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## **BY EMAIL**

14 April 2009

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Dear Sir:

### **Re: Enbridge Gateway Pipeline Project - Draft Joint Review Panel Agreement and Terms of Reference**

West Coast Environmental Law has reviewed the Draft Joint Review Panel (“JRP”) Agreement and Terms of Reference of the Enbridge Gateway Pipeline Project (the “Project”), which were released for public comment on February 9, 2009. We note that there was no change in these documents from the drafts which were previously released in 2006.

Thus, we wish to confirm our understanding that our past comments on the 2006 Draft JRP Agreement and Terms of Reference, set out in a joint letter to the Canadian Environmental Assessment Agency (“CEAA”) dated November 27, 2006 (attached), will be considered at this stage of the process. Further to those comments, we offer the following additional submissions on behalf of West Coast.

West Coast remains of the view that this Project engages higher-level strategic and policy questions related to:

- the development of the tar sands and their role in Canada’s energy future;
- the impact of the pipeline project (through the additional production capacity that it will permit) and the tar sands on Canada’s greenhouse gas emissions; and,
- shipping policy and the risks of tanker traffic and spills in the waters of the north Pacific coast.

In our view, these questions must be addressed and answered before a decision can be taken to approve the construction and operation of this pipeline project. These

questions, however, are not within the scope of the JRP process. By way of contrast, in the not-too-distant past, when a crude oil pipeline to Kitimat and oil tanker traffic along the north coast were previously proposed, the federal government established a distinct process to examine these questions.

In 1976, in response to a proposed oil port at Kitimat, the federal government appointed the West Coast Oil Ports Inquiry, under Commissioner Andrew Thompson, to inquire broadly into the issue. It is instructive that at that time, the Inquiry was asked not only to undertake a comprehensive regional assessment of the Kitimat project and potential adverse environmental, social, and navigational safety impacts, but also to explore the broader concerns of Canadians about oil tanker traffic on the west coast. Furthermore, this assessment was intended to proceed simultaneously with “energy policy assessment” hearings to look at alternative means by which Canada’s energy needs should be met, and in this context to consider whether a west coast oil port was needed at all.<sup>1</sup>

In comparison, the proposed JRP process will not assess the full range of risks or conclusively answer the appropriate policy questions. If consideration of these critical strategic level policy questions is left out of the process, then important information will not be available when decisions are made about the pipeline.

West Coast has also reviewed the proposed “Approach to Crown Consultation for the Northern Gateway Project”, which was provided to some First Nations around February 9, 2009. In general, West Coast urges the CEAA and the National Energy Board (“NEB”) to engage directly and meaningfully with affected First Nations to formulate an appropriate consultation and decision-making process related to the Project, in order to enable meaningful consultation on the Project itself.<sup>2</sup> In doing so, we note that the Crown’s constitutional duties to First Nations are more expansive and distinct from its statutory obligation to engage the public in the JRP process.

In light of this proposal having been released, West Coast has a number of legal concerns that we would like to briefly set out:

- The unilateral decision of the federal government to use the JRP process as its principal vehicle for consultation, which was taken without the involvement of First Nations, appears to disregard the constitutional imperative to provide an appropriate interim accommodation of First Nations’ rights to govern, manage and make decisions in their own territories. In respect of Treaty 8 First Nations,

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<sup>1</sup> Andrew Thompson, *West Coast Oil Ports Inquiry: Statement of Proceedings*, February 23, 1978, at pp. 1 and 98, and in the Commissioner’s “Letter of transmittal”.

<sup>2</sup> See for example *Ministry of Environment et al v. Dene Tha’ First Nation*, 2006 FC 1354 at para. 110, aff’d 2008 FCA 20, in which the court suggests that the duty to consult and accommodate on a project of this nature is triggered at a very early stage, when the agencies involved make their initial decisions about process design and that they will proceed by way of a Joint Review Panel. See also the recent decision of the BC Court of Appeal in *Carrier Sekani Tribal Council v. British Columbia (Utilities Commission)*, 2009 BCCA 67, in which the court concluded that the process of consultation requires discussion at an early stage of a government plan that may impact Aboriginal interests, before a decision crystallizes, “so that First Nations do not have to deal with a plan that has become an accomplished fact” (at para. 52).

this unilateral decision may not be compatible with the honour of the Crown, and its obligations under that treaty.<sup>3</sup>

- It is not clear that the JRP has the mandate to comprehensively deal with all aspects of Aboriginal Title and Rights (for example, under the *Canadian Environmental Assessment Act*, it appears that the JRP may only consider impacts on the *current* use of lands and resources for traditional purposes, not the full range of potential *future* uses of land and water associated with Aboriginal Title and Rights), which may render it an inappropriate vehicle to conduct Crown consultation.<sup>4</sup>
- The proposed JRP process appears to treat First Nations consultation as an “afterthought” to standard public participation in the JRP.<sup>5</sup> The draft JRP Agreement and Terms of Reference treat First Nations principally as a subset of the general public. For example, the language of these documents refers throughout to “the public, including Aboriginal people”, and the CEAA’s only distinct process proposed for consultation with First Nations is intended to deal only with the “residue” of issues that are not addressed by the JRP or the proponent. There appears to be no provision for consultation with First Nations at the higher, strategic level of decision-making on the Project, in which overarching policy questions related to the Project (such as those sketched out above) are considered.<sup>6</sup>
- The Crown’s proposed approach would involve relying almost exclusively on the proponent to document and accommodate the concerns of affected First Nations. This appears to be an excessive and thus legally impermissible delegation of substantive consultation duties to Enbridge. While the Crown may delegate procedural aspects of consultation to third parties, it retains the ultimate legal responsibility for consultation and accommodation.<sup>7</sup>

West Coast also notes, upon a review of documents posted on the online registry, that it does not appear as if the CEAA or NEB has engaged in consultation with First Nations upriver and downriver of the Enbridge Gateway Pipeline route, such as those First Nations situated up and down the Fraser River and its tributaries from the pipeline crossing. While their territories are not situated on the route, their Aboriginal Rights and Title may nevertheless be significantly affected by the Enbridge Gateway Pipeline. We strongly encourage the CEAA and NEB to consult meaningfully with them about the approach that will be used for consultation and decision-making about the Project, and about the Project itself.

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<sup>3</sup> See *Mikisew Cree First Nation v. Canada (Minister of Canadian Heritage)*, 2005 SCC 69 at para. 59, where the Supreme Court of Canada holds that the Crown’s process in taking up lands under the treaty must be compatible with the honour of the Crown, failing which, a court might set aside the government decision at issue.

<sup>4</sup> Section 2(1) of the *Canadian Environmental Assessment Act* defines “environmental effect” as including effects of changes to “physical and cultural heritage” and “the current use of lands and resources for traditional purposes by aboriginal persons.”

<sup>5</sup> *Mikisew Cree* at para 64.

<sup>6</sup> See *Haida Nation v. British Columbia (Minister of Forests)*, 2004 SCC 73 at para. 76.

<sup>7</sup> *Ibid.* at para. 53.

Thank you for the opportunity to provide comments. Should you have any questions, please do not hesitate to contact us.

Yours truly,  
WEST COAST ENVIRONMENTAL LAW

Jessica Clogg  
Senior Counsel

(Attachment)