



LETTER DECISION

File OF-Fac-Oil-E101-2018-01 01
12 July 2019

Mr. Adam Oswell
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Dear Mr. Oswell:

Enbridge Pipelines Inc. (Enbridge)
Application for the Line 5 St. Clair River Replacement (Project)
Hearing Order MHW-004-2019
Letter Decision – Order XO-E101-007-2019 and OrderMO-026-2019

Based on the evidence on the National Energy Board (NEB or Board) record for this matter, and for the reasons outlined below, the Board has determined that it is in the public interest to approve Enbridge's application to construct and operate the Project, pursuant to section 58 of the *National Energy Board Act* (NEB Act). The Board has also decided to approve the decommissioning of the existing segment of the Line 5 pipeline, pursuant to section 45.1 of the *National Energy Board Onshore Pipeline Regulations* (OPR).

Copies of Orders XO-E101-007-2019 and MO-026-2019, which together outline the specifics of the Project as approved, are attached.

1.0 Project Overview and the NEB Process

1.1 Application and Project Overview

On 20 July 2018, the Board received an application from Enbridge (Application) to replace the existing St. Clair River crossing of its Line 5 pipeline. The Project consists of installing approximately 0.5 kilometres (km) of new NPS 30 outside diameter pipeline and

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decommissioning in place the existing crossing pipe. The Project is located at the St. Clair River crossing of Enbridge's Line 5 pipeline near Sarnia, Ontario. The total land required for Project construction would be 3.84 hectares (ha), which would include 1.35 ha of temporary workspace (TWS) located on privately owned industrial lands and Crown lands (for example creek beds and roads), including 0.026 ha of Aamjiwnaang First Nation (Aamjiwnaang) Sarnia Reserve No. 45 Lands.

Enbridge applied to construct, operate and maintain the Project pursuant to section 58 of the NEB Act and requested exemptions from subsection 30(1) and sections 31, 33, and 47 of the NEB Act. Enbridge further included an application pursuant to section 45.1 of the OPR to decommission the existing crossing following the replacement going into service. Enbridge requested that the Board issue its decision on both components of the Project by 15 July 2019 to enable the timely implementation of mitigation measures that will help ensure reduced impact to wildlife.

1.2 The NEB Process

On 24 August 2018, the Board issued notification letters to Indigenous peoples¹ potentially affected by the Project: Aamjiwnaang, Bkejwanong Walpole Island First Nation (WIFN), Chippewas of Kettle and Stony Point First Nation (KSPFN), and Métis Nation of Ontario (MNO). The letter sought concerns about the Project and any comments with respect to potential impacts of the Project, including potential measures to address any impacts.

On 14 September 2018, the Board determined that the Application was complete. However, in response to a letter of comment received from Aamjiwnaang on 24 September 2018, the Board established a comment process on 11 October 2018. The Board received submissions from Aamjiwnaang and Enbridge, and determined that a streamlined hearing process would strike the best balance between efficiency and fairness. On 30 January 2019, the Board issued Hearing Order MHW-004-2019 (Hearing Order), thereby extending the time limit for the Board to issue a decision from 300 days to 15 months from the date that the Board determined the Application to be complete. The Hearing Order set out the remaining process steps for the Board's review of the Application.

The Board recognized Aamjiwnaang as an intervenor in the hearing process, and also allowed interested persons to apply to participate. The Board received five applications to participate. The Board granted Intervenor standing to the Alberta Department of Energy; Imperial Oil Limited; Ontario Ministry of Energy, Northern Development and Mines; and Sarnia Lambton Industrial Alliance. The Board granted Commenter status to the United Association of Journeymen and Apprentices of the Plumbing and Pipe Fitting Industry of the United States and Canada, U.A. Local 663 (Local 663).

Independent of the Board's adjudicative hearing process, the Board's Participant Funding Program announced \$40,000 to assist groups and \$6,000 to assist individuals with their

¹ "Indigenous" or "Indigenous peoples" has the meaning assigned by the definition *aboriginal peoples of Canada* in subsection 35(2) of the *Constitution Act, 1982*.

participation in the hearing for the Project. Aamjiwnaang was the only group to request funding and was awarded \$40,000.

The Board issued a number of procedural updates with additional process details. The Board proposed holding an Oral Traditional Evidence session in Sarnia, Ontario in March 2019. Aamjiwnaang submitted a letter on 5 March 2019 stating that it would not be making representations at the oral hearing, but would provide the Board with written submissions. Since Aamjiwnaang was the only Indigenous Intervenor, the Board proceeded with a fully written hearing process, which included the opportunity to provide written submissions and comment on draft conditions.

2.0 Assessment of the Application

2.1 Indigenous Matters

2.1.1 Enbridge's Consultation with Indigenous Peoples

Enbridge stated that the design of its Indigenous engagement program was based on adherence to regulatory guidelines and Enbridge's Indigenous Peoples Policy and principles.

Enbridge stated that the primary criteria it used to determine which Indigenous groups to engage included: location of the Project; proximity of Indigenous groups to the Project area; Enbridge's knowledge of the Indigenous groups in the area; adherence to the NEB Filing Manual; Indigenous groups and organizations in Southern Ontario who have identified an interest based on traditional territory, traditional lands or traditional land uses; existing relationships developed from previous projects; and the NEB's Traditional Territory Analysis.

Enbridge stated that its engagement with potentially affected Indigenous communities began on 30 November 2017, with Project notification packages being provided to Indigenous communities initially identified by Enbridge: specifically, Aamjiwnaang and WIFN. On 29 June 2018, Enbridge similarly provided Project notification packages to the additional Indigenous communities identified by the NEB's Traditional Territory Analysis: KSPFN and MNO.

In addition to Project mail-outs, Enbridge stated that its engagement activities also included calls and emails, in-person meetings and presentations. In particular, Enbridge met in-person with the representatives from Aamjiwnaang, WIFN, and KSPFN. Enbridge provided summaries of the concerns and issues raised by these communities and Enbridge's responses. Enbridge also stated that MNO had confirmed that it does not assert rights in the Project area. Enbridge indicated that it will continue to consult with Aamjiwnaang, WIFN, KSPFN and MNO throughout the lifecycle of the Project.

2.1.2 Participation of Indigenous Communities in the Board's Hearing Process

The Board's hearing process was designed to obtain as much relevant evidence as possible on Indigenous concerns regarding the Project, including the potential impacts on Indigenous interests, as well as possible mitigation measures to minimize adverse impacts on Indigenous

interests. The Board was provided with and considered information about concerns related to the Project, and the measures that would be required to address those concerns, as brought forward through consultation undertaken by Enbridge and through the participation of potentially affected Indigenous communities.

Indigenous communities concerned with potential Project-related impacts on their interests, including rights, had opportunities to present their views directly to the Board through preliminary comments following early notification, as well as through the hearing process outlined in the Hearing Order and related procedural updates. While the Board required Enbridge to implement a consultation program and undertake an assessment of the Project's potential effects, including its environmental and socio-economic effects, the Board also took steps to facilitate the direct participation of these communities in its assessment process as outlined in Section 1.2 of this letter decision.

The Board granted Aamjiwnaang pre-decided standing in the Hearing Order and recognized them as an Intervenor. No other Indigenous groups applied to participate in the Board's hearing. Aamjiwnaang provided its views directly to the Board in several ways, including its response to the Board's notification letter, comments on process, submitting written evidence, and providing comments on draft conditions.

Project-specific concerns raised by Aamjiwnaang included the following:

- Adequacy of the Board's process
- Traditional land use
- Adequacy of Crown consultation
- Human health
- Fish and fish habitat
- Water quality and spills
- Cumulative environmental effects.

Concerns regarding adequacy of the Board's process, traditional land use, and adequacy of crown consultation are addressed in Sections 2.1.3, 2.1.4, and 2.1.5 respectively. Concerns regarding Project effects on human health, fish and fish habitat, water quality and spills, and cumulative environmental effects are addressed in Sections 2.3.1, 2.3.2, 2.3.3, and 2.3.4 of this letter decision respectively.

2.1.3 Adequacy of Board Process

Aamjiwnaang raised various concerns regarding the Board's review process. Aamjiwnaang urged representatives from the Board to visit their community. Aamjiwnaang stated that they lack the resources and capacity to meaningfully participate. Aamjiwnaang submitted that the prescribed timelines for this application were impractical and unrealistic, and were not sufficient to allow for a full review of project descriptions, environmental impact statements and technical reports by intervenors and their consultants.

Aamjiwnaang requested an order from the Board stating that they have not been meaningfully consulted on the Project, and dismissing the application. In the alternative, if the Board does not dismiss the Project application, Aamjiwnaang requested:

- that the Board extend the date for closing the record on this application to at least 4 December 2019, with a final decision to follow no later than 14 December 2019 to provide Aamjiwnaang with the maximum amount of time possible to meaningfully respond to the application;
- that the Board issue a further procedural order providing Aamjiwnaang with additional opportunities to make submissions to the Board, including submission on expert environmental assessment(s) with respect to the proposed Project; and
- that the Board and the Crown conduct meaningful consultation with Aamjiwnaang within the community before making any determination with respect to the application, including but not necessarily limited to:
 - hosting community workshops;
 - the provision of capacity funding to explain the construction, risks and other considerations associated with the proposed Project; and
 - the provision of capacity funding for Aamjiwnaang to conduct third party review(s) of the reports put forward by Enbridge and to commission its own reports with respect to the proposed Project.

Enbridge replied that the Board's process has been thorough and accessible so that Indigenous concerns could be made known to the Board and addressed as appropriate. Enbridge noted that Aamjiwnaang has been an active participant in the Board's process.

Enbridge also noted that it had offered capacity funding to Aamjiwnaang based upon a work scope and budget that were collaboratively developed between Enbridge and Aamjiwnaang during a meeting on 8 May 2018. This ultimately resulted in the parties executing a Line 5 capacity funding agreement on 31 March 2019.

Views of the Board

As part of the Board's assessment process for facilities applications, the applicant is required to make all reasonable efforts to consult with potentially affected Indigenous communities and to provide information about those consultations to the Board. This includes information on the nature of the interests potentially affected, the concerns that were raised and the manner and degree to which those concerns have been addressed.

In assessing the consultation undertaken by Enbridge with Indigenous communities for the Project, the Board evaluated the design and implementation of Enbridge's consultation activities with regard to the nature and magnitude of the Project's potential impacts upon the rights and interests of Indigenous communities. The Board considered Enbridge's activities to engage Indigenous communities and to learn about their concerns and interests, as well as the concerns and views expressed by Indigenous communities. The Board also considered how Indigenous communities responded to opportunities for consultation and how Enbridge sought to understand and address the concerns of potentially affected Indigenous communities. For example, these interactions included the participation of Aamjiwnaang's Species at Risk representative in environmental surveys and archaeological assessments, and Enbridge's commitments regarding the replacement of trees removed as a result of the Project.

The Board notes the consultation activities undertaken by Enbridge for the Project, including mail-outs, phone calls, emails, and in-person meetings. The Board notes Enbridge's stated commitment to continue consultation with Aamjiwnaang, WIFN, KSPFN and MNO throughout the lifecycle of the Project, and Enbridge's assertion that it will meaningfully consider and address information and concerns brought forward in the future. Given the importance of ongoing consultation activities with Indigenous communities, the Board imposes **Condition 5, Consultation with Indigenous Communities**.

Based on all of the relevant information before it, the Board finds that Enbridge designed and implemented consultation activities that are appropriate for the size, scope and scale of the applied-for Project.

In addition to Enbridge's consultation activities, potentially affected Indigenous communities had the opportunity to present their views directly to the Board in its hearing process. In response to comments received from Aamjiwnaang and Enbridge, the Board established a public and transparent hearing process so that all parties could be aware of the evidence that the Board would consider in reaching its decision on the Project. In particular, Aamjiwnaang had the opportunity to:

- respond to the Board's notification letter;
- provide process comments;
- provide oral traditional evidence, which it declined;
- provide written evidence; and
- comment on draft conditions.

In response to a request from Aamjiwnaang, the Board also modified the hearing schedule to require Enbridge to file its comments on draft conditions in advance of Intervenor comments on draft conditions, extending the close of record from 3 May to 15 May 2019.

With respect to Aamjiwnaang's concerns regarding its resources and capacity to meaningfully participate, Aamjiwnaang did receive funding from the Board's Participant Funding Program to facilitate their participation in the Board's hearing.

The Board designs hearing processes individually and independently based on the specific circumstances of each application. The Board notes that the 15 month time limit represents the maximum time in which the Board will complete its assessment. Subsection 11(4) of the NEB Act requires all applications and proceedings before the Board to be dealt with as expeditiously as the circumstances and considerations of fairness permit. Fairness requires that "those whose interests were affected had a meaningful opportunity to present their case fully and fairly."²

It is the Board's view that the assessment process followed for this Project meets the procedural fairness requirements for notice, an opportunity to know the case to be met,

² *Administrative Law in Canada*, 5th ed, 2011, pages 12 and 13. Blake refers to the Supreme Court decision *Baker v. Canada (Minister of Citizenship and Immigration)*, [1999] SCJ No. 39.

and to be heard. The Board adopted the processes described above so that its decisions with respect to the Application were consistent with section 35 of the *Constitution Act, 1982* and with the requirements of procedural fairness. The Board is of the view that the hearing process was appropriate, given the scope of the Project, the nature of the concerns raised, the importance of constitutionally protected Indigenous rights and the Board's obligation to make a decision as to whether the Project is in the Canadian public interest.

The scope and scale of the Project involves the replacement of an approximately 0.5 km existing pipeline crossing. Aamjiwnaang had six and a half months from the Board's completeness determination and two months from the issuance of the Hearing Order to prepare their written evidence. The Board is of the view that considering all the circumstances, those whose interests were affected, including Aamjiwnaang, had a meaningful opportunity to present their case fully and fairly. Accordingly, the Board denies Aamjiwnaang's request to extend the date for closing the record on this application to 4 December 2019 and add further opportunities for Aamjiwnaang to make submissions to the Board. Aamjiwnaang's requests in relation to Crown consultation are addressed below.

2.1.4 Traditional Land Use

Aamjiwnaang stated that the current state of the environment in and around them impedes the community's ability to participate in hunting, fishing, medicine gathering and ceremonial activities. Aamjiwnaang also stated that its Traditional Land Use (TLU) study, which includes the area in which Enbridge intends to carry out its Project, is currently being reviewed by community members and has not yet been submitted to Chief and Council. Once the TLU study has been approved by Chief and Council, Aamjiwnaang indicated that it will communicate any potential concerns to Enbridge. Aamjiwnaang requested that the Board delay its decision to issue an Order for the Project or dismiss the Application until the TLU study has been approved by Chief and Council and any outstanding TLU investigations relevant to the Project have been properly reviewed and considered by Enbridge and reported to the Board. Aamjiwnaang requested that the Board extend the date for closing the hearing record to at least 4 December 2019 to allow it sufficient time to finalize its TLU.

Enbridge replied that it has been engaging with Aamjiwnaang on the Project since November 2017 and that the TLU study was initiated in 2014. During Project engagement activities, Enbridge asked both the Aamjiwnaang Environment Supervisor and Aamjiwnaang's Chief and Council to provide it with information regarding traditional land use practices on or near the Project footprint, so Enbridge could mitigate any Project-related impacts on these activities. Enbridge understands that the TLU study is substantially complete and includes information about TLU activities relative to the Project footprint, but has not yet been approved by Chief and Council. In Enbridge's view, the TLU study does not need to be approved in order for Aamjiwnaang to share any information relevant to the Project with Enbridge so it can review and consider this information and incorporate mitigation measures in its Environmental Protection Plan (EPP) for the Project. Enbridge advised Aamjiwnaang that it would be willing to

enter into confidentiality agreements regarding any TLU information that Aamjiwnaang shares with Enbridge.

Enbridge submitted that any potential Project-related impacts on rights are short-term in duration, limited to Project construction and decommissioning activities, and will be appropriately mitigated in accordance with its EPP for the Project and the Board's conditions. Enbridge stated that it will continue to consult with Aamjiwnaang regarding TLU activities and any other Project-related concerns, so it can better understand Aamjiwnaang's concerns and address them by incorporating mitigation measures, as appropriate, in its Project EPP prior to commencing construction.

Views of the Board

The Board notes that the Project footprint is relatively small, involving approximately 4.73 ha of permanent easements (including 0.026 ha of Aamjiwnaang Reserve Lands) and 3.15 ha of temporary workspace. Furthermore, the replacement pipeline will be installed within the existing Line 5 pipeline easement. Construction activities requiring ground disturbance will be conducted primarily on Enbridge-owned, previously disturbed land surrounded by residential lands.

The Board is of the view that Enbridge has made reasonable opportunities available to Aamjiwnaang and other affected Indigenous communities to identify any concerns regarding Project impacts to traditional land and resource use. The Board notes that Aamjiwnaang has only expressed general concerns about TLU and has not identified specific sites, resources or activities within the Project footprint that would require specific mitigation beyond what Enbridge is already proposing in its EPPs. The Board expects that Enbridge will effectively implement mitigation measures proposed in its EPP to reduce any potential Project impacts on traditional land use. Given the above, the Board is of the view that the potential adverse effects of the Project on the current use of lands and resources for traditional purposes by Indigenous communities are not likely to be significant.

The Board denies Aamjiwnaang's request to delay its decision to issue an order for the Project or dismiss the Application until the TLU study has been approved by Chief and Council. The Board notes Enbridge's commitment to work with Indigenous communities to address any further concerns that may arise. In addition to **Condition 5, Consultation with Indigenous Communities**, the Board is also imposing **Condition 7**, which requires Enbridge to file, for approval, a report on any **Outstanding Traditional Land Use Investigations** relevant to the Project. This condition requires a description of outstanding concerns regarding Project effects on TLU, but it also requires Enbridge to provide an explanation regarding any outstanding TLU investigations or follow-up activities that will not be completed prior to commencing construction. The Board does not intend this condition to require all TLU investigations relevant to the Project to be complete and finalized prior to its decision.

2.1.5 Adequacy of Crown Consultation

Aamjiwnaang stated its concern with the Board's assertion that it is the final decision-maker for this Project. Aamjiwnaang also stated that the Board's review process was not in keeping with the Honour of the Crown, article 19 of the United Nations Declaration on the Rights of Indigenous Peoples, and the expert panel's National Energy Board Modernization Report.

Aamjiwnaang stated that the Project has the potential to cause adverse impacts on Aamjiwnaang's Aboriginal and Treaty rights and that, as a result, the Crown has a constitutional obligation to consult Aamjiwnaang with respect to the Project. Aamjiwnaang submitted that it continues to hold unextinguished Aboriginal Title to the St. Clair River, including the river bed and surrounding watershed. Aamjiwnaang stated that the Crown has not been involved with the Application in any way. Aamjiwnaang submitted that they have not received any kind of notice from the Crown that it intends to rely on the NEB's processes to fulfill its duty to consult, nor has Aamjiwnaang been consulted, directly by the Crown or otherwise with respect to the potential effects of the proposed Project on Aamjiwnaang's Aboriginal, Title and Treaty rights. Aamjiwnaang also stated that even if the Crown intends to rely on the NEB's process to fulfill its duty to consult, the Board has not engaged in meaningful consultation with Aamjiwnaang.

Enbridge replied that the Board, as the final decision-maker for the Project, has the jurisdiction to fulfill the Crown's duty to consult and to assess whether consultation has been adequate. Enbridge pointed out that Natural Resources Canada (NRCan) issued a letter dated 25 March 2019 to advise that the federal Crown would, to the extent possible, rely on the NEB process to fulfill its duty to consult regarding the Project. This letter was provided to Aamjiwnaang, WIFN, KSPFN and MNO by both Enbridge and the Board in April. Enbridge submitted that consultation has consisted of both the engagement efforts undertaken by Enbridge and the Board's process.

Views of the Board

In *Clyde River (Hamlet) v Petroleum Geo-Services Inc.*³ and *Chippewas of the Thames First Nation v Enbridge Pipelines Inc.*,⁴ the Supreme Court of Canada acknowledged that the Board has the procedural powers to implement consultation and the remedial powers to impose and enforce accommodation measures as well as the requisite technical expertise. The Supreme Court of Canada also acknowledged the Crown's ability to rely on the Board's regulatory assessment process to fulfill its duty to consult. Under the NEB Act and case law, it is clear that the Board is the final decision-maker in relation to this Project.

The Board informed Aamjiwnaang, WIFN, KSPFN and MNO of NRCan's 25 March 2019 letter and placed it on the record for this hearing. The letter clarified the federal Crown's approach to fulfilling any potential duty to consult that may arise on projects regulated by the Board, including those for which the Board is the final decision-maker. NRCan stated that the federal Crown relies to the extent possible on the

³ 2017 SCC 40

⁴ 2017 SCC 41

Board processes to fulfill its duty to consult, as the Board has the technical expertise and mandate to consider and address project impacts, including those affecting Indigenous rights and interests.

Administrative tribunals play an essential role in the execution of federal or provincial constitutional powers. Through their legislative mandates, they are charged with performing duties and exercising the powers that fall within the executive branch of government. Administrative tribunals such as the Board must perform those duties and exercise those powers, not only in accordance with their legislative mandates, but also in accordance with section 35 of the *Constitution Act, 1982* and other applicable laws.

The Board's processes are designed to be thorough and accessible to Indigenous communities so that they may make their concerns known to the Board and have those concerns addressed as appropriate. In addition to the mandated one-on-one consultation that is to occur between an applicant and potentially impacted Indigenous communities, the Board's hearing process (described in Section 1.2 above) is itself part of the overall consultative process.

The Board has considered the information submitted regarding the nature of potentially affected Indigenous interests in the Project area, including information on constitutionally protected Indigenous and Treaty rights. The Board has also considered the anticipated effects of the Project on those interests, and the concerns expressed by the Aamjiwnaang in particular. In light of the nature of the interests and the anticipated effects, the Board has evaluated the consultation undertaken with respect to this Project, including the mandated consultation performed by Enbridge and the consultation undertaken through the Board's Project assessment process. The Board has also considered the accommodation and mitigation measures proposed to address the various concerns raised and potential effects which Enbridge has either committed to or which the Board has imposed through conditions of approval.

The Board recognizes that the Project is an approximately 0.5 km pipeline replacement project that is located mainly within a highly developed corridor. Although a small portion of the Project (0.026 ha) crosses Aamjiwnaang reserve lands, construction activities requiring ground disturbance will be conducted primarily on Enbridge-owned, previously disturbed land.

The Board is of the view that there has been adequate consultation and accommodation for the purpose of the Board's decision on this Project. The Board is also of the view that any potential Project impacts on the rights and interests of affected Indigenous communities are not likely to be significant and can be effectively addressed.

As a result of the above, considering all of its findings in this Letter Decision, related Orders and the conditions it has applied to this approval, the Board is of the view that the approval of this Project is consistent with section 35 of the *Constitution Act, 1982* and the Honour of the Crown.

2.2 Public Consultation

Enbridge stated that it developed a Project-specific consultation and engagement plan for the Project. Consultation included government stakeholders and non-governmental organizations. Enbridge also notified all directly affected and adjacent landowners in Froomfield, Ontario who will be impacted by construction.

Enbridge noted that concerns raised by stakeholders included: the duration of the road closure on the LaSalle Line; traffic management; the construction safety plan; and opportunities for employment by local trades. Enbridge committed to providing additional details and answers to these concerns to impacted parties when Project scope details and schedule have been confirmed. Enbridge stated that public notification regarding the road closure will be communicated via local print and radio media, road signage and through direct meetings with public works and emergency response agencies.

Enbridge stated that no stakeholders raised opposition to the Project and that all local government stakeholders voiced their support for the Project and for the ongoing safe operation of Line 5. Enbridge stated that it will continue to consult with all potentially affected stakeholders to identify and address any concerns they may have with respect to the Project. Enbridge committed to issuing a Project Update Letter in Q2 2019 to advise area residents of the Project timeline and planned construction activities.

Views of the Board

The Board finds that Enbridge has adequately and appropriately identified stakeholders and potentially affected landowners, and has developed appropriate engagement materials. The Board finds that Enbridge's design and implementation of consultation activities for the Project is appropriate given the scope and scale of the Project. The Board notes that no stakeholders raised concerns directly with the Board or actively participated in the Board's hearing, although the Applications to Participate for Sarnia Lambton Industrial Alliance and Local 663 did indicate support for the Project.

The Board notes Enbridge's commitment to continue to consult with all potentially affected stakeholders (including, for example, landowners, residents, and municipalities) to identify and address any concerns they may have with respect to the Project. The Board expects Enbridge to continue its efforts to consult and maintain consultation activities with all stakeholders throughout the lifecycle of the Project. Given the ongoing consultation activities with potentially affected stakeholders, the Board imposes **Condition 6, Public Consultation Update.**

2.3 Socio-Economic and Environment Matters

Enbridge filed an environmental and socio-economic assessment (ESA) for the Project, as well as project-specific EPPs for both construction of the new segment of pipe and decommissioning of the existing section of pipe. The ESA and EPPs detail the proposed standard and site-specific mitigation measures Enbridge would implement in carrying out the Project.

Views of the Board

The Board is of the view that, with the implementation of the mitigation proposed by Enbridge in its EPP and other submissions, as well as the Board's conditions, the Project is not likely to result in significant adverse environmental or socio-economic effects.

Enbridge has planned sufficient standard and site-specific measures to mitigate most of the potential adverse environmental effects identified. The Board is imposing **Condition 4, Environmental Protection Plan** in Orders XO-E101-007-2019 and MO-026-2019, requiring Enbridge to submit an updated EPP that includes all additional mitigation measures they have committed to during the course of Hearing MHW-004-2019. To enable Enbridge to remove Crayfish borrows and existing culvert rip rap on the right-of-way within the appropriate wildlife timing window, the draft condition was revised as requested by Enbridge so that the timing of filing the EPP is now required 30 days prior to commencing construction, rather than 45 days.

A more detailed discussion of several specific issues is included below.

2.3.1 Human Health

Aamjiwnaang submitted that Aamjiwnaang is among the most polluted places in Ontario because of the large number of heavy industries located so close to the residential community. Aamjiwnaang stated that Aamjiwnaang residents continue to be exposed to pollution that may adversely affect their health.

Enbridge stated that neither the act of constructing the replacement pipeline, nor decommissioning the existing pipeline, would be considered to have a potentially high or significant risk to human health. Risks to human health associated with operations were considered in the context of the Project. The existing Line 5 pipeline currently transports products under the St. Clair River. If the Project is approved, the product would then be transported under a newer and safer pipeline. Routine monitoring and maintenance would continue on the new pipeline. The existing pipeline and replacement pipeline are located in proximity such that the risks to human health are the same from both pipelines. However, there is a decreased probability of occurrence as a result of the Project.

Views of the Board

The Board acknowledges the matters raised by Aamjiwnaang regarding health concerns as a result of existing and ongoing industrial development in the Project area. The Board notes that as a result of Enbridge's proposed construction methods (i.e., horizontal directional drilling), and its commitment to regular monitoring and maintenance, Project-related impacts are not anticipated to change the existing environmental setting related to odours, air, or noise emissions. As a result, the Board finds that Project impacts to human health are not likely to be significant.

2.3.2 Fish and Fish Habitat

Aamjiwnaang raised concerns about potential impacts to fish and fish habitat as well as the alteration or loss of riparian habitat function.

Enbridge stated that minimal disturbance is anticipated in riparian areas, and provides detailed mitigation measures for working in riparian areas in its EPP. Enbridge further stated the Project would avoid serious harm to fish and fish habitat through the implementation of mitigation measures listed in its ESA, including adherence to Fisheries and Oceans Canada (DFO) Measures to Avoid Causing Harm to Fish and Fish Habitat.

Views of the Board

The Board finds that Enbridge's proposed mitigation for working in riparian areas, as well as its commitment to working with Aamjiwnaang during restoration and revegetation, is sufficient. Installation of the new section of pipe via horizontal directional drilling (HDD) under the St. Clair River would minimize Project effects on fish and fish habitat more effectively than any other method of installation and/or crossing. Based on the crossing method and mitigation proposed, and Enbridge's commitment to following DFO Measures to Avoid Causing Harm to Fish and Fish Habitat, the Board is of the view that Project effects on fish and fish habitat are not likely to be significant.

2.3.3 Water Quality and Spills

Aamjiwnaang raised concerns about the potential for a spill in the St. Clair River. Aamjiwnaang stated that the potential adverse impacts on its Aboriginal rights resulting from approval of the Project could be catastrophic in the event of a pipeline spill in the St. Clair River.

Enbridge proposed both standard and site-specific mitigation measures to minimize the potential for spills, as outlined in their ESA and draft EPPs. Further, Enbridge has stated it monitors pipeline conditions 24 hours per day through the supervisory control and data acquisition system, as well as implementing its damage prevention program to prevent, manage, and mitigate damage and ensure the safety of people, property, and the environment. Enbridge stated that it invited Aamjiwnaang representatives to attend a briefing for an emergency response exercise it conducted in May 2019 on both the Canadian and U.S. sides of the St. Clair River.

Enbridge stated that Aamjiwnaang had also expressed concerns regarding the potential taking of water and discharging to/from Talfourd Creek given the potential to impact water quality. As a result, Enbridge committed to using municipal water in an effort to mitigate Aamjiwnaang's concerns.

Views of the Board

Given the mitigation and environmental protection measures proposed, the Board is of the view that Enbridge has undertaken to implement sufficient measures to protect water quality, and prevent and mitigate a potential spill.

2.3.4 Cumulative Effects

Enbridge's Application addressed cumulative effects and notes that the Project is located in an area altered by human development, including residential, commercial and industrial development, transportation and infrastructure, and oil and gas activities. Enbridge stated that the Project's contribution to cumulative effects, in its view, would be negligible, and the total cumulative effects would persist with or without the Project. Enbridge stated that with the implementation of its proposed mitigation measures, a significant cumulative effect is not likely to occur as a result of pipeline replacement construction or operation.

Aamjiwnaang stated that the water quality and environmental health of the St. Clair River were severely degraded, and stated concerns that Enbridge's logic for evaluating cumulative effects on fish and fish habitat creates a situation where proponents are encouraged to increase negative cumulative effects. Aamjiwnaang further stated concerns regarding the Project's cumulative impacts on its members' ability to participate in hunting, fishing, medicine gathering and ceremonial activities.

In response to these concerns, Enbridge stated that any potential Project-related impacts on rights would be short-term in duration and limited to Project construction and decommissioning activities, and would be mitigated in accordance with Enbridge's EPPs and the Board's conditions. Enbridge further expressed its willingness to mitigate any Project impacts on traditional land use practices and to continued engagement with Aamjiwnaang on any potential Project impacts to Aamjiwnaang rights and interests.

Views of the Board

The Board assessed the potential cumulative effects of the Project by considering the impacts of any residual effects resulting from the Project, in combination with residual effects from other reasonably foreseeable projects and activities in the vicinity of the proposed Project. The Board is of the view cumulative effects of this small-scale Project would be low in magnitude and reversible in the short to medium term, and therefore the Project's contribution to cumulative effects would be negligible, while the total cumulative effects would persist with or without the Project.

The Board acknowledges the concerns raised by Aamjiwnaang regarding their ability to participate in hunting, fishing, medicine gathering and ceremonial activities as a result of existing and ongoing industrial development in the Project area, and the cumulative effects of that development. The Board notes that the Project proposed by Enbridge is not a new development; the proposed Project is to replace the existing section of pipe under

the St. Clair River. The Board finds that, with the implementation of mitigation measures proposed in Enbridge's EPPs and its stated commitment to continued communication and engagement with Aamjiwnaang, cumulative effects would be mitigated to the extent possible and that Project contributions to cumulative effects would not be significant.

2.3.5 Navigation and Navigation Safety

The Board is required to consider project effects on navigation and navigation safety for Board-regulated pipeline crossings of navigable waters prior to making decisions under section 58 of the NEB Act and in accordance with subsection 110(2) of the NEB Act.

Views of the Board

The Board notes that Enbridge is proposing to install the new section of pipe using an HDD method (meaning the pipe will be installed under the St. Clair River) and that decommissioning activities will occur on land. The Board also considered the mitigation measures for navigation and navigation safety proposed by Enbridge and to be included in its EPP as per **Condition 4, Environmental Protection Plan**. Accordingly, the Board has taken into account the Project's effects on navigation and navigation safety in accordance with subsection 110(2) of the NEB Act and has no concerns.

2.3.6 Canadian Environmental Assessment Act, 2012

The Project is not subject to the requirement of an environmental assessment under the *Canadian Environmental Assessment Act, 2012* (CEAA 2012), as it is not a designated project under that Act. However, the Board must consider section 67 of CEAA 2012 for any project to be carried out, in whole or in part, on federal lands.

Views of the Board

In conducting its assessment of the Project, the Board considered section 67 of CEAA 2012, since 0.026 hectares of land required for the Project are located on Aamjiwnaang Reserve Lands (i.e., federal lands). The Board has assessed the environmental effects of the Project and as part of this assessment conducted a significance determination. The Board is of the view that, pursuant to section 67, carrying out the Project is not likely to cause significant adverse environmental effects.

2.4 Engineering Matters

Enbridge submitted that the existing segment of Line 5 beneath the St. Clair River was coated with concrete at the time of initial construction to maintain negative buoyancy, but that the State of Michigan has identified concerns related to an anchor striking the line. Enbridge stated that while there are no integrity concerns with the segment, they propose to install a replacement

segment at a deeper depth beneath the St. Clair River. To minimize disruption to the St. Clair River, Project footprint and environmental impacts while maximizing the probability of a successful installation, Enbridge determined that HDD is the preferred trenchless construction method.

Enbridge confirmed that the Project will comply with the most recent version of all applicable acts, codes and regulations, including the OPR and CSA Z662. Regarding the operation of the Project, Enbridge stated that it will implement Enbridge's Integrity Management Program which includes routine internal inspection with in-line inspection tools, a corrosion inhibitor program and maintenance of the cathodic protection system.

Enbridge further requests that the Project be exempt from the leave to open (LTO) requirements of paragraph 30(1)(b) and Section 47 of the NEB Act, as the Application is routine in nature from an engineering perspective, and poses minimal risk to the public, to the environment and to the integrity of the Enbridge system.

Views of the Board

The Board is of the view that the general design of the Project facilities is appropriate for the intended use, and that the facilities will be constructed in accordance with accepted standards for design, construction and operation, including the mandatory OPR and CSA Z662 requirements, as well as Enbridge's standards and guidelines referenced therein. The Board accepts Enbridge's statements regarding the integrity of the existing Line 5 and the intended purpose, and risk mitigation, of constructing the replacement segment at a deeper depth. The Board notes that the Project will be part of the existing Enbridge System which is subject to the Board's comprehensive regulatory oversight.

The Board is satisfied with the approach Enbridge is using for crossing the St. Clair River, but notes that the success of HDD installations for pipeline construction depends on accurate HDD feasibility assessments, proper design and planning, and actual conditions encountered during the execution of the HDD. The Board imposes **Condition 9 (Horizontal Directional Drilling Execution Plan)**, requiring Enbridge to file a drilling execution plan, in accordance with Clause 6.2.11.2 of CSA Z662-19.

If HDD installation under the St. Clair River fails, Enbridge indicated that its contingency plan is re-alignment of the HDD path. The Board reminds Enbridge that if a contingency crossing method other than HDD or HDD re-alignment becomes necessary to complete the Project, Enbridge must assess the potential effects of the revised crossing method and apply to the Board for approval of such a crossing technique.

In regard to the requested LTO exemption, the Board notes that the Project is located in close proximity to populated areas and sensitive environmental features. The Board therefore views a leave to open application as appropriate under the circumstances. The Board denies Enbridge's request for an exemption in regard to leave to open, and reminds Enbridge to apply for leave to open pursuant to section 47 of the NEB Act, prior to the facilities being placed in operation.

2.5 Economic Matters

Enbridge submitted that the purpose of the Project is to alleviate the State of Michigan's concerns related to an anchor striking the existing segment of Line 5 beneath the St. Clair River. In the Application, Enbridge confirmed that adequate supply and markets exist to support the Project and that the Project is likely to be used at a reasonable level over its economic life. Further, Enbridge confirmed that it has notified both third party shippers and commercial third parties of the Project and neither group has outstanding concerns relating to the Project.

With regard to the cost of decommissioning the existing segment of Line 5 beneath the St. Clair River, Enbridge submitted that it is not proposing to fund the decommissioning with the amounts it has set aside in its Abandonment Trust. Enbridge further submitted that if the Project is approved, the length of the replacement pipe would offset the length of the existing decommissioned pipe resulting in no material changes to the abandonment cost estimate for the system.

Views of the Board

The Board is satisfied that the Project is economically feasible and has no concerns with Enbridge's ability to finance the Project. The Board notes that no party raised concerns regarding economic matters; rather, the Applications to Participate for Sarnia Lambton Industry Alliance and Local 663 indicated support for the Project.

In making its decision on the Application, the Board has not considered Enbridge's Abandonment Trust, the Project's impact on Enbridge's Abandonment Trust or any disposition of funds from Enbridge's Abandonment Trust. The Board notes that any decision relating to the funds of Enbridge's Abandonment Trust would require Enbridge to file a separate application with the Board in the future.

The Board also reminds Enbridge that decommissioning in place does not absolve Enbridge from the requirement to include a financial provision for post-abandonment activities in its abandonment cost estimate for the decommissioned facilities. The Board refers Enbridge to Chapter 6 and Table A-3 in Appendix IV of the Board's MH-001-2012 Reasons for Decision.

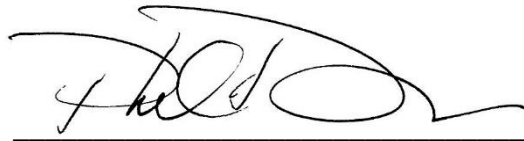
3.0 Conclusion

The Board has determined that it is in the public interest to approve Enbridge's application to construct and operate the Project. As part of its assessment, the Board determined that carrying out the Project is not likely to cause significant adverse environmental effects, pursuant to section 67 of CEAA 2012.

The Board has decided to grant Order XO-E101-007-2019 pursuant to section 58 of the NEB Act exempting the applied-for facilities from the application of paragraph 30(1)(a) and section 31 of the NEB Act. The Board is of the view that granting an exemption from section 33 is unnecessary. The Board denies Enbridge's request for a leave to open exemption from paragraph 30(1)(b) and section 47 of the NEB Act.

The Board has decided to grant Order MO-026-2019 pursuant to section 45.1 of the OPR to permit Enbridge to decommission the existing segment of the Line 5 pipeline crossing following the replacement going into service.

All of the above constitute the Board's reasons for decision for Order XO-E101-007-2019 and Order MO-026-2019, issued on 12 July 2019. The Board directs Enbridge to serve a copy of these reasons on all interested parties.



Presiding Member P. Davies



Member S. Kelly



Member J. Gauthier

Calgary, Alberta
July 2019