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BILL C-38 & PIPELINES:

How the budget implementation act will affect the Enbridge Tankers and Pipelines project and the Kinder Morgan expansion

Bill C-38 *Jobs, Growth and Long-term Prosperity Act* (the “Budget Act”) was introduced in Parliament on April 26th, 2012. Bill C-38 is not yet law. It is still being debated, and its provisions may change before the bill is passed into law. When relevant sections come into force, however, they will repeal the *Canadian Environmental Assessment Act*, and replace it with a new law that will significantly change the rules about how, and if, federal environmental assessment of projects occurs. This backgrounder will be updated if the Budget Act is amended.

Will the new Canadian Environmental Assessment Act apply to the Enbridge tankers and pipelines project?

Yes. Section 126 of the new *Canadian Environmental Assessment Act* provides that the new rules apply to review panels like the Enbridge Joint Review Panel (JRP) that are already in process when the Budget Act comes into force. However, a number of transition provisions apply. These are discussed further below.

For pipeline projects, like the Kinder Morgan expansion, for which environmental assessment has not yet begun, an environmental assessment by review panel will no longer be possible.¹ This is because the new *Canadian Environmental Assessment Act* contains special rules for pipelines approved under the *National Energy Board Act* (ss. 28-31).

I am signed up to make an oral statement to the Enbridge JRP. Will I get to do so?

Under the new rules, pipeline review processes headed up by the National Energy Board are not *required* to accept or consider public comments. Only “interested parties” must be provided with an opportunity to participate in the environmental assessment of the project.² An interested party is a person that the National Energy Board/JRP has determined to be “directly affected” or to have “relevant information or expertise”. And unlike non-pipeline panel reviews, which will also hear only from interested parties,³ there is not even a requirement to consider written comment from the public.

¹ New CEAA, s. 38(6).

² New CEAA, s. 28.

³ New CEAA, s. 43(1)(c).

However, although it is not required by legislation to do so after the Budget Act comes into force, provided it can meet whatever time limits are imposed on it, a JRP may still decide to hear from and consider the submissions of concerned citizens. Furthermore, the effect of subsection 126(1) of the new *Canadian Environmental Assessment Act* is that existing agreements between the Minister of Environment and other agencies, like the National Energy Board, entered into under the old *Canadian Environmental Assessment Act* to jointly review projects remain in force. In the case of Enbridge, that should mean that the agreement between the Minister of Environment and National Energy Board from December 4, 2009, which includes the terms of reference for the Enbridge JRP, would continue as if it had been made under the new *Canadian Environmental Assessment Act*. The Enbridge JRP Agreement and Terms of Reference requires the panel to “conduct its review in a manner which will facilitate the participation of the public and Aboriginal peoples, and enable them to convey their views on the project to the Panel by various means, such as oral statements, letters of comment or participation as intervenors....”. It remains to be seen how conflicts between the new law and the Enbridge JRP terms of reference will be resolved.

What timelines will apply to the Enbridge tankers and pipelines project?

Section 126 of the new *Canadian Environmental Assessment Act*, enacted by s. 52 of the Budget Act, and section 104 of the Budget Act set out the relevant transitional rules. In terms of what that time limit may be, there are two possible interpretations of the applicable provisions of the Budget Act. Either way, once the Budget Act comes into force, the Minister of the Environment and the National Energy Board must jointly establish a time limit within which an environmental assessment “decision statement” must be issued for the Enbridge tankers and pipelines project.⁴ Section 126 of the new *Canadian Environmental Assessment Act* also provides that 54(3) of the new *Canadian Environmental Assessment Act* applies to this time limit.⁵

On one interpretation of section 54(3) the new time limit would run from the date the new *Canadian Environmental Assessment Act* come into force, could be specific to the Enbridge project, and could permit the Enbridge JRP to finish its work (although it may not). This interpretation would clearly be more in keeping with the rules of procedural fairness and the Crown’s duties to First Nations.

The new section 54(3) of the *National Energy Board Act* could also be interpreted to incorporate the new *Canadian Environmental Assessment Act* time limit, which is two years *from the point the project was referred to a review panel*, with the possibility of a further time period of up to 3 months “to take into account circumstances that are specific to the project.” The time limit may be extended further only by the Governor General in Council (on the recommendation of the Minister). This is significant, because the Enbridge project was referred to a review panel on September 29, 2006, more than five years ago. Much of this delay was caused by Enbridge’s request to suspend the process for an extended period. Even

⁴ New CEAA, s. 126(4).

⁵ New CEAA, s. 54(3) reads: “The decision maker may extend that time limit by any further period – up to a maximum of three months – that is necessary to permit cooperation with any jurisdiction with respect to the environmental assessment of the designated project or to take into account circumstances that are specific to the project.” “[T]hat time limit” may either refer to the time limit referred to in s. 54(2) immediately above, which sets out the CEAA 2 year limit OR it may be considered a reference to a discretionary time limit set under New CEAA, s. 126(2).

taking into account that the clock would have stopped ticking for part of this time (time for a proponent to conduct studies and meet information requested by the review panel or the Minister of Environment is not counted) there is a strong possibility that the time limit would have been reached long ago. If this interpretation were correct, it would remain to be seen whether the federal Governor in Council (Cabinet) would extend the time line and for how long.

At the end of the day whether it is the Governor in Council, or the Minister of Environment/National Energy Board who makes the decision about the time limit, the new legislation could allow, but does not require that the Enbridge JRP would be permitted to finish its work.

Going forward review processes for pipelines like the Kinder Morgan expansion will have a maximum of 18 months (15 months to the recommendations report of the National Energy Board, plus three months for the Governor in Council to decide whether to issue the certificate), *from the date the application to the NEB is complete*. The actual time limit will be established by the Chairperson of the National Energy Board and it may be shorter than this. By virtue of Budget Act, s. 104, in the transition period for projects like Enbridge, the time limit established by the Minister of the Environment and National Energy Board under s. 126 is considered to have been the one set by the Chairperson.

The new *National Energy Board Act* provisions also give the Minister of Natural Resources extraordinary powers to issue very specific, binding directives to the Chairperson regarding timelines and other matters (new NEBA, ss. 6(2-3.5), 52(8)). These powers will apply to the Enbridge JRP once a time limit is set for it. This includes binding direction from the Minister of Natural Resources about how the Chairperson's new powers under subsections 6(2.1) and 6(2.2) must be exercised. These sections provide that among other things, if the Chairperson is of the opinion that a time limit for a pipeline approval process is not likely to be met, he or she may "take any measures that the Chairperson considers appropriate to ensure the time limit is met" including:

- Removing any or all members of the panel
- Authorizing one or more members of the panel to deal with the application
- Making decisions about whether the board will consider representations from any person

Once the Minister of Environment and the National Energy Board determine the time limit for the Enbridge process and it is deemed to be a time limit specified by the Chairperson, if the Minister of the Environment and the Chairperson are of the opinion that the time limit is not going to be met the Chairperson may exercise the powers noted above with respect to the Enbridge process. If this occurs then the Minister of Environment will "be considered to have terminated" the review panel's environmental assessment of the project. The National Energy Board will then complete the environmental assessment and prepare a report and the Governor in Council will make a decision about the project.

What will happen under the new rules if the Enbridge JRP says "no"?

The Budget Act introduces new language for sections 52 to 54 of the *National Energy Board Act*. The new section 54 now gives the Governor in Council (federal Cabinet) the authority to make an order directing the National Energy Board/JRP to approve (i.e., issue a certificate for) the pipeline even if the JRP recommends against it.