

Ms. Christine Long
Registrar & Board Secretary
Ontario Energy Board
P.O. Box 2319, 27th Floor
2300 Yonge Street
Toronto, ON M4P 1E4

October 2, 2020

**Re: EB-2020-0160 Windsor Pipeline Replacement Project ("Project") – Section 101 Application
Pollution Probe Submission**

Dear Ms. Long:

Please find enclosed Pollution Probe's Submission on the above noted proceeding.

Respectfully submitted on behalf of Pollution Probe.



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ONTARIO ENERGY BOARD

Windsor Pipeline Replacement Project – Section 101 Application

POLLUTION PROBE SUBMISSION

October 2, 2020

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Overview and Scope of Proceeding

Enbridge Gas Inc. (Enbridge) applied to the Ontario Energy Board (OEB) on June 10, 2020 under section 101 of the *Ontario Energy Board Act, 1998*, (Act) for special approval to construct 29 km of natural gas pipeline and related facilities, along County Road 46, located in the Towns of Tecumseh and Lakeshore in the County of Essex (Essex County). The proposed pipeline and facilities are part of the Windsor Pipeline Replacement Project that was approved by the OEB in its EB-2019-0172 Decision and Order, dated April 1, 2020.

Enbridge is also requesting an OEB order related to the abandonment of approximately 30 km of NPS 10 pipeline along County Road 46. The Essex County has requested removal of this pipeline in accordance with the Franchise Agreement and Enbridge has requested that the OEB order that the existing end of life pipeline remain abandoned in place within the active road allowance.

Enbridge stated that the application is being filed to resolve a dispute between Enbridge Gas and The Corporation of the County of Essex (Essex County), the road authority for County Road 46. Enbridge stated that it has not been able to reach agreement with Essex County regarding the construction of a 22.9 km segment of pipeline along County Road 46. The contested issues relate to the depth of cover of certain segments of the replacement pipeline and the removal of certain segments of the existing pipeline in lieu of abandonment in place.

This proceeding is not about approval of the pipeline or a refusal of Essex County to provide approval for Enbridge to build the proposed NPS 6 pipeline. This proceeding is purely about the location of the proposed NPS 6 pipeline within the road allowance of County Road 46 and treatment of the end of life NPS 10 pipeline being abandoned. Comparison to other issues, cases or precedents are not applicable.

In its application, Enbridge is requesting OEB approval for the following¹:

- a) an order, pursuant to section 101 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c-15, Schedule B, granting Enbridge Gas authorization to, within the County Road 46 right of way, construct a work upon, under or over a highway, utility line or ditch at a depth of cover of approximately 1 metre and otherwise in accordance with Enbridge Gas's standards and procedure as typically shown in Exhibit B, Tab 1, Schedule 1, Attachment 2; including abandoning the existing pipeline in-place; or
- b) In the alternative to a), an order, pursuant to section 101 of the *Ontario Energy Board Act, 1998*, S.O. 1998, c-15, Schedule B and Condition 4 of the Decision and Order in the Leave to Construct Application, direction and authorization, in whole or in part, to:

¹ EB-2019-0172 Exhibit A, Tab 2, Schedule 1

- i. construct a work upon, under or over a highway, utility line or ditch at a depth of cover of approximately 1.5 metres and otherwise in accordance with CSA Z662 and Enbridge Gas's construction policies and standards; and/or
 - ii. Removal and remediation of approximately 21.8 kms of NPS 10 steel existing steel main.
- c) Such other orders as are necessary for the proper completion of this proceeding.

Pollution Probe differentiates between the proposed new pipeline and the proposed abandonment of the existing pipeline since these are two very different projects and are treated very differently under OEB regulatory requirements, planning requirements and rate treatment. The proposed new 64 km of NPS 6 pipeline was the subject of the EB-2019-0172 Leave to Construct application and ultimate OEB approval on April 1, 2020.

It is important to note that the request by Enbridge in this proceeding and the corresponding requirements of Essex County apply only to work in the municipal road allowance of County Road 46 and not to the portions of the right-of-way within private easements adjacent to County Road 46. Essex County also confirmed that it has no authority to dictate the construction technique outside of the road allowance and the TAC Guidelines for Underground Utility Installations Crossing Highway Rights-of-Way (TAC Guidelines)² would also not apply outside the road allowance.

Connection Between EB-2019-0172 and EB-2020-0160

Pollution Probe recognizes that this proceeding is not meant to open the EB-2019-0172 proceeding on which there was an OEB Decision and Order. In fact, Pollution Probe was not a party to the EB-2019-0172 proceeding and as outlined in its letter of intervention for EB-2020-0160 dated July 8, 2020 and intervention reply letter dated July 22, 2020, Pollution Probe and the interests that it represents have a more significant concern with the issues brought forward in this specific proceeding due to their significant impact, potential rate treatment and ability to set a precedent for the future. Pollution Probe references elements of EB-2019-0172 that are specifically relevant to the request in this proceeding and is in no manner suggesting that the OEB should consider reopening EB-2019-0172 at this time. Pollution Probe also notes that the OEB's threshold for a transmission line determines the requirement to obtain Leave to Construct approval. Enbridge may refer to the proposed NPS 6 pipeline as a

² Exhibit B, Tab 1, Schedule 5, Appendix E.

‘distribution’ line, but under the jurisdiction of the OEB it is actually defined as a ‘transmission’ line.

The OEB’s Decision and Order for EB-2019-0172 dated April 1, 2020 indicates:

Enbridge Gas applied under section 90(1) of the Ontario Energy Board Act, 1998 (Act) for approval to construct a natural gas pipeline and ancillary facilities replacing approximately 64 kilometres of the Windsor pipeline in the Municipality of Chatham-Kent and the Towns of Lakeshore and Tecumseh (the Project). Enbridge Gas also applied under section 97 of the Act for approval of the forms of agreement it will offer to landowners to use their land for routing or construction of the proposed pipeline.

and the Decision Section indicated:

The OEB approves construction of the hybrid option combining the use of NPS 4 and NPS 6 pipeline sizes estimated to cost \$76.1 M, some \$1.3M less than the cost of the completion of the Project using only the NPS 6 pipeline capacity.

The EB-2019-0172 application, Environmental Report, proceeding, review and approvals relate to construction of the new facilities and no Environmental Report or detailed evidence was included in relation to the decommissioning of existing facilities. Rightly so, since Enbridge does not require OEB approval to decommission a pipeline and is free to do so without OEB approvals as long as it follows all relevant codes, standards, permits and complies with the Franchise Agreement. Any request for OEB approvals in relation to decommissioning of facilities is a new request that would require a full assessment of options and costs which were not considered or approved in EB-2019-0172.

Applicability of Section 101 Approval

This is the inaugural request by Enbridge for approvals under Section 101 of the OEB Act³. The decision in this proceeding has the ability to set a precedence for future applications and open the door for additional deviations to Franchise Agreement terms in the future. The significance of this proceeding for all consumers and municipalities in Ontario should not be underestimated.

Section 101 of the *Ontario Energy Board Act, 1998* states,

³ EB-2020-0160 Exhibit I.PP.1(e)

101 (1) The following persons may apply to the Board for authority to construct a work upon, under or over a highway, utility line or ditch:

1. Any person who has leave to construct the work under this Part.
2. Any person who intends to construct the work and who is exempted under section 95 from the requirement to obtain leave.
3. Where the proposed work is the expansion or reinforcement of a transmission or distribution system, any person who is required by the Board, pursuant to a condition of the person's licence, to expand or reinforce the transmission or distribution system.
4. The officers, employees and agents of a person described in paragraph 1, 2 or 3. 2006, c. 33, Sched. X, s. 3.

The new proposed NPS 6 pipeline was the subject of a Leave to Construct proceeding in EB-2019-0172 which aligns with ability to request Section 101 relief. Whether the OEB should issue an order and what the content of that order should include is a focus of this submission.

The proposed abandonment of approximately 30 km of existing NPS 10 pipeline was not the focus of Leave to Construct approval, was not part of the detailed evidence in EB-2019-0172 (including the Environmental Report) and was not specifically included in the OEB Decision and Order for EB-2019-0172 dated April 1, 2020. Enbridge can decommission a pipeline without OEB approval and in fact that is normal procedure for pipeline decommissioning done on a regular basis. Therefore, it is Pollution Probe's understanding that the OEB does not have the authority to issue a Section 101 order pertaining to the proposed abandonment and also that one is not required in any regard in this situation. It is the Franchise Agreement that governs these requirements and Enbridge has not requested relief from or a direct change to the Franchise Agreement in this proceeding.

The request in this application is effectively an exemption request from the terms in the Franchise Agreement. Essex County's rights under the Franchise Agreement are clear and not under dispute.

Reasonableness and Impact of the Requested Approvals

Enbridge indicates that its application is to resolve an impasse with Essex County. Essex County does not object to construction of the proposed NPS 6 pipeline or abandonment of the existing end of life pipeline. Essex County simply is exercising its rights under the Franchise Agreement to ensure that it can effectively operate and maintain County Road 46 now and in the future by including permit conditions. The County of Essex uses the TAC Guideline as a standard practice and it is commonly used by other municipalities.

Enbridge commonly uses its Construction and Maintenance Manual which provide guidance and standard approaches that meet or exceed minimum standards set by CSA Z662. CSA Z662 provides a minimum standard and clearly indicates that its minimum standards are not intended to be used prescriptively and may in fact be insufficient in some circumstances (such as the case for County Road 46). The CSA Z662 Standard indicates⁴:

The requirements in the Standard are considered adequate under conditions normally encountered, and requirements for abnormal or unusual conditions are not necessarily specifically addressed. Although in some instances in the Standard the requirements are necessarily quite prescriptive, the Standard is not a design handbook and the exercise of competent engineering judgment is necessary when using the Standard. The exercise of competent engineering judgment is intended to recognize circumstances in which the essential requirements and minimum standards contained in the Standard may be insufficient.

Essex County outlines specific concerns related to its safe operation and maintenance of County Road 46 which is a major (Class 2) arterial road⁵. Essex County has also confirmed that it intends to widen County Road 46 in the next 5 to 10 years⁶. In consideration of the current and future impacts of the proposed pipeline on the road allowance it appears clear that prescriptive application of the minimum CSA Z662 Standards is not sufficient or appropriate. Enbridge's own Construction and Maintenance Manual meets or exceeds⁷ the minimum CSA Z662 requirements and the conditions by Essex County are in alignment with what is allowed under CSA Z662, Enbridge's Construction and Maintenance Manual and the TAC Guidelines. It is misleading to suggest that compliance with CSA Z662 requires installation at a specific 1.0 meter depth of cover, rather than setting a minimum depth of cover for normal conditions. In Pollution Probe's view a comparison and contrast of CSA Z662 minimum standards (which should not be applied prescriptively in this situation), Enbridge's Construction and Maintenance Manual and the TAC is not particularly useful or relevant to the core issue in this proceeding. It comes down to the authority of Essex County to enforce its permitting rights under the Franchise Agreement.

⁴ Clause 1.4 CSA Z662

⁵ Essex County response to PP IR 5a.

⁶ Essex County response to PP IR 3a

⁷⁷ EB-2020-0136 Exhibit D, Tab 1, Schedule 1, Page 1 of 5

There appear to be only two reasons to reject the conditions required by Essex County, namely:

- It is not possible to abide by the conditions set by Essex County; or
- There was a deficiency in what was requested in the EB-2019-0172 Leave to Construct proceeding and a change is required.

There has been no evidence put forward in this proceeding that indicates that what Essex County has requested is not possible. The only arguments have been about what standards and guidelines should apply and what the incremental cost will be to Enbridge (and potentially Ratepayers if the OEB approves these costs in a future Rates proceeding).

There would have been no need for this proceeding if the EB-2019-0172 evidence had been more comprehensive and included the clearly known risks around securing the required approvals from Essex County. It is important to note that at the time Enbridge filed the EB-2019-0172 LTC application with the OEB, Essex County was still waiting for a response from Enbridge to pipeline alignment issues it had raised⁸. None of these issues were communicated to the OEB prior to its Decision. There have been numerous change requests for EB-2019-0172 which illustrate the gaps in proper planning and information provided to the OEB during the proceeding⁹. It is important to note that all of the other change requests for EB-2019-0172 were done through a notice to the OEB in compliance with the conditions of approval, rather than a Section 101 application. Pollution Probe has flagged these issues in Leave to Construct proceedings and risks associated with a lack of firm confirmation from the Ontario Pipeline Coordination Committee (OPCC) agencies and associated permitting authorities as required by the OEB's Environmental Guidelines for Location, Construction and Operation of Hydrocarbon Pipelines and Facilities in Ontario. Pollution Probe advocates that the OEB update its Environmental Guidelines for Location, Construction and Operation of Hydrocarbon Pipelines and Facilities in Ontario to be more prescriptive and require strict mandatory adherence to reduce future project risks, impacts and costs.

Pollution Probe's position is that there is no basis under Section 101 of the Ontario Energy Board Act for consideration of the requested approvals for the abandonment of the 30 km stretch of NPS 10 pipeline. However, it is important to note that removal of decommissioned pipe rather than abandonment in place is not uncommon for Enbridge. In fact, it has been proposed for a similar project¹⁰ currently before the OEB. Removal of

⁸ Essex County response to PP IR 1d.

⁹ DECISION AND ORDER ON COST AWARDS EB-2019-0172 April 30, 2020 - "The OEB notes that while the time expended is greater than might be expected, it would likely have been reduced by more comprehensive evidentiary disclosure by Enbridge Gas earlier in the proceeding".

¹⁰ EB-2020-0192 Exhibit B, Tab 1, Schedule 1. Page 17 of 20. Paragraph 43.

abandoned pipelines is particularly important in congested rights-of-way to provide valuable room for future infrastructure.

In this proceeding, public interest is best served by minimizing long term costs and impacts related to the proposed pipeline and abandonment of the existing pipeline. In Pollution Probe's view, implementing the conditions proposed by Essex County will be the least cost option for Ratepayers and lowest environmental and socio-economic impact over time. Locating the pipeline closer to the travelled road and using a more shallow depth will more likely result in a relocation in approximately 5 to 10 years, increasing the costs for Ratepayers by more than seven fold compared to complying with the conditions requested by Essex County¹¹.

Recommendations

Pollution Probe recommends the following.

- Decline the request to deviate from the Franchise Agreement permitting process for construction the proposed NPS 6 pipeline (i.e. not overrule Essex County's proposed permitting conditions);
- Decline consideration of the Section 101 Approvals requested related to the proposed NPS 10 pipeline abandonment (i.e. allow the Franchise Agreement permitting and approval for Essex County to remain intact);
- If the OEB considers the abandonment to be within the scope of Section 101, require OEB approvals related to decommissioning of the existing NPS 10 pipeline to requires a full review of those facilities and costs, including related studies and reports (e.g. Environmental Report).
- That the OEB not approve the incremental costs related to construction of the proposed NPS 6 pipeline or removal of the NPS 10 pipeline in this proceeding, requiring justification of these costs if they are sought in a future Rate proceeding.

¹¹ Costs in EB-2019-0172 were approximately \$120.9 million for 64 km which would estimate future costs of approximately \$56.7 million for a 30 km section of relocated pipeline along County Road 46. This compares to an incremental cost of \$7.2 million now, which would result in a net savings of \$49.5 million using simple math.