Signed By*

Nancy Marconi  
Registrar

## **Appendix A: Overview of Proposed Changes to the Environmental Guidelines**

### **Background**

In 2016, the OEB added section 3.2 (Indigenous Consultation) to the Environmental Guidelines in order to obtain the information it needs to assess whether the Constitutional Duty to Consult has been adequately discharged in respect of applications for the approval of Hydrocarbon Projects<sup>1</sup>. That section sets out the roles and responsibilities of project proponents, the Ministry of Energy (Ministry) and the OEB in respect of the Duty to Consult in applications to the OEB for approval of Hydrocarbon Projects.

Although the Environmental Guidelines have provided a solid framework to assist the OEB in considering the adequacy of Indigenous consultation in respect of Hydrocarbon Projects, the OEB is proposing some revisions to reflect the experience that the OEB and the Ministry have gained through the consideration of dozens of Hydrocarbon Project applications since 2016.

### **The proposed revisions**

The key proposed revision relates to the role of the Ministry after it has delegated the procedural aspects of the Duty to Consult to proponents. Under the current version of the Environmental Guidelines, the Ministry is, among other things, responsible for providing the applicant with a letter expressing the Ministry's view on the adequacy of Indigenous consultation based on the materials it has reviewed. The applicant files this letter with the OEB. Under the proposed revisions, the Ministry would no longer provide this letter. The OEB is the approval authority for Hydrocarbon Projects, and it is responsible for reviewing the complete record and determining whether the Duty to Consult has been adequately discharged. As the Ministry is not the approval authority, a formal indication of its views on Indigenous consultation for a Hydrocarbon Project is not necessary and could potentially lead to confusion regarding who is responsible for approving (or denying) the application.

In addition to this key revision, there are other proposed revisions, including more detail on what must be provided in the Indigenous Consultation Report that a project proponent must file with its application and other edits intended to improve clarity.

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<sup>1</sup> Hydrocarbon Projects are defined in the Environmental Guidelines to include (a) hydrocarbon pipeline projects for which an applicant seeks leave to construct from the OEB under section 90 or 91 or an exemption from the requirement to seek leave to construct under 95 of the OEB Act; (b) gas storage development projects that require approval of the OEB under section 36.1(1) or section 38(1) of the OEB Act; and (c) a proceeding under section 40(1) of the OEB Act.

## Areas where no change is proposed

Other than the proposed revisions described above, existing roles and responsibilities remain the same

- The Ministry remains responsible for assessing whether a proposed Hydrocarbon Project triggers the Duty to Consult, identifying the Indigenous groups that may be impacted by a proposed project and delegating the procedural aspects of the Duty to Consult to project proponents.
- Project proponents remain responsible for providing information to and engaging with Indigenous groups with respect to the proposed project, attempting to resolve any rights-based concerns that may arise, and preparing and filing an Indigenous Consultation Report with their application that describes all of the consultation activities that were undertaken (including copies of communications) and a summary of the rights-based concerns raised by Indigenous groups and what (if any) accommodations were made.
- The OEB remains responsible for issuing notice of the proceeding to ensure that potentially impacted Indigenous groups are aware of and can seek to participate in the hearing process, and for considering all information on the record (including the Indigenous Consultation Report, any related discovery, any evidence filed by Indigenous intervenors, and the final submissions of Indigenous and other parties) to assess whether the Duty to Consult has been adequately discharged in respect of the application.

The Environmental Guidelines do not create any specific responsibilities for Indigenous groups, other than the expectation that discussions with project proponents be held in good faith. Indigenous groups that may be impacted by a Hydrocarbon Project will receive direct notice of the proceeding before the OEB. Any concerns relating to the Duty to Consult as it relates to the application can be brought directly to the OEB's attention through the hearing process, as can concerns relating to any other issue that is within the scope of the proceeding. The OEB welcomes the participation of potentially impacted Indigenous groups in its proceedings, and details on how to participate in an OEB hearing can be found at [Intervenor information](#).

The current version of section 3.2 of the Environmental Guidelines is attached as Appendix B, and the proposed revised version is attached as Appendix C.

The Ministry of Energy has announced a [proposal](#) to amend the OEB Act to allow government to prescribe conditions in regulation to fast-track certain electricity and natural gas projects through the OEB's leave to construct process. (The Indigenous

consultation provisions of the OEB's Environmental Guidelines cover leave to construct applications for natural gas pipeline projects). If the OEB Act amendments are passed, the government may then propose regulations to exempt projects costing between \$2 million and \$10 million from the leave to construct process if the Duty to Consult is met. If the proposed amendments to the OEB Act and regulations are passed, the OEB will consider whether any additional changes are needed to the Environmental Guidelines.



## **Appendix B**

## 3.2 Indigenous Consultation

The OEB is committed to ensuring that Indigenous peoples (First Nations, Inuit, and Métis peoples) have an opportunity to bring their views forward and to participate in any proceedings that may impact their rights or interests. This includes potential adverse impacts on established or asserted Aboriginal or treaty rights, which triggers the constitutional duty to consult and, when required, to accommodate.

Section 35 of the Constitution Act, 1982 recognizes and affirms the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada. The Crown's duty to consult and accommodate arises when the Crown contemplates an action or makes a decision that may have an appreciable adverse effect on potential or proven Aboriginal or treaty rights.

With respect to hydrocarbon pipeline facilities applications, the duty to consult most often arises in the context of applications for leave to construct natural gas facilities under section 90 or 91 of the Act. The duty to consult has substantive aspects that the Crown (which may include Crown agents) must undertake, and procedural components that the Crown may delegate to the project proponent. The substantive aspects of the duty generally include:

- The preliminary and ongoing assessment of potential adverse effects on rights
- Identification of Indigenous communities that may be affected
- Overseeing the procedural aspects of the duty
- Determining if consultation and accommodation is adequate

The procedural aspects of the duty to consult generally include:

- Meeting with Indigenous communities to share the information required for communities to understand and assess the potential impacts on Aboriginal or treaty rights
- Providing reasonable resources for Indigenous communities to participate in consultation
- Responding to questions and concerns raised by Indigenous communities and keeping the Crown apprised of rights assertions by communities
- Maintaining a complete record of all Indigenous consultation activities
- Discussing options to accommodate communities in respect of adverse effects on Aboriginal or treaty rights

In cases where the duty to consult is triggered, the OEB cannot issue a final decision approving an application unless it is satisfied, based on the evidence before it, that the duty to consult has been discharged. Impacts on Indigenous rights or interests can arise in other proceedings. Where that is the case, representatives of affected Indigenous communities are encouraged to participate in the proceeding and make their views known to the OEB. Further information regarding the OEB's role and how to participate is set out on the OEB's [Consultation with Indigenous Peoples](#) webpage.

It is important that the applicant begin consultation with potentially affected Indigenous communities at the onset of project planning so communities have sufficient time to review materials and understand how projects may affect their rights, and the applicant and the communities have sufficient time to identify options for mitigating, avoiding or accommodating these affects.

The Ministry of Energy will coordinate the Crown's duty to consult obligations that may be triggered by applications for leave-to-construct for projects covered by these Guidelines.

The following describes the process and role of the Ministry of Energy in discharging this function:

- Applicants for projects shall contact the Ministry of Energy early in the project planning process, as soon as the need, terminal points, project characteristics and the general location are determined and provide a description of the project's characteristics and location to the Ministry of Energy.
- The Ministry of Energy will determine whether the proposed project triggers a duty to consult. If so, the Ministry of Energy will identify any Indigenous communities whose rights are potentially adversely affected by the proposed project and assess the extent of necessary consultation.
- If no duty to consult is triggered by the proposed project, the Ministry of Energy will provide a letter to the applicant confirming so within 25 business days of having been informed about the project by the applicant. This confirmation letter should be included by the applicant as part of the evidence supporting its application.
- If the Ministry of Energy determines that a duty to consult is triggered, it will expressly delegate the procedural aspects of consultation to the applicant. Depending on the Crown's assessment of the planned project, the Ministry of Energy will delegate the procedural aspects of consultation to the applicant by way of a Delegation Letter, a Memorandum of Understanding (MOU), or other express delegation instrument.
- The MOU or Delegation Letter will include the list of First Nation and Métis communities whose rights are potentially adversely affected by the planned project, direction on the respective roles and responsibilities of the applicant and Crown, and the requirements the applicant must satisfy in order to assist the Ministry of Energy in addressing the Crown's duty to consult. Within 25 business days of the Ministry of Energy having been informed of the project by the applicant, the Ministry of Energy will issue the Delegation Letter or MOU or other express delegation agreement to the applicant.

The applicant will include the Delegation Letter, MOU or other express delegation agreement as part of the evidence supporting its application. This documentation, and related records, will form part of the public record and the applicant can share the Delegation Letter, MOU or other express delegation with communities at any point prior to and during the proceeding.



The applicant should file an Indigenous Consultation Report with its application to the OEB. The Indigenous Consultation Report should describe the consultation activities that were undertaken and timing, include copies of communication and summary of the rights-based concerns raised by Indigenous communities, and descriptions of what (if any) accommodations were proposed. A matrix can be used to summarize the Indigenous consultation record, documenting the date, time and place of the consultations, concerns that were raised, and how they were addressed. Prior to the leave to construct record being closed by the OEB, the Ministry of Energy will provide a letter to the applicant expressing its view on the adequacy of the Indigenous consultation based on materials provided to the Ministry of Energy. It is noted that the consultation should start in the pre-application stage and is likely to continue during OEB's review of the application and in some cases may continue through the life of the project. The applicant is expected to file with the OEB the letter from the Ministry of Energy and keep the summary of the consultation record up to date until the OEB renders its decision.

### 3.3 Landowner Engagement

Landowners whose property will be encroached upon by a Hydrocarbon Project are considered "directly affected landowners". Their involvement in the planning of the route or site on their property is essential.

Other landowners whose property lies adjacent to, or close to a proposed Hydrocarbon Project, may be affected by proposed construction activities due to noise, dust, and impediment to traffic flows, or the operation of a nearby facility such as a compressor station. In addition, there may be landowners who are restricted from building structures in proximity to certain facilities. These landowners should also be involved in the planning of the route or site adjacent to their property. These landowners are referred to as "indirectly affected landowners".

Where possible, tenants should be identified and treated in the same manner as either directly affected or indirectly affected landowners, depending upon the location of the property they rent. This should include proprietors of commercial properties and residents in home rental units in areas that may experience construction disturbance.

In areas involving Crown Land, forms of tenure such as trapline licences, Sustainable Forestry Licenses, and permits or leases for commercial uses should be ascertained and the relevant tenure holders contacted.



## **Appendix C – Proposed Revised Version of Section 3.2 of the Environmental Guidelines**

### **3.2 Indigenous Consultation**

The OEB is committed to ensuring that Indigenous communities have an opportunity to bring their views forward and to participate in any proceedings that may impact their rights or interests. This includes potential adverse impacts on established or credibly asserted Aboriginal or treaty rights (“Section 35 Rights”).

Section 35 of the *Constitution Act, 1982* recognizes and affirms the existing Aboriginal and treaty rights of the Aboriginal peoples of Canada.<sup>2</sup> The Duty to Consult is the Crown’s constitutional obligation to consult and, where appropriate, accommodate Indigenous communities when contemplating conduct that may adversely affect their Section 35 Rights (“Duty to Consult”).

The Supreme Court of Canada has confirmed that, subject to certain conditions, regulatory tribunals such as the OEB can play an important role in fulfilling the Duty to Consult for projects that require their approval. In respect of applications for Hydrocarbon Projects (other than well licence referrals under section 40(1) of the OEB Act), the OEB is the primary approval authority for the Hydrocarbon Project as a whole. As such, the Crown relies on the OEB’s regulatory process to fulfill the Duty to Consult where it arises in relation to such approvals. For these applications, the OEB must be satisfied based on the evidence before it that, where triggered, the Duty to Consult has

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<sup>2</sup> The *Constitution Act, 1982* refers to “Aboriginal peoples” and defines that term as including “the Indian, Inuit and Métis peoples of Canada”. These Environmental Guidelines use the term “Indigenous” interchangeably with “Aboriginal”.

been adequately discharged prior to issuing any approval (or, in the case of a well licence referral under section 40(1) of the OEB Act, prior to issuing a report to the Minister of Natural Resources and Forestry).<sup>3</sup> All OEB decisions in respect of Hydrocarbon Project proceedings will include a determination on whether the Duty to Consult, if triggered, has been adequately discharged in respect of the Hydrocarbon Project. The OEB has significant remedial authority to address the Duty to Consult in this context, through its power to impose conditions under section 23 of the OEB Act when it grants an application, or by denying an application altogether. Indigenous communities that have outstanding concerns about the impact of a Hydrocarbon Project application before the OEB on their Section 35 Rights are encouraged to seek intervenor status in the proceeding. Further information regarding the OEB's role and how to participate in such proceedings is set out on the OEB's "Consultation with Indigenous Peoples" [webpage](#) and "Intervenor Information" [webpage](#)<sup>4</sup>

To ensure the OEB has the information it needs to make a determination regarding whether the Duty to Consult has been adequately discharged in respect of a Hydrocarbon Project, the OEB, in consultation with the Ministry of Energy, has developed the following process and requirements.

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<sup>3</sup> Under section 40 of the OEB Act, the OEB makes a report to the Minister of Natural Resources in relation to an application to the Minister for a licence relating to a well in a designated gas storage area. The Minister is then required to grant or refuse the licence in accordance with the OEB's report. For convenience, a referral under section 40 is also referred to as an "application" in these Environmental Guidelines.

<sup>4</sup> To ensure that funding is not a barrier to participation in our hearings, the OEB can reimburse eligible participants for certain costs as set out in the OEB's [Practice Direction on Cost Awards](#)

## **Indigenous Consultation Process for Hydrocarbon Projects**

### *Ministry of Energy's Determination of Whether the Duty to Consult is Triggered*

Hydrocarbon Project applicants must contact the Ministry of Energy early in the Hydrocarbon Project planning process and provide the Ministry with a description of the proposed Hydrocarbon Project, including (as applicable) the need for the Hydrocarbon Project, the terminal points of the Hydrocarbon Project, the characteristics of the Hydrocarbon Project (such as the length and diameter of a proposed pipeline), and the proposed route of the Hydrocarbon Project. The applicant must also provide any additional information requested by the Ministry of Energy.

The Ministry of Energy will assess whether the proposed Hydrocarbon Project triggers the Duty to Consult.

If the Ministry of Energy is of the view that the Duty to Consult is not triggered by the proposed Hydrocarbon Project, it will provide a letter to the applicant confirming that this is the case within 35 business days of having been informed about the Hydrocarbon Project by the applicant.

### *Delegation of Procedural Aspects of Consultation to the Applicant*

Where the Ministry of Energy considers the Duty to Consult to be triggered, it will identify the Indigenous communities whose Section 35 Rights may be adversely affected by the proposed Hydrocarbon Project and expressly delegate the procedural aspects of consultation to the applicant through a Delegation Letter, or other instrument as determined appropriate by the Ministry of Energy, within 35 business days of having



been informed of the Hydrocarbon Project by the applicant. The Ministry of Energy will also notify the potentially impacted Indigenous communities that the Crown has delegated the procedural aspects of the Duty to Consult to the applicant.

The Hydrocarbon Project applicant should include either the Delegation Letter or the letter providing the Ministry of Energy's view that the Duty to Consult is not triggered, as applicable, as part of the evidence supporting its application.

The procedural aspects of the Duty to Consult generally include:

- Sharing the information required for communities to understand and assess the potential impacts on their Section 35 Rights
- Meeting with Indigenous communities
- Providing reasonable resources for Indigenous communities to participate in consultation, where appropriate
- Responding to questions and concerns raised by Indigenous communities and keeping the Crown apprised of rights assertions by communities
- Maintaining a complete record of all Indigenous consultation activities
- Discussing options to accommodate communities in respect of adverse effects on their Section 35 Rights

The Delegation Letter will provide detailed instruction to the applicant on the procedural aspects of consultation it is required to undertake. Potentially affected Indigenous communities should be provided with a clear description of the proposed Hydrocarbon Project, including (as applicable) the need for the Hydrocarbon Project, the terminal

points of the Hydrocarbon Project, the characteristics of the Hydrocarbon Project (such as the diameter of a proposed pipeline), and the proposed route of the Hydrocarbon Project, including a map. The applicant is expected to be responsive to Indigenous communities' requests for information and both the applicant and Indigenous communities are expected to participate in consultation in good faith.

It is important that the Hydrocarbon Project applicant begin consultation early in the Hydrocarbon Project planning process so that Indigenous communities whose Section 35 Rights may be adversely impacted by the project have sufficient time to review materials and understand how the proposed Hydrocarbon Project may affect those rights, and so that, where appropriate, the applicant and Indigenous communities have sufficient time to identify options for accommodating (for example avoidance or mitigation measures) any such affected rights or interests.

#### *Indigenous Consultation Report (ICR)*

In cases where the Ministry has issued a Delegation Letter, Hydrocarbon Project applicants are required to file an Indigenous Consultation Report (ICR) with their Hydrocarbon Project application.

The purpose of the ICR is to inform the OEB of what consultations have taken place and with whom, what if any rights-based concerns have been raised, what if any accommodations have been made, and the extent to which the applicant understands that there are outstanding concerns about the Hydrocarbon Project from Indigenous communities.

The ICR should include, at a minimum:

- A copy of the Delegation Letter
- A summary of how the applicant carried out the delegated aspects of the Crown's Duty to Consult as set out in the Delegation Letter
- A chronology of meetings, other communications and actions with each Indigenous community with whom the applicant has consulted
- Copies of all written communications between the applicant and Indigenous communities, and detailed summaries of any and all meetings or phone calls between the applicant and Indigenous communities (such as notes or meeting minutes)
- A description of the efforts made where an Indigenous community has not responded to communications from the applicant
- Identification of specific concerns raised by Indigenous communities
- A description of how the specific rights-based concerns or issues raised by the Indigenous communities were addressed, mitigated or otherwise accommodated. In cases where the applicant could not or did not take steps to address, mitigate or otherwise accommodate a stated rights-based concern or issue, an explanation should be provided
- An indication of the extent to which (to the applicant's knowledge) Indigenous communities have any outstanding concerns with respect to the potential impact of the Hydrocarbon Project, together with any relevant documentation
- Confirmation that potentially affected Indigenous communities were informed by the applicant that the Hydrocarbon Project would be the subject of an application

before the OEB, that they could seek to participate in any process that the OEB holds in respect of the application and that they were directed to the Registrar for further information on participating in OEB hearings

- A description of what, if any, future consultations with Indigenous communities are contemplated after the filing of the application.

The Hydrocarbon Project applicant is expected to keep the ICR up to date at least until the OEB renders its decision. The OEB may require that updates be filed during the proceeding.

In Hydrocarbon Project proceedings, the OEB will consider the ICR and any additional evidence before it related to the Duty to Consult, such as responses to interrogatories or evidence, letters of comment, and submissions filed by an Indigenous community that has intervened in the proceeding. The OEB is committed to ensuring that it has sufficient evidence to allow it to make an informed decision regarding whether the Duty to Consult, if triggered, has been adequately discharged for the Hydrocarbon Project.

## **Appendix D: Participation by Indigenous Groups in OEB Hearings**

### **Background**

In addition to the applications for Hydrocarbon Projects that are addressed in the Environmental Guidelines, the OEB considers applications in a number of other areas, including the setting of distribution and transmission rates for electricity and natural gas utilities, applications for leave to construct certain electricity transmission lines, applications for approval of natural gas municipal franchise agreements and applications for certificates of public convenience and necessity for natural gas utilities. In many cases the OEB is required to hold a public hearing before it issues a final decision and/or order in respect of these applications. Information about the main types of applications the OEB considers can be found on the OEB's [Application Process](#) webpage, including a description of the issues that are typically considered (i.e., within scope) for each application type.

Any person or party with a substantial interest that is within the scope of a proceeding will be granted approval to be an intervenor in the hearing. Intervenors are typically permitted to participate by asking questions about the application, filing their own evidence, and making submissions. There are many cases in which one or more Indigenous groups will have a material interest in the outcome of an application, whether those interests relate to the Duty to Consult or another issue within the scope of the proceeding.

On March 31, 2022, the OEB sought feedback on the Framework for Review of Intervenor Processes and Cost Awards, which identified potential initiatives to enhance the efficiency and effectiveness of the OEB's public hearings process. Some of the comments received encouraged the OEB to enable greater participation by Indigenous groups in the hearing process.

The OEB is committed to ensuring that Indigenous peoples have an opportunity to participate in the hearings process so that their voices are heard and their concerns are considered and is seeking to engage with Indigenous groups on their participation in OEB hearings.

In furtherance of this goal, the OEB is inviting responses from Indigenous groups to the following questions:

1. Have you ever participated in an OEB hearing? If so, what did the hearing(s) pertain to and why did you participate?
2. Broadly speaking, can you identify the elements of the OEB's hearing process that worked well?

3. What are elements of the OEB's hearing process that you think could use improvement, and why?
4. Is there other information that would help you to decide whether to participate in a hearing?
5. Are there changes that you would suggest to better facilitate participation by Indigenous groups in OEB hearings?
6. Would it assist you if there was an identified person or group within the OEB that you could contact regarding a specific hearing or the hearing process more broadly? If so, why?
7. Are there other matters that you think the OEB should consider when examining how it engages with Indigenous communities in its hearings?

## **Appendix E – Filing Instructions**

Indigenous groups are responsible for ensuring that any documents they file with the OEB **do not include personal information** (as that phrase is defined in the *Freedom of Information and Protection of Privacy Act*), unless filed in accordance with Rule 9A of the OEB's [Rules of Practice and Procedure](#).

Please quote file numbers, **EB-2024-0079** and **EB-2022-0011**, for all materials filed and submit them in searchable/unrestricted PDF format with a digital signature through the [OEB's online filing portal](#).

- Filings should clearly state the sender's name, postal address, telephone number and e-mail address.
- Please use the document naming conventions and document submission standards outlined in the [Regulatory Electronic Submission System \(RESS\) Document Guidelines](#) found at [File documents online | Ontario Energy Board \(oeb.ca\)](#) on the OEB's website.
- Indigenous groups are encouraged to use RESS. Those who have not yet set up an account, or require assistance using the web portal can contact [registrar@oeb.ca](mailto:registrar@oeb.ca) for assistance.
- Cost claims are filed through the OEB's online filing portal. Please visit the [File documents online](#) page of the OEB's website for more information. All participants shall download a copy of their submitted cost claim and serve it on all required parties as per the [Practice Direction on Cost Awards](#).

All communications should be directed to the attention of the Registrar at [registrar@oeb.ca](mailto:registrar@oeb.ca) and be received by end of business, 4:45 p.m., on the required date.

## **Appendix F - Cost Award Matters**

Because of the targeted nature of this consultation, the OEB is deviating from its standard practice in determining eligibility for costs and has determined that Indigenous groups who are recipients of this letter shall be eligible for costs.

### **Eligible Activities**

Costs awards of up to 15 hours in total will be available to an Indigenous group who is a recipient of this letter in relation to the following activities:

- providing written comments on the proposed changes to the Environmental Guidelines
- providing written responses to questions regarding participation by Indigenous groups in OEB hearings

Cost awards will also be available for participating in any virtual meeting(s) that the OEB may hold to discuss the two initiatives, to a maximum of actual meeting time plus 50% for preparation and reporting.

### **Cost Awards**

The maximum hourly rates set out in the OEB's Cost Awards Tariff will be applied.

The OEB will use the process set out in section 12 of its *Practice Direction on Cost Awards* to implement the payment of the cost awards. Therefore, the OEB will act as a clearing house for all payments of cost awards in this process. For more information, please refer to the OEB's *Practice Direction on Cost Awards*.



## Appendix G - List of Recipients

List of Recipients
Aamjiwnaang First Nation
Alderville First Nation
Algonquins of Ontario
Algonquins of Pikwakanagan First Nation
Animakee Wa Zhing 37 First Nation
Animbiigoo Zaagi'igan Anishinaabek
Anishinaabeg of Naongashiing First Nation
Anishinabe of Wauzhushk Onigum
Anishinabek Nation
Apitipi Anicinapek Nation (Wahgoshig First Nation)
Aroland First Nation
Association of Iroquois and Allied Indians (AIAI)
Atikameksheng Anishnawbek
Attawapiskat First Nation
Aundeck Omni Kaning First Nation
Batchewana First Nation
Bearskin Lake First Nation
Beausoleil First Nation
Beaverhouse First Nation
Big Grassy River First Nation (Mishkosiminiziibiing)
Biigtigong Nishnabeg First Nation
Biinjitiwaabik Zaaging Anishinaabek First Nation
Bingwi Neyaashi Anishinaabek First Nation
Brunswick House First Nation
Caldwell First Nation
Cat Lake First Nation
Chapleau Cree First Nation
Chapleau Ojibwe First Nation
Chiefs of Ontario (COO)
Chippewas of Georgina Island
Chippewas of Kettle and Stony Point First Nation
Chippewas of Nawash Unceded First Nation
Chippewas of Rama First Nation
Chippewas of Saugeen First Nation
Chippewas of the Thames First Nation
Constance Lake First Nation
Couchiching First Nation
Curve Lake First Nation
Deer Lake First Nation
Dokis First Nation
Eabametoong First Nation
Eagle Lake First Nation
Flying Post First Nation

<b>List of Recipients</b>
Fort Albany First Nation
Fort Severn First Nation
Fort William First Nation
Ginoogaming First Nation
Grand Council Treaty #3
Grassy Narrows First Nation
Haudenosaunee Confederacy Chiefs Council c/o Haudenosaunee Development Institute
Henvey Inlet First Nation
Hiawatha First Nation
Hornepayne First Nation
Huron-Wendat Nation
Iskatewizaagegan #39 Independent First Nation
Kasabonika Lake First Nation
Kashechewan First Nation
Kawartha Nishnawbe First Nation
Keewaywin First Nation
Kiashke Zaaging Anishinaabek (Gull Bay)
Kingfisher Lake First Nation
Kitchenuhmaykoosib Inninuwug
Koocheching First Nation
Lac des Mille Lacs First Nation
Lac La Croix First Nation
Lac Seul First Nation
Long Lake #58 First Nation
Magnetawan First Nation
Marten Falls First Nation
Matachewan First Nation
Mattagami First Nation
McDowell Lake First Nation
M'Chigeeng First Nation
Métis Nation of Ontario
Michipicoten First Nation
Mishkeegogamang First Nation
Missanabie Cree First Nation
Mississauga #8 First Nation
Mississaugas of Scugog Island First Nation
Mississaugas of the Credit First Nation
Mitaanjigamiing First Nation
Mocreebec Council fo the Cree Nation
Mohawk Council of Akwesasne
Mohawks of the Bay of Quinte
Moose Cree First Nation
Moose Deer Point First Nation
Moravian of the Thames Delaware Nation
Munsee-Delaware Nation

## List of Recipients

Muskrat Dam Lake First Nation
Naicatchewenin First Nation
Namaygoosisagagun First Nation
Naotkamegwanning First Nation
Neskantaga First Nation
Netmizaaggamig Nishnaabeg
Nibinamik First Nation
Nigigoonsiminikaaning First Nation
Niisaachewan Anishinaabe Nation
Nipissing First Nation
Nishnawbe Aski Nation
North Caribou Lake First Nation
North Spirit Lake First Nation
Northwest Angle 33 First Nation
Ojibway Nation of Saugeen
Ojibways of Garden River
Ojibways of Onigaming First Nation
Oneida Nation of the Thames
Pays Plat First Nation
Pikangikum First Nation
Poplar Hill First Nation
Rainy River First Nation
Red Rock Indian Band
Red Sky Métis Independent Nation
Sachigo Lake First Nation
Sagamok Anishnawbek First Nation
Sandy Lake First Nation
Seine River First Nation
Serpent River First Nation
Shawanaga First Nation
Sheguiandah First Nation
Sheshegwaning First Nation
Shoal Lake #40 First Nation
Six Nations of the Grand River
Slate Falls First Nation
Taykwa Tagamou Nation
Temagami First Nation
Thessalon First Nation
Wabaseemoong Independent Nations
Wabauskang First Nation
Wabigoon Lake Ojibway Nation
Wahnapiatae First Nation
Wahta Mohawks First Nation
Walpole Island First Nation
Wapekeka First Nation

<b>List of Recipients</b>
Wasauksing First Nation
Washagamis Bay (Obashkaandagaang First Nation)
Wauzhushk Onigum First Nation
Wawakapewin First Nation
Webequie First Nation
Weenusk First Nation
Whitefish River First Nation
Whitesand First Nation
Whitewater Lake First Nation
Wiwemikong Unceded First Nation
Williams Treaties First Nations
Wunnumin Lake First Nation
Zhiibaahaasing First Nation

## Appendix C – Filing Instructions

Natural gas distributors and other interested parties are responsible for ensuring that any documents they file with the OEB **do not include personal information** (as that phrase is defined in the *Freedom of Information and Protection of Privacy Act*), unless filed in accordance with Rule 9A of the OEB's [Rules of Practice and Procedure](#).

Please quote file numbers, **EB-2024-0079**, for all materials filed and submit them in searchable/unrestricted PDF format with a digital signature through the [OEB's online filing portal](#) at <https://p-pes.ontarioenergyboard.ca/PivotalUX/>.

- Filings should clearly state the sender's name, postal address, telephone number, fax number and e-mail address.
- Please use the document naming conventions and document submission standards outlined in the Regulatory Electronic Submission System (RESS) Document Guidelines found at [File documents online | Ontario Energy Board \(oeb.ca\)](#)
- Natural gas utilities are encouraged to use RESS. Those who have not yet set up an account, or require assistance using the web portal can contact [registrar@oeb.ca](mailto:registrar@oeb.ca) for assistance.

All communications should be directed to the attention of the Registrar at [registrar@oeb.ca](mailto:registrar@oeb.ca) and be received by end of business, 4:45 p.m., on the required date.