

Lake Erie Connector International Power Line Project
Federal Consultation and Accommodation Report

Proposed by:
ITC Lake Erie Connector LLC

Prepared by:

Major Projects Management Office

May 3, 2017

Disclaimer

If there is any inconsistency or ambiguity between this report and the National Energy Board Report (EH-001-2015), the National Energy Board Report (EH-001-2015) shall prevail.

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Acronyms and Abbreviations used in this Report

CAR	Consultation and Accommodation Report
Agency	Canadian Environmental Assessment Agency
<i>CEAA 2012</i>	<i>Canadian Environmental Assessment Act, 2012</i>
EA	Environmental Assessment
GiC	Governor in Council
ha	Hectare
INAC	Indigenous and Northern Affairs Canada
ITC	ITC Lake Erie Connector LLC
Km	kilometer
m	Meter
mm	Millimeter
NEB	National Energy Board
NEB Act	<i>National Energy Board Act</i>
NRCan	Natural Resources Canada
RoW	Right of way
SARA	<i>Species at Risk Act</i>
TK	Traditional knowledge
TLU	Traditional land use

1. Introduction

The Crown has a constitutional duty to consult Aboriginal groups, and where appropriate accommodate, when it contemplates conduct that may adversely impact asserted or established Aboriginal or treaty rights. The Crown seeks to undertake consultation that is meaningful, effective, and in a manner that upholds the honour of the Crown.

A duty to consult arises when the following three conditions are present:

- The Crown contemplates conduct;
- The Crown has actual or constructive knowledge of asserted or established Aboriginal or treaty rights, as recognized and affirmed under section 35 of the *Constitution Act, 1982* (section 35 rights); and
- That conduct or decision may have an adverse impact on these section 35 rights.

The Crown's objectives in the consultation process are to meet the legal duty, uphold the honour of the Crown, and build long-term relationships with potentially-impacted Aboriginal groups. Through this process the Crown seeks to better understand how the Crown's contemplated conduct (in this case, the authorization of an international power line) could potentially impact Aboriginal and Treaty Rights. The process also solicits input on how to address or otherwise accommodate potential impacts, where appropriate. The Crown's contemplated conduct with respect to the ITC Lake Erie Connector LLC (ITC Lake Erie) proposed Lake Erie Connector International Power Line Project (the Project) is the potential for the Governor in Council (GiC) to approve the National Energy Board's (NEB or the Board) decision, pursuant to the *National Energy Board Act* (NEB Act), to issue a Certificate of Public Convenience and Necessity, subject to terms and conditions (the contemplated conduct).

1.1 Purpose of the consultation and accommodation report

The Government of Canada, through its Major Projects Management Office (MPMO), representing "the Crown" on behalf of Natural Resources Canada, has prepared this Consultation and Accommodation Report (CAR) to document Aboriginal consultation conducted to date for the decision on the Project. The CAR includes potential accommodation measures, with respect to the potential impacts of the Project on section 35 rights. The CAR is intended to inform statutory decision makers of the Aboriginal consultation that has occurred with respect to the Project. To this end, the CAR:

- Describes the consultation process undertaken by the Crown with Aboriginal groups;
- Reports the views of Aboriginal groups on how the Crown conduct may potentially impact their section 35 rights;

- Explains the Crown's findings regarding the potential impacts of the proposed Project on section 35 rights;
- Outlines accommodation measures proposed to address potential impacts on section 35 rights; and
- Presents the Crown's conclusion on the adequacy of consultation.

The CAR considers the impacts on section 35 rights, and the concerns and issues of potentially-impacted Aboriginal groups, as identified through consideration of the NEB Recommendation Report for the Project, the Crown's identification of potential adverse Project impacts, and other factors and information brought forward through the participation of Aboriginal groups during the consultation process. This includes all information brought forward by Aboriginal groups through direct consultation, Aboriginal engagement records provided by ITC, as well as through submissions made as part of the NEB's Environmental Assessment (EA), and submissions made as part of the Project application review under the NEB Act. The conclusions and recommendations of the NEB applicable to section 35 rights are reflected in the CAR.

1.2 Project description

On May 22, 2015, ITC Lake Erie filed an application to the NEB under section 58.16 of Part III.1 of the NEB Act seeking approval for a an approximately 117 kilometre 1,000 megawatt (MW) ± 320 kilovolt (kV) high-voltage direct current (HVDC) bi-directional electric transmission interconnection, plus associated facilities to transfer electricity between Nanticoke, Haldimand County, Ontario and Erie County, Pennsylvania, United States crossing Lake Erie. The Project has been proposed to connect the Independent Electricity System Operator (IESO) market in Ontario with the market in the US mid-Atlantic and Midwest.

The Project represents \$544 million in direct construction investment (Canada portion of the Project), and consists of a proposed 1,000 MW HVDC transmission line (terrestrial and in-water cables), two HVDC converter stations with ancillary above-ground facilities (one in Canada and one in the US), and new terrestrial AC lines to connect the converter stations to the IESO, and Pennsylvania New Jersey Maryland (PJM) electricity grids. The length of the buried AC line in Canada is 1.3 kilometres. The Canadian HVDC converter station (Haldimand Converter Station) will be located in Ontario near a point of interconnection in Haldimand County, close to the Nanticoke transformer station switchyard. The Haldimand Converter Station will convert 500 kV AC power to ± 320 kV direct current (DC) power or vice versa. The HVDC transmission line would consist of two transmission cables, one positively charged and the other negatively charged, along with a fibre optic cable for communications between the converter stations.

The HVDC transmission line would enter the waters of Lake Erie and cross from Canada to the US. The length of the Canadian portion of the HVDC transmission line is 48.1 kilometres, consisting of 1.3 kilometres on land and 46.8 kilometres under the lakebed.

ITC Lake Erie stated that the majority of both the terrestrial AC and HVDC transmission lines will be installed within a plowed agricultural field, the current right-of-way of Haldimand Road 55 (including areas currently occupied by the road bed and roadside ditch), and on disturbed areas alongside an access road on OPG lands near the Nanticoke Transformer Station switchyard.

Subject to regulatory approvals, ITC Lake Erie noted during the NEB hearing that should the Project be approved, they plan to begin construction of the facilities in the second quarter of 2018 with an expected in-service date in the fourth quarter of 2020.

The NEB was of the view that overall, with the NEB's imposed conditions and with the implementation of ITC Lake Erie's environmental protection procedures and mitigation, the Project is not likely to cause significant adverse environmental effects.

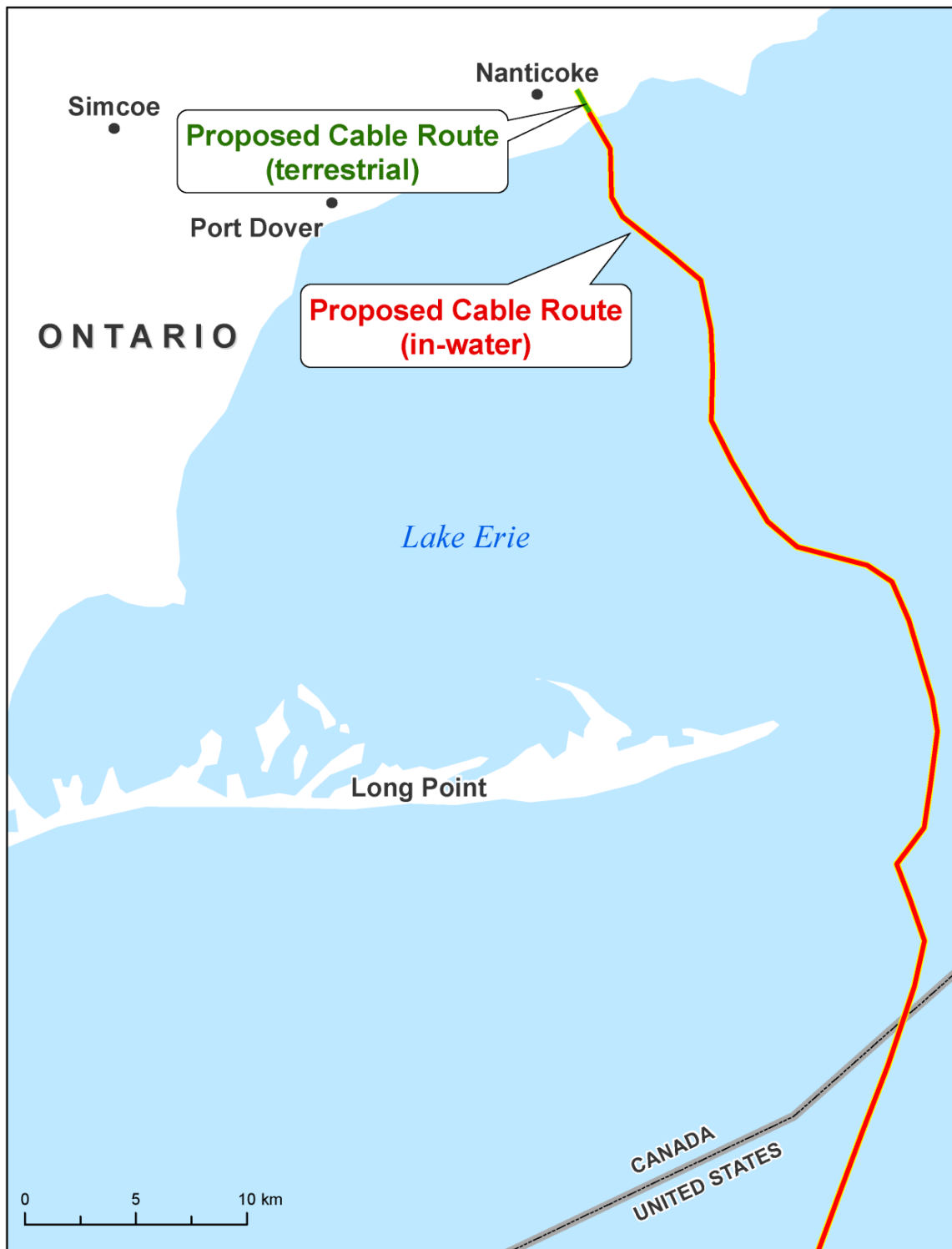


Figure 1 - Location of the proposed Project

1.3 Crown's approach to aboriginal consultation and accommodation

The Crown is committed to renewing the relationship with Aboriginal peoples to one based upon recognition of rights, respect, cooperation, and partnership. Crown consultation with potentially-impacted Aboriginal groups has taken place in four phases:

- **Phase I: Early engagement phase**

Shortly after ITC Lake Erie filed a Project description in 2015, MPMO consulted with the NEB and Indigenous and Northern Affairs Canada (INAC) to compile a list of potentially-impacted Aboriginal groups. The Crown contacted potentially-impacted Aboriginal groups to encourage participation in the NEB's hearing process so that the NEB could understand and consider the groups' interests. In addition, the NEB held early engagement sessions with Aboriginal groups to discuss its hearing process, its participant funding program, and how groups could participate in its hearings.

- **Phase II: NEB hearing phase**

Upon initiating the hearing phase on October 21, 2015, all potentially-impacted Aboriginal groups were eligible to apply to participate in the hearing and to apply for participant funding. The NEB closed its hearing record on August 24, 2016 and subsequently included other filings through processes open to comment by the parties. The NEB regulatory review process is described in more detail in Section 2.1.

- **Phase III: NEB recommendation phase**

On January 19, 2017, the NEB issued its Reasons for Decision determining that a Certificate of Public Convenience and Necessity be issued subject to GIC approval. These Reasons for Decision were provided to the Minister of Natural Resources so that the Minister could make a ministerial recommendation to the GiC. The Reasons for Decision included 42 conditions, including a condition that ITC Lake Erie fulfill all commitments made during the hearing and in the filings¹. The Reasons for Decision further concluded that the Project is not likely to cause significant adverse environmental effects with the implementation of ITC Lake Erie's environmental procedures and mitigation. In preparing its Reasons for Decision, the NEB considered input from potentially-impacted Aboriginal groups that was received during the hearing phase, and imposed several conditions in response to input provided by those groups.

¹ Certificate Condition 3, Appendix III, NEB Report.

- **Phase IV: Post NEB recommendation consultation phase**

Once the NEB Report was issued, the Crown contacted potentially-impacted Aboriginal groups by telephone and email to propose direct consultations. In initiating direct consultation, the Crown shared its preliminary analysis of the level of consultation owing to each potentially-impacted group. Following receipt of the NEB Recommendation Report, the Crown contacted each potentially-impacted Aboriginal group to consult on that group's section 35 rights and seek views on outstanding impacts from the Project that were not addressed in the NEB Recommendation Report. The Crown offered funding to groups owed a moderate or a high level duty to consult. The Crown also considered input provided by potentially-impacted Aboriginal groups to the NEB during the hearing phase (contained within the NEB's hearing records) in order to ensure a comprehensive understanding of each group's views about impacts on section 35 rights.

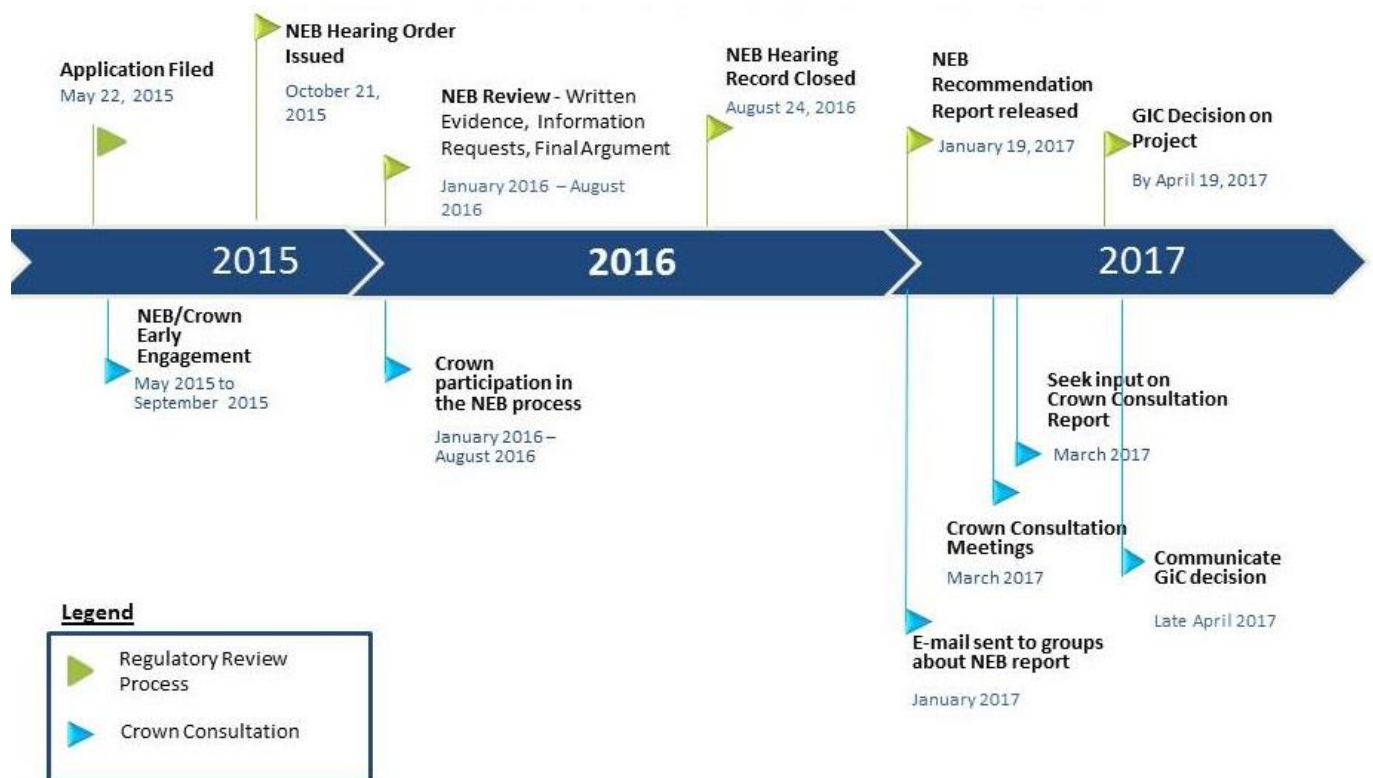


Figure 2 - Review process timeline for the project including Crown consultation

2. Project application and environmental assessment

This section provides an overview of the Project application review and EA processes, including the participation of Aboriginal groups in the regulatory review processes.

2.1 NEB review

The NEB regulatory review process is outlined below, including the participation of Aboriginal groups in the process, leading to the NEB Recommendation Report to inform the decision of the GiC.

In May 2015, the NEB received ITC Lake Erie's application and on October 21, 2015, the NEB issued a Notice of Public Hearing. An Application to Participate for Aboriginal groups and other stakeholders along with funding to support their engagement in the review process was made available from November 9-27, 2015. This was to allow those that may be impacted by the Project to share with the NEB any concerns or comments and to help inform the environmental and socio-economic analysis undertaken by the NEB. Information sessions were also organized, along with online sessions to provide more information on participating in the NEB hearing process.

The NEB received 11 applications to participate in the hearing process. Of the 11 applications, all were granted participant standing: 6 were Interveners (one Aboriginal group, one Crown corporation, one not-for-profit corporate entity, one landowners group, one federal government department, one provincial government agency); and 5 were Commenters (one Crown corporation, one association, one municipal government, two federal government departments)².

On October 21, 2015, the NEB issued its hearing order for the EH-001-2015 that established the process for a public hearing, which would be completed within 15 months or by January 20, 2017, as required by the NEB Act. The hearing order included a list of issues that the NEB would consider during its assessment of ITC Lake Erie's Application. The NEB conducted its public hearing from April 2016 to August 2016. The hearing included written evidence, several rounds of Information Requests, letters of comment, and the submission of final arguments.

On February 26, 2016, the NEB released 20 possible conditions for the Project for information purposes, to provide all Participants with information about how potential concerns could be

² An Intervener or a Commenter is a person, company or group who applied to participate in the NEB's hearing and was granted standing by the NEB to participate. An Intervener may submit various forms of written evidence and oral presentations. A Commenter may file one Letter of Comment that would be placed on the online public registry (record) and would form part of the official hearing record and would be considered by the NEB as evidence.

addressed. Following the receipt of additional filings and further assessment by the NEB, a revised list of 37 possible conditions was released to Parties for comment on 25 July 2016. Two additional possible conditions were released for comment on 8 August 2016. The draft conditions were circulated to hearing participants for comment. The NEB considered all comments it received from ITC Lake Erie, interveners and commenters before finalizing and setting out the final terms and conditions it would impose if the Project is approved by the GiC.

In a letter dated March 4, 2016, the NEB set out a path forward for gathering oral traditional evidence. The Aboriginal Intervenor did not make a request to provide oral traditional evidence.

Once the hearing record was closed on August 24, 2016, the NEB, in writing its Report, considered all evidence presented over the course of the hearing process. The final Report was then transmitted to the Minister of Natural Resources on January 19, 2017.

The regulatory review by the NEB is the initial part of the NEB's broader role as a lifecycle regulator. The NEB regulates the construction, operation and abandonment of international power lines as well as the export of electricity. The NEB has exclusive jurisdiction and responsibility to enforce the *National Energy Board Electricity Regulations* pursuant to the NEB Act and certificate conditions. Should the Project be approved, and ITC Lake Erie decides to proceed with it, the NEB would use this same oversight to regulate the Project facilities and components going forward.

2.1.1 Participation of Aboriginal groups

The NEB Panel formed to review the Project application engaged with Aboriginal groups potentially-impacted by the Project to ensure they were aware of how to participate in the hearing process, including how to obtain funding to support that engagement.

In May 2015, the NEB and the federal Crown sent letters to Aboriginal groups to advise them of the Project. These letters included offers to meet with Aboriginal groups to provide further information on the regulatory process and the role of the NEB in the review. The NEB held pre-hearing meetings with two groups.

One Aboriginal group applied for, and was granted, standing in the NEB hearing as an intervener. The Aboriginal group, the Haudenosaunee Confederacy Chiefs Council (HCCC), after being named an Intervenor, did not submit any further information during the hearing process, and did not provide oral traditional evidence, and did not file evidence or a final argument.

The Crown incorporated the information gathered during the NEB early engagement sessions and submitted by groups in the hearing process as part of the assessment the effects of the Project.

2.2 National Energy Board recommendation report conclusions

On January 19, 2016, the NEB released its Reasons for Decision, which concluded that the Project is in the present and future public convenience and necessity, and that through the implementation of ITC Lake Erie's environmental protection procedures, and mitigation and the NEB's conditions, the Project is not likely to cause significant adverse environmental effects. The NEB determined, subject to GiC approval that a Certificate of Public Convenience and Necessity shall be issued. This Certificate would be subject to the 42 conditions set out in the NEB's Reasons for Decision and ITC would have to meet these conditions should the Project go ahead.

The 42 NEB Certificate conditions are categorized as follows:

- 8 applying generally to the proposed activity;
- 21 applying prior to construction;
- 6 applying during and post-construction;
- 3 applying prior to operation; and,
- 4 applying during operation.

The proposed NEB conditions cover a wide range of issues and concerns identified during the engagement process with ITC Lake Erie, including, environmental protection, fish and fish habitat, procurement and employment opportunities, Treaty rights, ancestral remains and archeological artifacts, and Crown consultation. The following conditions relate specifically to concerns raised by Aboriginal groups during the NEB process and during engagement with ITC Lake Erie:

- **Certificate Condition 19:** requires ITC Lake Erie to file with the Board the relevant in-water restricted activity timing windows, the finalized timing of the in-water trench construction, in the event that an in-water trench construction does not adhere to the timing window a rationale for why and mitigation measures applied and a summary of ITC Lake Erie's consultation with the applicable regulatory agencies.
- **Certificate Condition 20:** requires ITC Lake Erie to file with the Board a Project specific environmental protection plan, including mitigation and monitoring commitments.
- **Certificate Condition 22:** requires ITC Lake Erie to file with the Board a Project specific Weed Management Plan.
- **Certificate Condition 24:** requires ITC Lake Erie to file with the Board a signed confirmation that all relevant archeological and heritage resource permits and clearances have been obtained, a description of how ITC Lake Erie will meet the conditions and recommendations contained in those permits and clearances and a description of how ITC Lake Erie has

incorporated mitigation measures in response to those conditions, comments or recommendations.

- **Certificate Condition 25:** requires ITC Lake Erie to file with the Board confirmation that a qualified environmental compliance manager is on site during construction to carry out appropriate inspections and monitor compliance with the environmental protection plan.
- **Certificate Condition 26:** requires ITC Lake Erie to file with the Board confirmation that a qualified aquatic specialist is on site during construction during blasting activities and horizontal directional drilling..
- **Certificate Condition 28:** requires ITC Lake Erie to file with Board a quantitative estimation and assessment of greenhouse gas emissions expected to directly result from construction and a description of the methodology used in that estimation.
- **Certificate Condition 32:** requires ITC Lake Erie to file with the Board a post-construction environmental monitoring report for the terrestrial portion of the Project.

In addition, ITC made a number of commitments throughout the NEB review process. NEB Certificate Conditions 1 and 3 render all commitments made by ITC Lake Erie pertaining to design, construction, operation, and environmental protection legally binding. Certificate Condition 4 requires that the Project be constructed, operated, and abandoned in accordance with the standards and other information referred to in the Application and proceedings. Certificate Condition 8 requires ITC Lake Erie to compile and publish its commitments in a tracking table on a regular basis.

2.2.1 Recommendations and conclusions on Aboriginal engagement and impacts

The following is a summary of the NEB's recommendation and conclusions regarding the potential impacts of the Project on Aboriginal groups and the adequacy of ITC Lake Erie's consultation with Aboriginal groups, as described in the NEB Reasons for Decision.

- The NEB was satisfied with the design and implementation of ITC Lake Erie's consultation activities to date given the scope and nature of the Project. The Board also found that that all 33 potentially impacted Aboriginal groups were provided with sufficient information about the Project.
- The Board noted ITC Lake Erie's commitment to continue to facilitate opportunities with potentially impacted Aboriginal communities to contribute to Project planning and the commitment to work with interested communities to address any Project-specific concerns raised, as well as to identify further opportunities for consultation throughout construction and operation of the Project. The Board also noted that ITC Lake Erie stated its commitment to continued engagement with local Aboriginal groups to identify potential opportunities for training and employment.

- The Board found that ITC Lake Erie made reasonable efforts to provide Aboriginal groups who expressed an interest in the Project with opportunities to participate in Project planning, and to share traditional knowledge and identify site-specific and general concerns about the Project.
- The Board found that ITC Lake Erie was responsive to the concerns raised by Aboriginal groups and that it committed to continue to work with Aboriginal groups, to address Project-related concerns, and establish appropriate mitigation measures.
- The Board found that ITC Lake Erie had designed and implemented an appropriate and effective consultation program that meets the requirements and expectations of the Board, including those set out in the *National Energy Board's Electricity Filing Manual*.

The NEB was of the view that overall, with the NEB's imposed conditions and with the implementation of ITC Lake Erie's environmental protection procedures and mitigation, the Project is not likely to cause significant adverse environmental effects.

2.3 Governor in Council decision-making process

After the NEB has released its Reasons for Decision and submitted its recommendation, to the Minister of Natural Resources, the GiC has three months to:

- 1) Approve the issuance of a Certificate of Public Convenience and Necessity to allow the Project to proceed;
- 2) Refuse to approve the issuance of the certificate; or
- 3) Extend the 90 day time limit for rendering a determination by any additional period or periods of time. The time limit was extended on April 13, 2017.

3. Engagement by ITC Lake Erie with Aboriginal groups

This section summarizes ITC Lake Erie's engagement process with potentially-impacted Aboriginal groups.

3.1 Aboriginal engagement

The NEB Electricity Filing Manual required ITC Lake Erie to identify, engage, and consult with potentially-impacted Aboriginal groups prior to filing an application with the NEB. ITC Lake Erie was also required to report to the NEB on these activities and to describe any issues or concerns raised by Aboriginal groups as part of its application.

Further to this requirement, ITC Lake Erie stated that the following principles guide its approach to Aboriginal engagement:

- Early engagement with Aboriginal groups can eliminate potential Project design issues and concerns by identifying and addressing construction and operation issues in an open and transparent manner.
- Working with Aboriginal groups in the technical study and planning stages can enhance Project development and lead to positive acceptance of the Project.
- Aboriginal groups have a diverse range of interests and protocols. Time spent learning about perspectives, impacts, and interests, fosters trust and respect and can lead to a Project with mutually beneficial aspects.
- ITC Lake Erie can assist Aboriginal groups with capacity building in a variety of ways, from information sharing in its data collection processes, to internships and considering opportunities for strategic partnerships and contracting for the Project.
- ITC Lake Erie will follow the evolving legal and constitutional relationship between Aboriginal groups and the Crown in order to comprehend the issues confronting First Nations and Métis.

ITC Lake Erie outlined that the goals and objectives of its Aboriginal engagement program are to:

- carry out early, transparent and meaningful engagement with Aboriginal groups interested in the Project;
- build trust and confidence in the Project through learning about historical relationships, interests and perspectives, and consideration of impacts and concerns relating to the Project and lands in general;
- strive to meet the needs of parties having an interest in the Project by integrating recommendations, as appropriate, from Aboriginal groups as part of the Project planning process;
- establish mutually acceptable community engagement processes and consider local initiatives that will enable ITC Lake Erie to receive comments from a broad range of sources throughout the Project preparation and implementation process;
- support the participation of Aboriginal groups potentially impacted by the Project through capacity funding for engagement activities;
- ensure the Aboriginal groups provide input into the environmental and socio-economic assessment where possible;
- meet with Aboriginal groups upon request, provide up to date information about the Project, obtain input on the proposed development and implementation of the Project, and explain the regulatory approvals processes;
- consider opportunities to put in place internships, contracting, and procurement opportunities; and

- carry out on-going engagement activities and fulfill commitments with Aboriginal groups according to agreements and protocols.

ITC Lake Erie began engaging with 17 potentially-impacted Aboriginal groups in August 2013. The 17 Aboriginal groups were identified based on desktop research, ITC's own operating experience, and an established network of contacts with Aboriginal communities and organizations in the Project area. In 2015, based on input provided by the NEB and NRCan, ITC Lake Erie added 16 groups to its consultation list for a total of 33.

ITC Lake Erie provided these Aboriginal groups with information about the Project, opportunities to meet with ITC Lake Erie to discuss the Project and express any concerns they might have, and opportunities to provide details of traditional land and resources use activities and other site-specific information to inform Project planning.

ITC Lake Erie tracked their efforts to provide Aboriginal groups with opportunities to participate in its planning of the Project. ITC Lake Erie engaged with Aboriginal groups to determine how they preferred to contribute to the Project.

ITC Lake Erie invited interested Aboriginal groups to participate in archeological assessment activities.

During ITC Lake Erie's engagement with Mississaugas of the New Credit First Nation, an Archeology Monitoring Agreement, a letter Agreement and a Memorandum of Understanding were put in place. ITC carried out similar engagement with the Six Nations of the Grand River and put in place an Archeology Monitoring Agreement and a Memorandum of Understanding. The Crown is not party to these agreements and as such, while the Crown does consider the existence of agreements between ITC Lake Erie and the Mississaugas of the New Credit First Nation and the Six Nations of the Grand River, the Crown considers only what Aboriginal groups or ITC Lake Erie have voluntarily shared with the Crown.

4. Crown consultation with Aboriginal groups

This section outlines the scope of the Crown's consultation with Aboriginal groups as well as the consultation process undertaken by the Crown.

4.1 Aboriginal and treaty rights

Outlined below is the historical and contextual information related to Aboriginal groups whose section 35 rights, have the potential to be adversely impacted by the Project.

In understanding the scope and nature of the rights and obligations under historic treaties, the Crown is guided by the text of the treaty. The Crown also relies on the understandings and intentions of Aboriginal and Crown participants to the making of the treaty or subsequent adhesions, in accordance with rules of treaty interpretation articulated by the Supreme Court of Canada. Rights protected under these historic treaties may include harvesting activities undertaken for spiritual and cultural purposes.

As stated by the Supreme Court of Canada in *Mikisew Cree*, and recently reaffirmed in *Grassy Narrows First Nation*³, the Crown's right to take up lands under historic treaties is not absolute, and is subject to the duty to consult and, if appropriate, accommodate the treaty Aboriginal groups' interests before reducing the area over which their members may continue to pursue hunting, trapping, and fishing rights.

While treaty adherents have rights to hunt, trap, and fish throughout their entire treaty area, land use information and other evidence filed with the NEB was reviewed to understand key interactions between the Project and Aboriginal groups' traditional use areas, including for spiritual and cultural use. Where a treaty First Nation no longer has a meaningful right to hunt, trap, or fish in relation to the territory over which it traditionally hunted, trapped, or fished, this could result in a treaty infringement.

The Crown assessed a depth of consultation owed to each potentially-impacted Aboriginal group.

4.1.1 Southern Ontario Treaties - The Upper Canada Treaties (1764-1862)

Many of the Aboriginal groups potentially-impacted by the Project are signatories to Southern Ontario Treaties which were made during the era known as the Upper Canada Land Surrenders, between 1764 and 1862. These surrenders are seen as treaties which transfer all Aboriginal rights and title to the Crown in exchange for one-time payments or annuities. They tended to be made with individual First Nations for tracts of land.

³ *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, [2005] 3 SCR 388 at para. 56 and *Grassy Narrows First Nation v. Ontario (Natural Resources)*, [2014] 2 SCR 447 at paras. 50-3.

While declaring Great Britain's authority over its recently conquered territories in North America, the Royal Proclamation of 1763 also outlined all the protocols and procedures required for the acquisition of Aboriginal land. Only once these procedures and protocols had been followed and land title legally secured could colonisation in Upper Canada proceed. These procedures would eventually become the model for all future land cessions. In the Great Lakes region, more than 30 land cessions were negotiated by agents of the Indian Department and Aboriginal peoples between 1764 and 1862. These land surrenders, mostly one time cash payments with no or few ongoing obligations, permitted the development of southern and eastern Ontario. However in 1916, a Commission of inquiry jointly created by Ontario and Canada proposed that a new treaty be negotiated in the region between Georgian Bay, the Ottawa River, Lake Simcoe and the lands west of the Bay of Quinte. A number of irregularities in the early land surrenders of the 19th century were causing considerable confusion and problems for the region's First Nation population. The 1923 Williams Treaties, taking its name for the head of the Royal Commission, ceded all lands in the region to the Crown for a fixed one time cash payment.

4.1.2 Huron-British Treaty of 1760

One Aboriginal group on the Crown list is signatory to the Huron-British Treaty of 1760 as part of the Anglo-Huron Treaty of 1760. During the long colonial rivalry between France and the Great Britain, different First Nation groups were important military allies to both European powers. Both France and Great Britain wanted to secure strong alliances with these First Nation peoples to secure their military control in North America. Great Britain negotiated two treaties during this period. At the end of the Seven Year War, the British military commanders concluded two treaties in 1760, one, the Treaty of Swegatchy, with the main group of Aboriginal French allies, and the other, the Huron-British Treaty (Murray), with the Huron-Wendat of Lorette. These two treaties marked a period of neutrality for France's former Aboriginal allies in exchange for continued access to traditional territories for the Algonquins, the protection of First Nation village sites, the right to trade with the British and the protection of traditional practices for the Huron. It is important to note that these three treaties were recognized as historic treaties by court decisions (Ireland and Jamieson, Côté and Sioui).

4.1.3 Métis nations

Métis are Aboriginal peoples of Canada. Section 35 of the *Constitution Act, 1982* protects the customs, practices, and traditions that were historically important features of Métis communities, who emerged subsequent to European “contact”, and prior to the exercise of “effective control” by the European settlers. For Métis to be able to exercise Section 35 rights, they must be able to demonstrate they are members of a modern Métis community that has

ancestral linkages to an historic rights bearing Métis community. The test for establishing Métis Section 35 rights was set out by the Supreme Court of Canada decision in *R. v. Powley*⁴.

On April 14, 2016, the Supreme Court of Canada decision in *Daniels v. Canada*⁵, declared that Métis and non-Status Indians are "Indians" and fall under subsection 91(24) of the *Constitution Act, 1867*. The Government of Canada's position is that not all Canadians who self-identify as Métis are Section 35 rights-holders and thus there is a distinction between Métis self-identification and Métis Aboriginal rights. The 2003 Supreme Court of Canada decision in *R. v. Powley* provides the test needed to prove Métis Aboriginal rights.

The Crown consulted groups and organizations asserting Métis rights in Ontario.

4.2 Aboriginal consultation by the Crown

4.2.1 Aboriginal groups identified for consultation

Beginning in the summer of 2015, and following receipt of the Project description by ITC Lake Erie, the Crown worked to develop a list of potentially-impacted Aboriginal groups. In conducting this work, the Crown used information from the NEB, ITC Lake Erie, and INAC. By September 2016, the Crown finalized a list of 33 individual Aboriginal groups and organizations representing several Aboriginal groups as having section 35 rights potentially impacted by the Project for the purposes of the post NEB recommendation consultation phase (Phase IV).

This list was developed through the consideration of Aboriginal groups whose traditional territories, treaty areas, or traditional use fall within a 100 km buffer on either side of the Project footprint, and therefore could have potential impacts on their section 35 rights.

The following table lists the Aboriginal groups and organizations included in the final Crown list.

Table 1 - Aboriginal groups included in the Crown list

Aboriginal groups	
Ontario	
Aamjiwnaang First Nation	Métis Nation of Ontario - Credit River Métis Community Council

⁴ *R. v. Powley*, [2003] 2 SCR 207

⁵ *Daniels v. Canada*, [2016], 1 SCR 99

Aboriginal groups	
Alderville First Nation	Métis Nation of Ontario - Grand River Métis Community Council
Association of Iroquois and Allied Indians	Métis Nation of Ontario - Niagara Region Métis Community Council
Beausoleil First Nation	Métis Nation of Ontario - Oshawa and Durham Métis Community Council
Bkejwanong Territory (Walpole Island First Nation)	Métis Nation of Ontario - Toronto and York Region Métis Community Council
Caldwell First Nation	Mississaugas of the New Credit First Nation
Chippewas of Georgina Island First Nation	Mississaugas of Scugog Island First Nation
Chippewas of Kettle and Stony Point First Nation	Mohawk Council of Akwesasne
Chippewas of Rama First Nation	Mohawk Council of Kahnawake
Chippewas of the Thames First Nation	Mohawk Council of Kanesatake
Curve Lake First Nation	Mohawks of the Bay of Quinte
Delaware Nation at Moraviantown	Munsee-Delaware Nation
Haudenosaunee Confederacy Chiefs Council and Haudenosaunee Development Institute	Oneida Nation of the Thames
Hiawatha First Nation	Six Nations of the Grand River
Métis Nation of Ontario	Southern First Nations Secretariat
Métis Nation of Ontario - Clear Waters Métis Community Council	Wahta Mohawks
Quebec	
Nation huronne-wendat	

4.2.2 Establishing the depth of duty to consult in the post NEB recommendation consultation phase (Phase IV)

The Crown undertook a preliminary depth of consultation analysis for each potentially-impacted Aboriginal group on the Crown list to determine the extent of consultation owed by the Crown. This analysis took account of the following factors for each Aboriginal group:

- Strength of the case for any asserted Aboriginal rights that may be adversely impacted; and
- Degree of potential impact of contemplated Crown action or activity to adversely impact section 35 rights.

The Crown considered these two factors for each Aboriginal groups' use of lands and resources in proximity to areas potentially impacted by the Project. The Crown assessed the potential

severity of impacts on section 35 rights as outlined in section 5.1, and then consulted each Aboriginal group in a manner consistent with the conclusions of its depth of consultation analysis. Figure 3 illustrates how the Crown tailored its consultation with each Aboriginal group.

The Crown compiled information to conduct this analysis from a number of sources, including:

- Filings to the NEB by ITC Lake Erie;
- Filings to the NEB by Aboriginal groups;
- Correspondence between the Crown and individual Aboriginal groups; and,
- The federal Government's Aboriginal and Treaty Rights Information System.

	Anticipated Negligible/ Very Weak Rights Claim	Anticipated Weak Rights Claim	Anticipated Moderate Rights Claim	Anticipated Strong Rights Claim	Modern Treaty Settlement, (including in process); Reserve Lands
Low Degree of Potential Adverse Impact	Nothing Required - opportunity to participate through public consultations	Recommended Letter, Info, Request for Aboriginal group to identify interest in contemplated conduct	Letter, Info, Input Welcomed on Project	Letter, Info, Consultation Session if Requested	Letter, Info, Consultation Session Anticipated
Moderate Degree of Potential Adverse Impact	Nothing Required - opportunity to participate through public consultations	Recommended Letter, Info, Request for Aboriginal group to identify interest in contemplated conduct	Letter, Info, Consultation Session if Requested	Letter, Info, Consultation Session Anticipated	Letter, Info, Consultation Session Most Likely Required
High Degree of Potential Adverse Impact	Recommended Letter, Info, Request for Aboriginal group to identify interest in contemplated conduct	Letter, Info, Input Welcomed on Project	Letter, Info, Consultation Session Anticipated	Letter, Info, Consultation Session(s) Most Likely Required	Possible Collaborative Development of Consultation Model (Protocol Agreement)

Source: Aboriginal Consultation Interactive Guidebook, Natural Resources Canada, January 2011.

Figure 3 - Federal Crown depth of consultation determination framework

4.2.3 Post NEB recommendation consultation activities (Phase IV)

In January 2017, the Crown corresponded with the 33 Aboriginal groups and organizations on the Crown list to advise them of the publication of the NEB's Recommendation Report.

The Crown initiated the post-hearing consultation process by sending letters and applicable funding applications to the Aboriginal groups and organizations to seek their input on the NEB recommendations, and to identify any outstanding issues or concerns related to the Project.

For Aboriginal groups that were owed a moderate or high duty to consult, the Crown invited those groups to apply for funding specifically allocated in Budget 2016 to support their participation in Phase IV. The Participant Funding Program was administered by the Canadian Environmental Assessment Agency (CEAA) on behalf of the Major Projects Management Office. CEAA followed up with groups to offer assistance in filling out the funding application in advance of the April 2017 deadline. The Crown also followed up with groups to identify the desire to hold consultation meetings and if so what dates would be convenient.

Of the two Aboriginal groups offered funding, both submitted a completed funding application.

During this time, the Crown followed up with groups on the low range of the consultation spectrum. No requests for information about the project were received from Indigenous groups.

4.3 Participant funding provided to support consultation

Through the Participant Funding Program, the Crown offered funding to support the engagement of Aboriginal groups during Crown consultation activities. The Crown invited Aboriginal groups to apply for funding, offering \$8,500 to groups assessed as being owed a high level of consultation. These funds were identified to support Aboriginal groups' review of the NEB Recommendation Report and their meaningful consultation with the Crown on any issues that may remain outstanding, along with the consideration of measures to mitigate potential impacts, if necessary.

As of March 31, 2017, the Crown had allocated \$17,000.00 in funding to Aboriginal groups, as outlined in Table 2.

Table 2 - Allocation of federal funds for participation in the Phase IV consultation.

Applicant/Recipient name	Funding amount approved (\$)
Mississaugas of the New Credit First Nation	\$8,500
Six Nations of the Grand River	\$8,500
Total	\$17,000

4.4 Crown consultation record and tracking of key issues

The Crown reviewed, responded to, and retained all correspondence with each Aboriginal group. The Crown further considered the engagement logs as filed by ITC Lake Erie in the NEB hearing process.

An issues tracking table was developed to identify issues raised by Aboriginal groups during the NEB hearing process and engagement with ITC Lake Erie, and was then updated during Crown consultations. The table also included an analysis by the Crown of the extent that proposed conditions by the NEB would be likely to address the concerns of Aboriginal groups or if a gap existed. The tool was updated as consultation progressed and informed areas where accommodation measures may be considered. This tool was also informed by the analysis provided by the NEB to the Crown in September 2016, of the issues raised by all Aboriginal groups throughout the hearing process.

5. Potential impacts of contemplated Crown conduct on section 35 rights

This section considers potential impacts of the Project on section 35 rights, as well as mitigations to address impacts.

5.1 Approach to assessing potential impacts of the project on section 35 rights

This section presents the Crown's methodology for assessing the seriousness of potential impacts of the Project on section 35 rights. The following information informed the Crown's understanding of potential impacts of the Project on these rights:

- Information contained in ITC Lake Erie's Application and reports provided by ITC Lake Erie on Aboriginal engagement;
- Information provided by Aboriginal groups regarding their views of how their section 35 rights may be impacted by the Project;
- Input from Aboriginal groups on assessing potential impacts of the Project on these rights;
- Conclusions in the NEB Recommendation Report with respect to the residual effects of the Project; and
- Consultation with Aboriginal groups during the Crown consultation process.

The Crown considers the following types of information in assessing the seriousness of a potential impact on Aboriginal and Treaty Rights, where available:

- The location of the area understood to be the Aboriginal group's area of traditional use;
- Past, present, and anticipated future Aboriginal uses of the Project area and its surroundings, including the frequency and timing of such uses by each Aboriginal group;
- The baseline conditions associated with the exercise of section 35 rights, including a consideration of other activities or development in the local or regional area that are in

proximity to the Project that may contribute to the current condition of the valued components;

- The context within which the rights are exercised, such as the relative importance of the Project area and its surroundings to the exercise of each group's section 35 rights, including any special characteristics or unique features of that area;
- The relative availability of other areas in reasonable proximity, within the area of traditional use of each Aboriginal group where the meaningful exercise of section 35 rights could reasonably occur;
- Any residual and cumulative effects of the Project to valued components associated with the exercise of these rights, including consideration of the magnitude and direction of change, geographic extent, duration and frequency of change, reversibility of the change and probability of occurrence (informed by the NEB Recommendation Report);
- The extent to which the Project would affect each Aboriginal groups' access to and use of the Project area to exercise section 35 rights; and
- Measures proposed to mitigate adverse effects corresponding to impacts on these rights.

The Crown's assessment of the seriousness of a potential impact on section 35 rights considers likely adverse residual effects that could cause a change to the practice of a right, whether deemed significant or not, after mitigation measures are applied.

5.1.1 Mitigation measures committed to by ITC Lake Erie

During the NEB review process, ITC Lake Erie committed to several design and mitigation measures that would help avoid or mitigate potential impacts of the Project on Aboriginal groups' hunting, fishing, and gathering activities, as well as sites of cultural importance. These measures include:

- Having a construction protocol (i.e. Environmental Protection Plan) to address potential adverse environmental impacts on fish and fish habitat in Lake Erie;
- Coordinating Monitoring Agreements for archeological work with interested Aboriginal groups.
- Implementing standard mitigation measures to minimize potential adverse environmental effects on the physical environment, soil and soil productivity, water quality and quantity, vegetation, wildlife and wildlife habitat, aquatic species and habitat, species at risk, species of special concern, atmospheric and acoustic environments, electromagnetism and corona discharge, navigation and navigation safety, heritage resources, and human receptors.
- Following Fisheries and Oceans Canada's "Measures to Avoid Causing Harm to Fish and Fish Habitat", including blasting methodology;
- Conducting post-construction environmental monitoring of the terrestrial route;

- Restoring vegetation to pre-construction conditions in consultation with Haldimand County; and
- Following Environment and Climate Change Canada's guidance related to determining the presence of nests, and if clearing and construction commences during the nesting period for migratory birds, ITC Lake Erie would have a qualified avian biologist conduct bird nest surveys prior to commencing construction.

5.1.2 National Energy Board conditions

There are several NEB-imposed Certificate conditions for the Project that are relevant to mitigating potential impacts from Section 58.16 activities on Aboriginal groups' hunting, fishing, and gathering activities, as well as sites of cultural importance. These conditions include:

- **Certificate Condition 1:** requires ITC Lake Erie to comply with all of the conditions contained in the NEB Certificate unless the NEB otherwise directs;
- **Certificate Condition 3:** requires ITC Lake Erie to implement or cause to be implemented all of the policies, practices, mitigative measures, recommendations, and procedures for the protection of the environment and promotion of safety referred to in its Application, or as otherwise agreed to in its related submissions;
- **Certificate Condition 4:** requires ITC Lake Erie to construct, operate, and abandon in accordance with the specifications, standards, and other information referred to in its Application or as otherwise agreed to in its related submissions;
- **Certificate Condition 8:** requires ITC to file with the NEB its Commitments Tracking Table. The Commitments Tracking Table lists all the commitments made by ITC Lake Erie in its Project Application or in its related submissions;
- **Certificate Condition 19:** requires ITC Lake Erie to file with the Board the relevant in-water restricted activity timing windows, the finalized timing of the in-water trench construction, in the event that an in-water trench construction does not adhere to the timing window a rationale for why and mitigation measures applied and a summary of ITC Lake Erie's consultation with the applicable regulatory agencies.
- **Certificate Condition 20:** requires ITC Lake Erie to file with the Board a Project specific Environmental Protection Plan describing all environmental protection procedures, and mitigation and monitoring commitments.
- **Certificate Condition 22:** requires ITC Lake Erie to file with the Board a Project specific Weed Management Plan.
- **Certificate Condition 24:** requires ITC Lake Erie to file with the Board a signed confirmation that all relevant archeological and heritage resource permits and clearances have been obtained, a description of how ITC Lake Erie will meet the conditions and recommendations contained in those permits and clearances and a description of how ITC Lake Erie has

incorporated mitigation measures in response to those conditions, comments or recommendations.

- **Certificate Condition 25:** requires ITC Lake Erie to file with the Board confirmation that a qualified environmental compliance manager is on site during construction to carry out appropriate inspections and monitor compliance with the environmental protection plan.
- **Certificate Condition 26:** requires ITC Lake Erie to file with the Board confirmation that a qualified aquatic specialist is on site during construction during blasting activities and horizontal directional drilling..
- **Certificate Condition 28:** requires ITC Lake Erie to file with Board a quantitative estimation and assessment of greenhouse gas emissions expected to directly result from construction and a description of the methodology used in that estimation.
- **Certification Condition 31:** requires ITC Lake Erie to conduct pre-disturbance bird surveys in the event that construction or clearing activities take place within restricted activity periods for migratory birds
- **Certificate Condition 32:** requires ITC Lake Erie to file with the Board a post-construction environmental monitoring report for the terrestrial portion of the Project.

6. Issues raised by Aboriginal groups during the environmental assessment and Crown consultation processes

Aboriginal groups raised a number of common issues through the environmental assessment process, including during direct engagement sessions with ITC Lake Erie. This is a summary of the key issues raised by Aboriginal groups and does not represent the views of the Crown. This section also identifies mitigation measures that address issues and concerns identified by potentially-impacted Aboriginal groups.

6.1 Effects of in-water power line on fish and fish habitat

Issue

Concerns were expressed that the HVDC cables, its electromagnetic fields, and its in-water installation under Lake Erie shoreline and near the shore could have adverse effects on fish and fish habitat. These potential impacts could lead to changes in fish abundance and loss of fish habitat. This could also have the effect of temporarily reducing the water quality of Lake Erie as a result of sedimentation and runoff from construction activities.

ITC Lake Erie commitments

ITC made specific commitments during the NEB hearing process that are relevant to mitigating the Project's potential effects on fish and fish habitat including:

- Having a construction protocol (i.e., Environmental Protection Plan) to address potential adverse environmental impacts on fish and fish habitat in Lake Erie;

- Implementing standard mitigation measures to minimize potential adverse environmental effects on the physical environment, soil and soil productivity, water quality and quantity, vegetation, wildlife and wildlife habitat, aquatic species and habitat, species at risk, species of special concern, atmospheric and acoustic environments, electromagnetism and corona discharge, navigation and navigation safety, heritage resources, and human receptors; and
- Following Fisheries and Oceans Canada's "Measures to Avoid Causing Harm to Fish and Fish Habitat", including blasting methodology.

NEB Conditions that serve to address this issue

The NEB included a number of Certificate conditions to mitigate potential Project-related effects on fish and fish habitat during and post construction:

- **Certificate Condition 19:** requires ITC Lake Erie to file with the Board the relevant in-water restricted activity timing windows, the finalized timing of the in-water trench construction, in the event that an in-water trench construction does not adhere to the timing window a rationale for why and mitigation measures applied and a summary of ITC Lake Erie's consultation with the applicable regulatory agencies.
- **Certificate Condition 20:** requires ITC Lake Erie to file with the Board a Project specific Environmental Protection Plan describing all environmental protection procedures, and mitigation and monitoring commitments.
- **Certificate Condition 25:** requires ITC Lake Erie to file with the Board confirmation that a qualified environmental compliance manager is on site during construction to carry out appropriate inspections and monitor compliance with the environmental protection plan.
- **Certificate Condition 26:** requires ITC Lake Erie to file with the Board confirmation that a qualified aquatic specialist is on site during construction involving blasting activities and horizontal directional drilling.
- **Certificate Condition 27:** requires ITC Lake Erie to file with the Board confirmation that it has received all the necessary approvals and permits.

Crown's conclusion

The Crown acknowledges that fish and fish habitat is important to Aboriginal people and can impact their use and enjoyment of Lake Erie and its resources. The Crown is of the view that the commitments made by ITC Lake Erie and the NEB conditions provide assurances that potential adverse effects to fish and fish habitat during construction and operation would be minimized. ITC Lake Erie's commitment to having a construction protocol and to adhere to in-water work windows would reduce potential impacts to fish and fish habitat. NEB Certificate Condition 19 and 26 require ITC Lake Erie to file with the Board the relevant in-water timing windows and to have a qualified aquatic specialist on-site that also reduce any potential adverse effects to fish and fish habitat. Certificate Condition 27 also requires Lake Erie to file with the Board

confirmation that ITC Lake Erie has received all necessary approvals and permits, which may include authorizations under the *Fisheries Act* if aspects of the Project are found to potentially cause serious harm to fish and fish habitat. It is important to note that the Governor in Council's decision on whether or not to approve the issuance of a Certificate of Public Convenience and Necessity has no bearing on the issuance of authorizations under the *Fisheries Act*. Compliance with a *Fisheries Act* authorization means it is the proponent's responsibility to identify aspects of the proposed works and activity that could cause serious harm to fish and to employ measures to avoid and mitigate those adverse effects.

Taken together, the Crown is satisfied that concerns regarding potential Project effects to fish and fish habitat have been reasonably accommodated by these conditions and commitments.

6.2 Effects of construction activities on heritage resources and ancestral remains

Issue

Concerns were expressed that terrestrial construction activities such as clearing, grading and trenching, and cable maintenance activities could cause disturbance to or loss of previously recorded or unidentified archeological resources or sites. These activities also have the potential to unearth bones, remains or any other such evidence of a native burial site or any archeological findings.

ITC Lake Erie commitments

ITC made specific commitments during the NEB hearing process that are relevant to mitigating the Project's potential effects on heritage resources and ancestral remains including:

- Coordination of Monitoring Agreements for archeological work with interested Aboriginal groups that were present on-site during the Stage 2-4 archaeological investigations and artifact recovery on the Haldimand Converter Station site.

NEB Conditions that serve to address this issue

The NEB included a Certificate Condition to mitigate potential Project-related effects to heritage resources and ancestral remains during and post construction:

- **Certificate Condition 24:** requires ITC Lake Erie to file with the Board a signed confirmation that all relevant archeological and heritage resource permits and clearances have been obtained from the relevant provincial authorities for the terrestrial and in-water portions of the Project,, a description of how ITC Lake Erie will meet the conditions and recommendations contained in those permits and clearances and a description of how ITC Lake Erie has incorporated mitigation measures in response to those conditions, comments or recommendations.

Crown's conclusion

The Crown acknowledges that heritage resources and ancestral remains are important to Aboriginal people. Archeological and heritage resource permits are not within federal jurisdiction. The Crown is of the view that the commitments made by ITC Lake Erie and NEB condition 24 provide assurances that potential adverse effects to heritage resources and ancestral remains during construction and operation would be minimized. The NEB report speaks to ITC Lake Erie's work in negotiating agreements with the Mississaugas of the New Credit First Nation and Six Nations of the Grand River Indigenous which allowed these interested groups to participate in the data collection process for archeology work and in the monitoring activities of the archeology work. NEB Certificate Condition 24 requires ITC Lake Erie to file with the Board a confirmation that all relevant archeological and heritage resource permits and clearances have been obtained.

Taken together, the Crown is satisfied that concerns regarding potential Project effects to heritage resources and ancestral remains have been reasonably accommodated by these conditions and commitments.

6.3 Opportunities for economic participation by Aboriginal groups in the project

Issue

Aboriginal groups have expressed an interest to ITC Lake Erie and the NEB for the employment of local skilled trades, and opportunities to supply and sell goods and services.

ITC Lake Erie commitments

ITC made specific commitments during the NEB hearing process that are relevant to providing economic participation opportunities to local Aboriginal groups including:

- ITC Lake Erie stated it will seek to use local labour and business, and Aboriginal residents and businesses as appropriate. The company said that it continues to engage in discussions with local community members and Aboriginal groups to determine the availability of goods and services required to support construction of the Project, which will range from site security and provision of amenities, to heavy equipment and operators, as well as skilled electrical trades.
- ITC Lake Erie submitted that it has identified opportunities for involvement of Aboriginal groups in future field studies, and potentially for the provision of services by Aboriginal businesses in support of the construction of the Project (such as engagement of local businesses in landscaping of the Project site). The company stated that it is committed to continued engagement with local Aboriginal groups regarding training and employment. ITC Lake Erie expressed interest in participating in future career fairs or similar sessions to

increase awareness of the types of skilled trades that would be required during construction. The majority of the potential Aboriginal employment and training opportunities would be during the construction phase of the Project, as the Project will require minimal staff during operations.

NEB conditions that serve to address this issue

The NEB did not include a condition that is directly related to the economic participation of Aboriginal groups but noted ITC Lake Erie's commitments to Aboriginal groups regarding potential opportunities for training and employment, as well as provisions of services by Aboriginal businesses in support of the construction of the Project. The Board found that the Project would provide benefits to Aboriginal, local, regional, and provincial economy and that any adverse socio-economic impacts of the Project will be adequately addressed.

Crown's conclusion

The Crown acknowledges that providing local Aboriginal groups with opportunities to participate and benefit from the economic opportunities of the Project may be beneficial. The Crown is of the view that the commitments made by ITC Lake Erie will provide assurances that they will work with potentially impact Aboriginal groups to identify opportunities for employment, training and other economic opportunities.

Taken together, the Crown is satisfied that the concerns raised regarding the economic participation by Aboriginal groups in the Project have been reasonably accommodated by these commitments.

6.4 Adequacy of the Crown's consultation process

Issue

One Aboriginal group raised a concern about the Crown consultation process and its perceived reliance on the NEB process to fulfill its duty to consult to the extent possible. In the view of the Aboriginal group, the Crown cannot delegate fiduciary duties and must undertake an assessment of Aboriginal rights and interests before it can determine if the NEB process is appropriate.

Crown's conclusion

The Crown sought to consult potentially-impacted Aboriginal groups in a manner consistent with the federal government's commitment to renew the relationship with Aboriginal peoples on a nation to nation basis. The Crown contacted all potentially-impacted Aboriginal groups by phone and email, in order to ensure that all those who wanted to, had the opportunity to express their views. The Crown further provided a depth of consultation assessment to each Aboriginal group.

To ensure that input and concerns from all potentially-impacted Aboriginal groups were meaningfully considered, the Crown offered participant funding, offered to meet with each group in person, and sought to conduct coordinated consultation. In addition, to ensure transparent and effective consultations, the Crown encouraged potentially-impacted Aboriginal groups to participate in the NEB process indicating that the Crown would be relying on the process to, in part, inform the GiC decision. The NEB's hearing process helps to ensure the consideration of proposed accommodation measures to address issues and concerns raised by Aboriginal groups. NEB Certificate conditions are relied upon by the federal Crown for accommodation of potential Project impacts on section 35 rights.

The Crown believes that it has met its duty to consult owed to each of the potentially-impacted Aboriginal groups for this Project.

7. Summary conclusion on contemplated conduct

The Crown heard a range of concerns from Aboriginal groups. These views reflect groups' commitment to stewardship of the land and traditional territories, as well as a strong desire to ensure development does not impede the ability of future generations to carry out traditional land use activities.

In relation to concerns directly linked to the Project's potential impact on section 35 rights, the Crown has assessed those concerns in light of the Project's proposed power line integrity, safety, and environmental protection, the conditions proposed by the NEB for the Certificate of Public Convenience and Necessity, and commitments made by the proponent. The Crown also noted during its assessment ITC Lake Erie's statement that the lands required for the Project are currently under active agricultural use or have previously been disturbed for industrial and municipal use. The lands are not currently being used by Aboriginal groups for traditional land use activities. The Crown concludes that ITC Lake Erie's commitments and the NEB conditions that would be legally binding to a potential Certificate of Public Convenience and Necessity, would all help to avoid, mitigate, or otherwise accommodate for adverse Project impacts on section 35 rights.

In addition, ITC Lake Erie has made a commitment to respect the agreements and protocols entered into with Indigenous groups such as the archeology monitoring agreements with Mississaugas of the New Credit First Nation and Six Nations of the Grand River. The Crown is of the view that these agreements and the on-going relationship between indigenous groups and ITC Lake Erie will also help to mitigate any potential impacts on section 35 rights.

The Crown has provided its views on the potential adverse impacts of the Project on each Aboriginal group's section 35 rights. Given the uniqueness of each Aboriginal group, and in recognition of the different ways in which biophysical, area-specific, and experiential impacts could impact each specific group's exercise of section 35 rights, the Crown has documented its understanding and assessment of the potential impacts in each Aboriginal group's annex.

The Crown concludes that ITC's Project commitments to Indigenous groups and the NEB's 42 legally binding certificate conditions address Indigenous concerns and that the Crown's duty to consult has been met.

8. Annexes

An annex has been developed for each potentially-impacted Aboriginal group identified by the Crown as having section 35 rights potentially impacted by the Project. The annexes detail the issues raised by Aboriginal group during the NEB's Enhanced Aboriginal Engagements, the NEB hearing process, and Crown consultation. The annexes have been shared with the respective Aboriginal groups, but will not be published as part of the CAR, as they contain third party information.