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March 5, 2013

National Energy Board
444 - 7th Avenue SW
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Attention: Ms. Sheri Young,
Secretary of the Board

Re: Northern Gateway Pipelines Inc.
Enbridge Northern Gateway Project Application of 27 May 2010
Hearing Order OH-4-2011

I am writing in response to the Enbridge's letter of March 1, 2013 wherein Enbridge responded to my motion dated February 7, 2013 requesting a copy of a 2002 report by Det Norske Veritas (DNV) entitled "Optimized Escort tug Operations at Fawley Terminal" ("DNV 2002 Report"). My response is as follows.

The National Energy Board Act, specifically Section 16.1, provides the Board with the authority to make orders to ensure confidentiality of information that may be disclosed in this proceeding and at this point the Board has not done with respect to the information I have requested in my motion. Even if the Board accepts Enbridge's arguments the requirements of Section 16.1 would need to be satisfied before the Board could rule that the requested information is confidential and therefore not available to be released. Section 16.1 in its entirety reads:

16.1 In any proceedings under this Act, the Board may take any measures and make any order that it considers necessary to ensure the confidentiality of any information likely to be disclosed in the proceedings if the Board is satisfied that

(a) disclosure of the information could reasonably be expected to result in a material loss or gain to a person directly affected by the proceedings, or could reasonably be expected to prejudice the person's competitive position; or

(b) the information is financial, commercial, scientific or technical information that is confidential information supplied to the Board and

(i) the information has been consistently treated as confidential information by a person directly affected by the proceedings, and

(ii) the Board considers that the person's interest in confidentiality outweighs the public interest in disclosure of the proceedings.

Section 16.1 contains a two part test for the Board to follow in determining issues of confidentiality in proceedings. Parts 16.1 (a) and (b) form the first test. Once either condition is established, then parts 16.1 (i) and (ii) must apply.

I submit that in this case Enbridge has fail to meet the requirements of either Section 16.1 (a) or (b) and therefore the Board does not have the authority to deem the report as confidential. I base this position on the following.

I submit that Enbridge has not provided any evidence that would support that DNV's purported client is "a person directly affected by the proceedings" or that release of the requested report would "reasonably be expected to prejudice the person's competitive position". In essence, if the owner of the requested report is not a participant in these proceedings, as appears to be the case, on what basis can it be claimed that they, whoever they are, is a person directly affected by these proceedings. If they are not directly affected by these proceedings, then 16.1 (b) does not apply. Enbridge has submitted no evidence that would indicate that DNV's other "client" is a person directly affected by these proceeding and therefore I submit that it would be improper for the Board to deem the requested report as confidential under the provisions of Section 16.1.

Even if Section 16.1 (a) or (b) did apply, which I submit they do not, parts (i) and (ii) would both need to be satisfied in order for the Board to deem the requested report as confidential as per the provisions of 16.1. While Enbridge has consistently treated the requested report as confidential, I submit that Enbridge's interest in confidentiality does not outweigh the public interest to disclose the requested report in these proceedings.

In addition, or in the alternative, the JRP has the powers under CEAA and under section 45 of the Canadian Environmental Assessment Act, 2012, the review panel has the power to order a witness to produce any record or thing that the Panel considers necessary for conducting the environmental assessment.

The following are excerpts from the *Alberta Wilderness Association v. Cardinal River Coals Ltd.* [1999] 3 FC 425 decision that support the request of the motion to release confidential information:

48 By the provisions of s.35 of *CEAA*, which provide production of evidence powers, including confidential evidence, I find that the Joint Review Panel has a duty to use these powers to the full extent necessary to, in the words of paragraph 4 of Schedule 1, obtain and make available "all information required for the conduct of its review".

49 I find that to meet this duty it is incumbent on the Joint Review Panel to require the production of information which it knows exists, and which is apparently relevant to one or more of the s.16 factors. In my opinion, it is not sufficient to withdraw from this duty to fill a gap in the evidence with subjective, albeit, expert opinion, when actual information is known to be available.

My interpretation of this last sentence is that it is not sufficient for Enbridge to provide an expert witness from Det Norske Veritas to be cross examined, but rather the DNV 2002 report needs to be put into evidence.

Marine safety is a significant issue in these proceedings and the need to avoid oil spills, and to reduce the risk of oil spills to acceptable levels is I submit, clearly in the public interest. The issue of marine safety and oil spills is one of the primary issues the Board must consider when making its decision on Enbridge's applications. In this specific context, the information purported to be in the requested report is the sole basis supporting Enbridge's assertion (according to B23-15, TERMPOL 3.15 Adobe page 49) that:

To reduce the frequency of incidents, Northern Gateway will use escort tugs extensively. The effectiveness of escort tug on reducing incidents is based on previous DNV studies (DNV 2002). Typical causes of grounding and collision incidents were studied by DNV to ascertain how an escort tug might help a tanker avoid an incident, or minimize the damage if the incident was to occur.

The tug escort plan for Northern Gateway will be as follows:

All laden tankers will have a close escort tug between the pilot boarding stations at Triple Islands, Browning Entrance and Caamaño Sound and the Kitimat Terminal (Segments 1, 2, 3, 4a, half of 4b, 6 and 7). In addition all laden tankers will have a tethered escort tug between Browning Entrance and Caamaño Sound and the Kitimat Terminal (i.e., throughout the CCAA, Segments 1, 2, 3, 6 and 7).

All tankers in ballast will have a close escort tug between the pilot boarding stations at Triple Islands, Browning Entrance and Caamaño Sound and the Kitimat Terminal (Segments 1, 2, 3, 4a, half of 4b, 6 and 7).

The predicted effect on lowering the frequency of incidents is provided in Table 4-7. In total this gives a reduction of the total incident frequency by some 65%.

I would also like to raise issues of fundamental and natural justice that are applicable in this matter. As the Board knows, its process and decisions must adhere to the principles of natural justice as they have been developed and refined through countless court decisions. One of the cornerstones of natural justice is a person's right to know the case to be met and that person's right to critically test the evidence, in this case, Enbridge's evidence through access to all the evidence and cross-examination. In this case, the exclusion of the requested report, a report that underpins the entirety of Enbridge's position with respect to marine safety in the Douglas Channel and its approaches, would deprive me of my right to natural justice, more specifically; my right to know the case to be met and to cross examine Enbridge based on full disclosure of the evidence.

Rule 40 of the National Energy Board Rules of Practice and Procedure, 1995, SOR/95□208 provides the Board with the mechanism in which to subpoena a witness and have them produce reports.

Based on all of the foregoing, I respectfully submit that the Board should order Enbridge to have the DNV 2002 report submitted to the board and put into evidence.

In the alternative, recognizing that the onus is clearly Enbridge to demonstrate that their proposed project is in the Public Interest, I submit that if the Board rules that the requested report should be confidential and they therefore deny my motion, that given the importance of the information contained within the requested report in supporting Enbridge's purported risk assessment results, the Board should give little or no weight to Enbridge's submission with respect to marine safety and the risk of oil spills in Douglas Channel and the approaches to Douglas Channel. Given the import of these issues in determining whether the proposed project is in the Public Interest, I submit that the Board will have no alternative other than denying Enbridge's applications.

While it is true that the confidential status of the DNV 2002 report has been a matter of public record since June 8, 2011, it is worth mentioning that in my final preparations for the cross examination of Enbridge's 2nd marine panel in Prince Rupert I felt that as a final step it would be good due diligence of me to review all of the references in the application for completeness. This is when I found the reference for the DNV 2002 confidential report. As an individual intervener this was done later rather than sooner due to limits of my time and energy resources.

Respectfully,

Ms. Cheryl Brown
Douglas Channel Watch