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**BY EMAIL**

June 30, 2020

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### **NOTICE OF HEARING AND PROCEDURAL ORDER NO. 1**

**Re: Enbridge Gas Inc.  
Windsor Pipeline Replacement Project – Section 101 Application  
Ontario Energy Board File Number: EB-2020-0160**

#### **Application**

Enbridge Gas Inc. (Enbridge Gas) has filed an application with the Ontario Energy Board (OEB) under section 101 of the OEB Act, for 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. The proposed pipeline and facilities are part of the Windsor Pipeline Replacement Project that was approved by the OEB in its Decision and Order<sup>1</sup>, dated April 1, 2020.

Enbridge Gas says 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

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<sup>1</sup> EB-2019-0172 Decision and Order

County Road 46. Enbridge Gas says 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 include the depth of cover of certain segments of the replacement pipeline and removal of certain segments of the existing pipeline in lieu of abandonment in place.

Enbridge Gas alleges that Essex County is withholding approval for construction along County Road 46, unless Enbridge Gas makes significant and costly departures from the requirements of the CSA Z662 code and Enbridge Gas' construction policies and procedures. Enbridge Gas also says that it is filing this application pursuant to condition 4 in the OEB's Decision and Order.

Enbridge Gas is seeking the following relief:

- a. an order pursuant to section 101 of the OEB Act, 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' standards and procedure; including abandoning the existing pipeline in-place; or
- b. in the alternative to a), an order, pursuant to section 101 of the OEB Act and Condition 4 of the Decision in the LTC application, direction and authorization, in whole or in part, to:
  - 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' construction policies and standards; and/or
  - ii. Removal and remediation of approximately 21.8 kms of NPS 10 existing steel main.

The OEB is convening a hearing to consider Enbridge Gas' application and has assigned File No. **EB-2020-0160** to this application. The scope of the hearing will be strictly limited to the issues at dispute in this application. This Notice of Hearing and Procedural Order No. 1 provides for procedural steps in the OEB's review of Enbridge Gas' application. The OEB will make a determination on whether to hold a written or oral hearing at a later date.

To access the Enbridge Gas application and evidence, please select the file number **EB-2020-0160** from the list on the OEB website: [www.oeb.ca/notice](http://www.oeb.ca/notice). You can also phone our Consumer Relations Centre at 1-877-632-2727 with any questions.

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**Service of Notice and Procedural Order No. 1**

This letter serves as notice that the OEB is holding a hearing to consider Enbridge Gas' application.

Enbridge Gas is directed to immediately serve this letter in its exact form and the application on:

- The clerk of Essex County
- The clerk of the Corporation of the Town of Lakeshore (Lakeshore)
- The clerk of the Corporation of the Town of Tecumseh (Tecumseh)
- Technical Standards and Safety Authority (TSSA)
- All intervenors of record in the leave to construct application for the Windsor Pipeline Replacement Project, EB-2019-0172.

Enbridge Gas is further directed:

To complete service by July 7, 2020 and to file with the OEB an affidavit confirming service, immediately thereafter.

To post this notice and procedural order and the application on a prominent place on its website and to make copies available at its offices in Chatham and Toronto.

**Requests for intervenor status and cost eligibility**

Any party that wishes to participate as an intervenor in this proceeding should apply for intervenor status by **July 17, 2020**. For information on how to apply for intervenor status, please refer to the *OEB's Rules of Practice and Procedure* and the *OEB's Practice Direction on Cost Awards*.

Further, the OEB will determine at a later date whether to proceed by way of a written or oral hearing. If you think an oral hearing is needed, you can write to the OEB to explain why by **July 17, 2020**.

**Request for intervenor status and cost eligibility by Essex County**

On June 18, 2020 the OEB received a letter from Essex County requesting intervenor status and cost eligibility.

Essex County states that as the owner and road authority responsible for County Road 46, it has an interest in land that is affected by the application and notes that its participation is necessary and will help the OEB obtain a better understanding of the key matters at issue. Essex County states that it has and will incur significant legal and engineering fees and costs associated with its participation and is therefore requesting compensation for its costs.

Essex County is approved as an intervenor. However, the OEB denies Essex County's request for costs.

Section 3.05 (i) of the *Practice Direction on Cost Awards* (Practice Direction) sets out that a municipality in Ontario is not eligible for a cost award. The OEB has noted previously that municipalities have been specifically excluded from eligibility for costs because they have access to a revenue stream from their own constituent taxpayers to whom they are responsible and should therefore not be funded by ratepayers, and also because, in some circumstances, the municipalities are owners of regulated distributors who are ineligible for costs.<sup>2</sup>

Section 3.07 of the Practice Direction permits the OEB to make exceptions to classes excluded from cost awards in special circumstances. The OEB does not find that the case put forward by Essex County constitutes unique or special circumstances. The OEB has therefore determined that Essex County will not be eligible for costs in respect of its interest in this application.

The OEB is making provision for the following procedural steps in the order below. The OEB may issue further procedural orders from time to time.

**IT IS THEREFORE ORDERED THAT:**

1. Enbridge Gas shall serve this notice and procedural order and the application on Essex County, Lakeshore, Tecumseh, all parties in the original leave to construct proceeding and on the Technical Standards and Safety Authority.
2. Any evidence of Essex County relevant to this proceeding shall be filed with the OEB and served on all parties by **July 24, 2020**.
3. If intervenors or OEB staff seek information from Enbridge Gas that is in addition to the evidence filed with the OEB and that is relevant to the hearing, they shall request the information by means of written interrogatories filed with the OEB and delivered to all parties by **July 31, 2020**. All interrogatories and responses must include a specific reference to the evidence on which the interrogatory is based.
4. If Enbridge Gas, intervenors or OEB staff seek information from Essex County that is in addition to the evidence filed with the OEB and that is relevant to the hearing, they shall request the information by means of written interrogatories filed with the OEB and delivered to all parties by **August 7, 2020**. All interrogatories and

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<sup>2</sup> EB-2014-0002 Procedural Order No. 1

responses must include a specific reference to the evidence on which the interrogatory is based.

5. Enbridge Gas shall file with the OEB complete written responses to all interrogatories and serve them on all parties by **August 14, 2020**.
6. Essex County shall file with the OEB complete written responses to all interrogatories and serve them on all parties by **August 21, 2020**.

All materials filed with the OEB must quote the file number, **EB-2020-0160**, and be submitted in a searchable / unrestricted PDF format with a digital signature through the OEB's web portal at <https://pes.ontarioenergyboard.ca/eservice>. Filings must clearly state the sender's name, postal address, telephone number, fax number and e-mail address. Parties must use the document naming conventions and document submission standards outlined in the RESS Document Guidelines found at <http://www.oeb.ca/OEB/Industry>. If the web portal is not available, parties may email their documents to [boardsec@oeb.ca](mailto:boardsec@oeb.ca).

All communications should be directed to the attention of the Board Secretary at the address below, and be received no later than 4:45 p.m. on the required date.

With respect to distribution lists for all electronic correspondence and materials related to this proceeding, parties must include the Case Manager, Judith Fernandes at [Judith.Fernandes@oeb.ca](mailto:Judith.Fernandes@oeb.ca) and OEB Counsel, Michael Millar at [Michael.Millar@oeb.ca](mailto:Michael.Millar@oeb.ca).

## **ADDRESS**

Ontario Energy Board  
P.O. Box 2319  
2300 Yonge Street, 27th Floor  
Toronto ON M4P 1E4  
Attention: Registrar

Email: [boardsec@oeb.ca](mailto:boardsec@oeb.ca)  
Tel: 1-888-632-6273 (Toll free)  
Fax: 416-440-7656

**DATED** at Toronto, June 30, 2020

**ONTARIO ENERGY BOARD**

**By delegation, before: Christine E. Long**

*Original signed by*

Christine E. Long  
Registrar and Board Secretary

cc: Guri Pannu, Counsel for Enbridge Gas  
[guri.pannu@enbridge.com](mailto:guri.pannu@enbridge.com)

Scott Stoll, Counsel for Enbridge Gas  
[sstoll@airdberlis.com](mailto:ssoll@airdberlis.com)

David M. Sundin, Counsel for the County of Essex  
[dsundin@mctaguelaw.com](mailto:dsundin@mctaguelaw.com)

## ONTARIO ENERGY BOARD

**IN THE MATTER OF** the *Ontario Energy Board Act, 1998*,  
S.O. 1998, c. 15 (Schedule B);

**AND IN THE MATTER OF** an application by Enbridge Gas Inc. pursuant to Condition 4 from the Ontario Energy Board's Decision and Order, and Section 101 of the *Ontario Energy Board Act, 1998* for authority to construct a work upon, under or over a highway, utility line or ditch in the County of Essex for the purposes of a natural gas pipeline in respect of which the Ontario Energy Board granted leave to construct in EB-2019-0172 to Enbridge Gas Inc.;

### APPLICATION FOR AUTHORITY TO CONSTRUCT

1. The Applicant, Enbridge Gas Inc. ("**Enbridge Gas**" or the "**Company**"), is an Ontario corporation with its head office in the City of Toronto. It carries on the business of selling, distributing, transmitting and storing natural gas within Ontario.
2. This Application is to resolve a dispute between Enbridge Gas and The Corporation of the County of Essex ("**Essex County**"), the road authority for County Road 46, where Essex County is withholding approval for construction unless Enbridge Gas makes significant and costly departures from the requirements of the CSA Z662 code and Enbridge Gas's construction policies and procedures.

## Background

3. Enbridge Gas applied to the Ontario Energy Board (the “**Board**”) under sections 90 and 97 of the *Ontario Energy Board Act, 1998* (the “**Act**”) to install approximately 61.6 kms of NPS 6 inch high pressure steel natural gas pipeline known as the Windsor Line. The application for Leave to Construct (“LTC”) the pipeline was heard by the Board under docket number EB-2019-0172. On April 1, 2020 the Board issued a decision and order granting Leave to Construct for the Project subject to the Conditions of Approval. A map showing the location of the Pipeline along County Road 46 is provided at Exhibit B, Tab 1, Schedule 1, Attachment 1.
4. This project is intended to address a pipeline safety and integrity matter. As noted in the LTC application, the existing pipeline is between 50 to 70 years old which is the principal reason the pipeline is being replaced. As such, Enbridge Gas seeks to have the new Pipeline installed as soon as practicable and does not want any additional delays to the in-service date.
5. Enbridge Gas has commenced construction of the Pipeline where it has received the necessary municipal or environmental approvals. This start of construction was consistent with the LTC Application and Enbridge Gas is still seeking for the Project to be in service by early December 2020.
6. This Application will confirm to the Board that Enbridge Gas will install the NPS 6 steel for the entire length of the pipeline.

7. Paragraph 4 of the Conditions of Approval of the OEB order states the following:

4. Enbridge Gas shall advise the OEB of any proposed change in the project, including but not limited to changes in: OEB-approved construction or restoration procedures, the proposed route, construction schedule and cost, the necessary environmental assessments and approvals, and all other approvals, permits, licenses, certificates and rights required to construct the proposed facilities. Except in an emergency, Enbridge Gas shall not make any such change without prior notice to and written approval of the OEB. In the event of an emergency, the OEB shall be informed immediately after the fact.

8. Section 101 of the Act provides:

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.

(2) The procedure set out in subsections 99 (1) to (4) applies with necessary modifications to an application under this section. 1998, c. 15, Sched. B, s. 101 (2).

(3) Without any other leave and despite any other Act, if after the hearing the Board is of the opinion that the construction of the work upon, under or over a highway, utility line or ditch is in the public interest, it may make an order authorizing the construction upon such conditions as it considers appropriate.

9. Typically, when Enbridge Gas seeks to install distribution mains within any municipality, including Essex County, it would apply to the applicable road authority for consent to install the project. Essentially, this consent is to approve the location for the installation of a pipeline to avoid conflicts with current and future infrastructure. These consents are usually not controversial as the applicable municipality and Enbridge Gas have been engaged in discussions to find a suitable location for several months.

10. These consents are required under the terms of the 1957 Franchise Agreement (see Exhibit B, Tab 1, Schedule 3, Appendix A) which provides Essex County staff with approval of the location of the pipeline to prevent conflicts and interference with the safe operation of the highway.
  
11. Enbridge Gas has been in discussion with Essex County for several months prior to filing the LTC Application. While Enbridge Gas and Essex County have agreed upon a number of matters, including the running line of the pipeline, Essex County has insisted on several unusual requirements:
  - a. Execution of a Road User Agreement (see Exhibit B, Tab 1, Schedule 7) in a form approved by Essex County;
  - b. A minimum depth of cover of 1.5 metres over an approximately 22.9 kms length of the project within 6 metres of the travelled portion of County Road 46; and
  - c. Removal of the to be abandoned existing NPS 10 steel main.
  
12. Enbridge Gas has made adjustments to its location in order to avoid planned or future conflict with County road projects. For example, Enbridge Gas has agreed to locate approximately 6.3 kms of NPS 6 steel main much closer to the edge of the right-of-way in order to avoid a future road widening that is planned to occur between 5 and 10 years into the future. While this new alignment will increase construction costs it will also reduce or eliminate conflict with the future road work.
  
13. For the remaining 22.9 kms of the Pipeline along County Road 46, which is to be installed less than 6.0 metres from the edge of the traveled portion of the roadway, Essex County has insisted on a depth of cover of 1.5 metres. The

County has not demonstrated a safety reason or future conflict with a road project supporting the increase in the depth of cover.

14. Essex County has also demanded that Enbridge Gas remove approximately 21.8 kms of NPS 10 Steel main from the right-of-way rather than permitting it to be abandoned in-place.
15. The changes demanded by Essex County will increase capital construction costs by more than \$13 million, increase operational costs and fail to provide meaningful enhancement to the safety of the line, people or property. Further, the additional depth creates additional construction risks and challenges for working around existing Town of Lakeshore watermains.
16. These costs would be in addition to the cost estimates provided in the LTC Application. If ordered to incur these costs, Enbridge Gas will seek recovery through rates.
17. Enbridge Gas cannot agree to these demands of Essex County which would constitute a “change” within the meaning of Condition 4 of the Decision and Order that requires prior Board approval before it can be implemented. Further, Enbridge Gas is unable to agree the demands are reasonable in the circumstances.
18. Essex County has premised their position regarding the depth of cover upon the transmission line provisions of the CSA Z662 code rather than the distribution provisions and upon a misinterpretation and application of the Transportation Association of Canada’s *Underground Utility Installations Crossing Highway*

*Rights-of-Way* (the "**TAC Manual**"), a copy of which is provided at Exhibit B, Tab 1, Schedule 5, Appendix E.

19. Despite the TAC Manual only suggesting a depth of cover of 1.5 metres beneath the traveled portion of the road way, Essex County has insisted on that depth of cover anywhere within 6 metres of the travelled edge of the road way.
20. Enbridge Gas has repeatedly explained the applicable CSA Z662 provisions and even took the unusual step of providing a certified engineering report from Enbridge as well as an independent third party engineering assessment of the loading demonstrating the appropriateness of the installation (Exhibit B, Tab 1, Schedule 5, Appendix A).
21. Essex County has provided no technical information that demonstrates Enbridge Gas's proposed installation is unsafe or otherwise deficient. Despite this additional information from Enbridge Gas, and no information to the contrary, Essex County has not altered its demands.
22. Essex County chose not to participate in the LTC Application even though it was aware its position on the depth of cover would not meeting the following circumstances:
  - a. were not required to meet the CSA Z662;
  - b. were not required to ensure the safety of persons or property;
  - c. were not consistent with the purpose and intent of the existing 1957 Franchise Agreement (Exhibit B, Tab 1, Schedule 3, Appendix A); and
  - d. That Enbridge Gas would not readily agree to such demands.

23. Enbridge Gas notes that the additional depth of cover required without justification and evidence in relation safety, the property and future road widening conflicts may result in an increase in costs of constructing pipeline energy infrastructure projects in the future.
24. Enbridge Gas requests this proceeding be conducted expeditiously such that a decision is issued at the earliest opportunity and in any event prior to August 15, 2020 in order to avoid additional construction, demobilization and mobilization charges. Enbridge Gas will participate in written and/or oral proceedings, including, if ordered, virtual technical or settlement conferences to ensure an expeditious decision following a proper review and consideration of the matters herein.
25. The persons impacted by this Application are the Corporation of the County of Essex and the Corporation of the Town of Lakeshore. This Application and Pre-filed Evidence will be served upon the Corporation of the County of Essex, Corporation of the Town of Lakeshore and the parties in the Leave to Construct Application at the time it is being filed with the Board. Enbridge Gas will file an affidavit detailing service shortly.

**Relief Requested:**

26. Enbridge Gas requests the Board issue a decision with:
- 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:
  - 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.

27. Enbridge Gas requests that copies of all documents filed with the Board in connection with this proceeding be served on it and on its counsel, as follows:

The Applicant:	Mark Kitchen Director, Regulatory Affairs Enbridge Gas Inc.
Address for personal service: Mailing Address:	500 Consumers Road Toronto, ON M2J 1P8 P. O. Box 650 Scarborough, ON M1K 5E3
Telephone:	(416) 495-5499
E-Mail:	EGIRegulatoryProceedings@enbridge.com

And to: Guri Pannu  
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Enbridge Gas Inc.

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The Applicant's counsel: Scott Stoll  
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DATED June 12, 2020, at Toronto, Ontario.

ENBRIDGE GAS INC.  
By its counsel

AIRD & BERLIS LLP

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Scott Stoll