

ONTARIO ENERGY BOARD

IN THE MATTER OF the *Ontario Energy Board Act, 1998*;

AND IN THE MATTER OF an Application by NOVA Chemicals (Canada) Ltd. For an Order granting leave to construct a hydrocarbon pipeline and ancillary facilities in the Township of St. Clair, County of Lambton.

REPLY

1. NOVA Chemicals (Canada) Ltd. ("NOVA Chemicals") has applied for leave to construct approximately 4.0 kilometres of nominal pipe size 12 inch hydrocarbon pipeline ("Proposed Pipeline") to connect NOVA Chemicals' Corunna petrochemical facility ("Corunna Facility") to the existing Windsor-Sarnia Pipeline owned and operated by Plains Midstream Canada ULC. The Proposed Pipeline will provide a second natural gas liquids ("NGL") pipeline to the Corunna Facility, complementing an existing connection of the facility to another pipeline (the Sunoco Logistics Mariner West pipeline). The new, second connection will provide greater NGL supply capacity and reliability to support NOVA Chemicals' current operations and possible future expansion of the Corunna Facility.¹

¹ Exhibit 3, Tab A.

Need, Cost, Environment & Land Matters

2. Board Staff supports the approval of this application², subject only to concerns regarding NOVA Chemicals' request that the leave to construct applied for be granted for a period of 36 months from the date of the order.
3. In particular, Board Staff has noted that:
 - a. NOVA Chemicals is a competitive corporation, and therefore the issues of need, capital investment levels and cost recovery for the Proposed Pipeline are not issues of concern to the Board.
 - b. No environmental issues or concerns were raised as a result of the circulation for review of the Environmental Report ("ER") for the Proposed Pipeline as prepared by Stantec Consulting Ltd. The ER was provided to the Ontario Pipeline Coordinating Committee, local municipalities, and potentially affected First Nations and Métis communities for review.
 - c. No land matter concerns are raised by NOVA Chemicals' application, because the Proposed Pipeline will be located entirely within an existing right of way for which NOVA Chemicals already holds easements.
4. NOVA Chemicals also notes that a more complete description of its consultation activities with respect to the Proposed Pipeline is provided at Exhibit 3, Tab B, and that there are no outstanding issues or concerns arising from the broader consultation process there described.

Conditions; Length of Authorization to Commence Construction (Condition 2.a)

5. The only concern which has been raised by Staff regarding the requested approval is NOVA Chemicals' request that the authorization for leave to construct terminate 36 months from the date on which the decision in this application is issued (i.e. some time in November 2018, assuming that a decision in this matter is issued prior to the end of November 2015). Staff's concerns with this request are based on:

² OEB Staff Submission, September 28, 2015.

- a. The Board's "*typical*" requirement that construction begin within 12 months of the date of the leave to construct decision³; and
- b. the requested 36 month approval period being "*too long*"⁴.

Staff did not provide any rationale for its conclusion that the requested approval period is "*too long*".

- 6. Review of the Board's leave to construct approval decisions issued over the last 5 years reveals a number of orders setting a 12 month expiry date, but also a number of orders with longer terms, ranging from 13 months to more than 3 years. Past determinations regarding the length of the leave to construct authorization seem to be very circumstance specific.
- 7. For example, the Board decision in the Enbridge Gas Distribution ("EGD")/Union Gas Limited ("Union") combined Parkway West/Kirkwall-Parkway/Enbridge GTA proceeding resulted in leave to construct approvals for 3 distinct projects, each of which approvals was of a different length:
 - a. The Board granted EGD a 13 month period for the commencement of construction of EGD's GTA Project (EB-2012-0451).
 - b. The Board granted Union a 2 year authorization period for leave to construct its Parkway West Project (EB-2012-0433), on the basis of a request by Union for "*additional flexibility*" for construction start.
 - c. In respect of Union's Brantford-Kirkwall/Parkway D Project (EB-2013-0074), the Board granted a 3 year authorization period (recognizing, it appears, that the use of the proposed facilities was dependent on TransCanada Pipelines Limited's Kings North project, which at the time had not yet been approved).
- 8. In EB-2011-0040/0041/0042, Union applied for leave to construct a natural gas distribution system extension to the Township of Ear Falls and the Municipality of Red Lake. The Board granted Union a 1.5 year authorization for Phase I of the project (to extend the system to supply a local business operation), and a 3.5

³ OEB Staff Submission, page 2, bottom paragraph.

⁴ OEB Staff Submission, page 3, second last paragraph.

year authorization period for Phase II of the project (to extend the system on into the town and municipality, provided that the town and municipality could raise sufficient funding for required contributions to the extension project).

9. Additional examples are:

- a. EB-2014-0261: Union Gas Limited – Dawn Parkway 2016 Expansion Project – 32 month approval expiry (by settlement agreement).
- b. EB-2011-0013/14/15: Union Gas Limited – leave to construct natural gas pipelines in the Municipality of Chatham-Kent - 17 month approval expiry (despite a planned in-service date within a year of the date of the decision).
- c. EB-2010-0381: Union Gas Limited – leave to construct a natural gas pipeline and ancillary facilities in the City of London and the Municipality of Middlesex Centre, in the County of Middlesex – 17 month approval expiry (in this case the affected municipal roadway was to be widened and there was a potential conflict regarding the road widening/pipeline placement scheduling, though this was not expressly referred to in setting the term for the approval).
- d. EB-2009-0422: Dawn Gateway Pipeline Limited Partnership – leave to construct a natural gas pipeline and ancillary facilities in the Townships of St. Clair and Dawn-Euphemia, all in the county of Lambton - 21 month approval expiry (despite a construction plan for an in-service date within a year).

10. NOVA Chemicals respectfully submits that OEB Staff has implicitly acknowledged this “circumstance specific” approach to determination of an appropriate authorization period for a leave to construct in proposing what NOVA Chemicals understands to be a 20 month authorization period in the circumstances of this case. (Staff has not expressly stated that the authorization period granted to NOVA Chemicals should be 20 months, but Staff has submitted that NOVA Chemicals should be directed to report in June 2017 on any change in its proposed construction start date of June 2017, and could then seek an extension of its leave to construct order, if appropriate. This submission implies a 20 month approval period.)

11. The project specific circumstances which give rise to NOVA Chemicals' request for a 36 month authorization period for leave to construct the Proposed Pipeline are detailed in the Response to OEB Staff Interrogatory 3. In summary, these project specific circumstances are:
- a. The NGL transportation path which culminates with the Proposed Pipeline will include Kinder Morgan Cochin LLC's new Utopia East Project ("UTOPIA"). UTOPIA is a larger and more complex project, which involves the construction of approximately 380 kilometers of new pipeline in Ohio. Construction of UTOPIA is scheduled to commence in November 2016, and full in-service is scheduled for January 2018. UTOPIA is still subject to completion of regulatory and survey activities, and therefore there is a risk of delay.
 - b. To "optimize cash flow" (i.e. commit capital in a timely manner, but not too early so as to unnecessarily tie it up), NOVA Chemicals plans to complete the Proposed Pipeline shortly before UTOPIA is completed.
 - c. All else being equal, construction of the Proposed Pipeline in the late summer/early fall would be optimal from an environmental perspective. (Construction in another seasonal period could entail additional mitigative activities and costs.⁵) Thus NOVA Chemicals is currently planning construction for the summer/fall of 2017 (for completion in November 2017).
 - d. If UTOPIA is significantly delayed, however, allowing a 36 month authorization period for NOVA Chemicals' leave to construct would allow NOVA Chemicals the option of delaying its own construction until the next optimal construction period: summer/fall 2018.
12. NOVA Chemicals' Response to OEB Staff Interrogatory 3 also explained that the leave to construct application was brought now in order to provide NOVA Chemicals and its contractual counterparties with a level of commercial certainty regarding NOVA Chemicals' commitment to the NGL supply and transportation arrangements being contracted for, in support of development of the supply resources and transportation facilities.

⁵ See Exhibit 3, Tab E, paragraph 2 and Exhibit 3, Tab H, Schedule 2, Table 4.5 (pages 70-84).

13. It is submitted that these circumstances justify NOVA Chemicals' request for a 36 month authorization for leave to commence construction of the Proposed Pipeline.
14. It is further submitted that, in the circumstances of the Proposed Pipeline as evidenced, the requested authorization period length should not pose any concerns, and, as noted above, Staff has not identified any rationale for its concern regarding the period requested.
15. In the EB-2011-0040/0041/0042 case (Union's application for, *inter alia*, leave to construct the natural gas distribution system extension to the Township of Ear Falls and the Municipality of Red Lake), Union Gas requested that no construction start date or termination date conditions be specified for either of the two phases of the proposed extension project.
16. The Board's *Decision with Respect to Preliminary Questions and Final Decision and Orders* (July 25, 2011) notes (page 38) a submission by Board Staff that:

...matters such as Leave-to-Construct new facilities should not be left open-ended because facts and circumstances related to construction projects change over time and for this reason, the Board should issue approvals within [sic] a reasonable and certain timing window.

In that case, Staff proposed, and the Board accepted, a 3 year termination date for the second phase of the project.

17. Applying the principle cited by Board Staff in the Union Red Lake case, NOVA Chemicals has proposed a certain timing window for commencement of construction of the Proposed Pipeline: 36 months. Therefore the issue for determination on this application is whether a 36 month authorization period is reasonable in the circumstances of NOVA Chemicals' application.
18. The principle cited by Board Staff in the Union Red Lake case is that "reasonable" is to be considered in light of the risk of implementation of the leave

to construct (i.e. commencement of construction) despite a material change in the “*facts and circumstances related to*” the project.

19. The “*facts and circumstances related to*” the Proposed Pipeline are that the pipeline to be constructed is short (approximately 4 kilometers long), runs entirely within an existing and longstanding NOVA Chemicals right of way, and operationally and commercially affects only a few sophisticated commercial entities: NOVA Chemicals, Plains Midstream Canada ULC, Kinder Morgan Cochin LLC and upstream NGL suppliers to NOVA Chemicals⁶.
20. As acknowledged in Board Staff’s submissions, NOVA Chemicals has stated⁷ that it does not anticipate any changes to the basis of its application or the facts underpinning it within the 36 month period from the date of approval of its application.
21. The one potential exception to this confirmation, as was identified by NOVA Chemicals, is the potential for a material delay in the UTOPIA project.
22. Further, NOVA Chemicals has provided a sound rationale for having the additional 16 months (from the currently scheduled construction start period of June 2017) within which to commence construction of the Proposed Pipeline. That additional flexibility would allow for NOVA Chemicals to retain an environmentally and financially optimal approach to construction of the Proposed Pipeline should the UTOPIA project on which NOVA Chemicals is relying be significantly delayed.
23. The additional 16 months (from the currently scheduled construction start period of June 2017) to allow for the chance of significant delay also accommodates any brief delay in construction start. Any number of circumstances could dictate brief delay in commencement of construction, for example:

- (i) Late spring 2017 weather.

⁶ Exhibit 3, Tab A, paragraph 10.

⁷ Response to OEB Staff Interrogatory 3, part c).

- (ii) Brief delays in the UTOPIA project.
 - (iii) Delays of the commencement or completion of a “plant turnaround” (a planned production outage for maintenance activities) at the Corunna Facility which NOVA Chemicals has planned for the early spring of 2017. Delays in the schedule for this plant turnaround could delay the availability of NOVA Chemicals’ resources to commence construction of the Proposed Pipeline until beyond the June 2017 date that Staff seems to have proposed for expiry of the leave to construct requested.
- 24. Should any of the foregoing circumstances, or any other unforeseen circumstances, result in brief delays to the commencement of construction of the Proposed Pipeline at the last minute, the process required for NOVA Chemicals to advise the Board formally and seek extension of its leave to construct, and for the Board to process that request, could result in the loss of a significant portion of the ideal summer construction period in 2017.

Requested Disposition

- 25. NOVA Chemicals thus requests that the Board grant leave to construct the proposed Project with a 36 month authorization for commencement of construction, as NOVA Chemicals has applied for.
- 26. Should the Board be nonetheless persuaded that a shorter period of authorization would be preferable, NOVA Chemicals requests that the Board set the authorization expiry date no earlier than November 2017, to provide some flexibility to address brief delays in commencement of construction (such as those provided by way of example at paragraph 23, above).
- 27. However, NOVA Chemicals does not agree that a shorter authorization period within which to commence construction is required, in the particular circumstances evidenced in this application, and repeats and reiterates that the 36 month authorization period requested is both reasonable and certain, and

thus appropriate, in the particular circumstances of the Proposed Pipeline as evidenced herein.

28. Finally, NOVA Chemicals does not see any utility in adding an additional Construction Schedule Status Report requirement at the time of expiry of its authorization for leave to construct, as Staff has proposed. If construction is delayed beyond that expiry date and NOVA Chemicals wishes to apply for an extension of its leave to construct, then it will file an application for extension with appropriate supporting information, which information would of necessity include a schedule update.
29. The Board should thus not impose an additional reporting obligation.
30. Finally, while NOVA Chemicals does not understand OEB Staff to be suggesting otherwise, NOVA Chemicals wishes to make clear its understanding that should it require an extension of time within which to commence construction of the Proposed Pipeline, it would be entitled to apply for such an extension without any preceding express authorization of the Board to do so.

ALL OF WHICH IS RESPECTFULLY SUBMITTED by:



GOWLING LAFLEUR HENDERSON LLP, per:

Ian A. Mondrow

Counsel to NOVA Chemicals (Canada) Ltd.

October 9, 2015