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7 March 2019

The Honourable Rosa Galvez, Chair
Standing Senate Committee on Energy, the Environment and Natural Resources
The Senate of Canada
Ottawa, Ontario
Canada, K1A 0A4

Dear Senator Galvez:

In the National Energy Board’s correspondence dated 15 February 2019 to the Senate Energy, Environment and Natural Resources Committee, we provided responses to two of the Committee’s three requests for supplementary information during our appearance on 7 February 2019, and committed to submitting our response to the third request – the case studies on the Northern Gateway Pipeline Project, the Trans Mountain Expansion Project, and the Energy East Pipeline Project – at a later date.

Please find these case studies attached, followed by a description of the impact assessment process proposed under Bill C-69.

On behalf of my fellow witnesses and the National Energy Board, I again thank the Committee for the opportunity to participate in its study of Bill C-69.

Yours sincerely,

Sandy Lapointe
Executive Vice President, Regulatory

Cc: Maxime Fortin, Clerk
Case Study 1: Northern Gateway Pipeline Project

Overview of the Northern Gateway Project
Northern Gateway Pipelines Limited Partnership (the proponent) applied for approval to construct and operate the Northern Gateway Pipeline Project (NGP Project), a 1,150 km pipeline, which was proposed to run between an inland terminal near Edmonton, Alberta and a marine terminal near Kitimat, British Columbia. The three major components of the proposed NGP Project were: an export oil pipeline; a parallel import condensate pipeline; and a terminal at Kitimat with 2 tanker berths, 3 condensate storage tanks and 16 oil storage tanks.

Overview of the Legislative Framework
A three-person Joint Review Panel with members from the Canadian Environmental Assessment Agency (CEAA) and the National Energy Board (NEB) was responsible for conducting the review of the NGP Project. The Joint Review Panel’s mandate was set out in a Joint Review Panel Agreement, which was developed following an extensive consultation process with the public and Indigenous peoples. The review was ultimately subject to the Canadian Environmental Assessment Act, 2012 (CEAA 2012) and the National Energy Board Act (NEB Act).

Issues and Outcomes
From August to September 2010, the Joint Review Panel held seven sessions to gather input from Indigenous communities and stakeholders on the issues to be included in the review as well as aspects of the hearing process. In May 2011, the Joint Review Panel issued its Hearing Order (A29152), which described the steps in the review process, provided information on how to participate, and included a List of Issues to be considered as part of the review (found in Appendix I).

On 10 December 2013, the Joint Review Panel submitted its report to the Minister of Natural Resources for decision by the GIC (A56136). The report describes the issues raised, how these issues were resolved and the Joint Review Panel’s recommendation that the NGP Project would be in the public interest, subject to 209 conditions (listed in Appendix I of Volume 2). After receiving the Joint Review Panel’s recommendations, the GIC issued an Order in Council on 17 June 2014 directing the NEB to issue the certificate to the proponent for the NGP Project. Subsequently, on 23 June 2016, the Federal Court of Appeal quashed the GIC’s Order, which nullified the certificates for the NGP Project, on the basis that Canada had failed to execute its framework for consultation in a manner that satisfied its duty to consult and accommodate. Approximately five months later, the GIC indicated on 25 November 2016 that it did not accept the Joint Review Panel’s recommendation that the NGP Project would be in the public interest.
As a result, the GIC, on recommendation of the Minister of Natural Resources, directed the NEB to dismiss the NGP Project application. The NEB took this action and communicated this to the company by letter (A80935) on 6 December 2016.

Timelines
The proponent filed its application with the NEB on 27 May 2010. After determining that there was sufficient information to initiate the review process\(^1\), the Joint Review Panel issued its Hearing Order on 5 May 2011 (A29152). The Joint Review Panel completed its review and submitted its recommendation report (A56136) on 10 December 2013 to the Minister of Natural Resources for GIC decision.

It should be noted that when the Joint Review Panel’s review of the NGP Project first began, neither the Canadian Environmental Assessment Act (as it then was) nor the NEB Act contained legislative time limits for reviews or a formal standing test. The Jobs, Growth and Long-term Prosperity Act (JGLTPA) fully came into force on 6 July 2013, towards the end of the NGP Project review process. As a result, the only substantive impact the JGLTPA had on the Joint Review Panel’s review of the NGP Project, was to impose a time limit for when the Joint Review Panel needed to submit its report to the Minister of Natural Resources for the GIC’s final decision. The Minister of the Environment and the Chair of the NEB set a time limit of 31 December 2013 (A43273). As noted above, the Joint Review Panel submitted its report within the time limit established.

\(^1\) The Joint Review Panel Agreement established that the Panel was to determine whether the application contained “sufficient information … to initiate the joint review process. If … there is… [the panel] will proceed to issue a Hearing Order. If there is not sufficient information, the proponent will be notified and the process will not proceed until the required information has been filed…”. 
Case Study 2: Trans Mountain Expansion Project

Overview of the TMX Project
Through the application for the Trans Mountain Expansion Project (TMX Project) Trans Mountain Pipeline ULC was seeking an expansion of the existing Trans Mountain pipeline system. The TMX Project would include: pipeline facilities to allow for a twinning (looping) of the existing 1147 km Trans Mountain pipeline system in Alberta and British Columbia, with about 981 km of new buried pipeline; new and modified facilities, such as pump stations and tanks; additional tanker loading facilities at the Westridge Marine Terminal in Burnaby; reactivation of 193 km of pipeline between Edmonton and Burnaby; and an increase in Trans Mountain’s shipping capacity from 300,000 barrels per day (bbl/d) to 890,000 bbl/d. Some temporary infrastructure, such as access roads, a worker camp, stockpile sites and contractor staging areas would also be required during construction.

Overview of Legislative Framework
The TMX Project was subject to a review by an NEB Panel (Panel) under the NEB Act and the CEAA 2012, both of which had been amended by the JGLTPA, which fully came into force on 6 July 2013. Some of these amendments included:

- Replacing Board “decisions” with a “recommendation report” and providing GIC with the final decision on applications for pipelines over 40 km in length;
- Introducing a 15 month time limit for the NEB to conduct its review of pipelines over 40 km in length, along with mechanisms for extensions and excluded periods (“suspensions” or “time outs”) when required or justified;
- Authorizing the NEB, as a Responsible Authority, to conduct federal environmental assessments on its own, under CEAA 2012; and
- Adding a standing test to the NEB Act, which required panels to hear from parties that were directly affected, and allowed panels to consider representations from individuals that had relevant information or expertise.

Issues and Outcomes
The NEB Panel submitted its report (A77045) on 19 May 2016 to the Minister of Natural Resources for GIC decision. The report summarized the issues raised throughout the Panel’s review process, how they were resolved, and recommended to the GIC that the TMX Project was in the public interest, subject to 157 conditions. On 29 November 2016, the GIC issued an Order in Council directing the NEB to issue a certificate to the proponent for the TMX project, which the NEB did on 3 December 2016. On 30 August 2018, the Federal Court of Appeal (FCA) released a decision that quashed the Order in Council approving the TMX Project and nullified the certificate issued by the NEB. The reasons are contained in the FCA’s decision. On 21 September 2018, the NEB received a new Order in Council (A94111) from the GIC requiring the NEB to reconsider its recommendation as relevant to project-related shipping and to complete the reconsideration by 22 February 2019 (A98021).
Timelines
On 16 December 2013, the proponent submitted its application for the TMX Project. On 3 April 2014, the NEB Panel deemed the application for the TMX Project to be complete, thus starting the 15 month time limit\(^2\). The Panel conducted its review and submitted its report (A77045) on 19 May 2016 to the Minister of Natural Resources for GIC decision.

The Chair of the NEB suspended the calculation of the time limit on two occasions:

1. 11 July 2014 to 3 February 2015 (approximately six months): In June 2014, the proponent changed the corridor for the delivery lines to the Westridge Marine Terminal. An excluded period was granted to allow the proponent to file studies and information on its new preferred corridor through Burnaby Mountain.

2. 17 September 2015 to 6 January 2016 (approximately four months): On 21 August 2015, the Board announced, on its own volition, that it was striking the proponent’s filed evidence prepared by or under the direction of Mr. Steven J. Kelly. This action was taken to ensure the integrity of the hearing as Mr. Kelly had been appointed as an NEB Board Member by the GIC. An excluded period was granted to acquire replacement evidence for that stricken from the hearing record.

\(^2\) A completeness determination does not mean that the panel has all of the required information to make its decision; rather it simply determines that it has enough to commence the assessment process (which process entails the receipt and testing of substantial amounts of evidence from the proponent and other participants).
Case Study 3: Energy East Pipeline Project

Overview of the Energy East Pipeline Project
The Energy East Pipeline Project (EE Project) was a proposal by Energy East Pipeline Ltd. (the proponent), a wholly-owned subsidiary of TransCanada Pipelines Limited, for a 4,500 km crude oil pipeline from Alberta and Saskatchewan to refineries in Eastern Canada. The proposed project would have included: the purchase and conversion of approximately 3,000 km of existing pipe on the existing TransCanada Mainline from gas to oil service; approximately 1,500 km of newly constructed pipeline and facilities including laterals and connections, pump stations, and custody transfer metering stations; new marine facilities that would have enabled access to other markets by ship; and the construction and operation of four oil storage tank terminals.

Overview of the Legislative Framework
The EE Project was subject to a review by an NEB Panel (Panel) under the NEB Act and the CEAA 2012. Had the NEB Panel completed its review of the EE Project, it would have implemented the 2012 legislative changes noted in Case Study 2 on the Trans Mountain Expansion Project.

Timelines
On 17 May 2016, the proponent filed its consolidated application to the NEB for the EE Project. The 15 month time limit began on 16 June 2016, when the original NEB review Panel deemed the proponent’s application for the EE Project to be complete. The 15 month time limit was suspended on 30 August 2016 due to disruptions during a public hearing and was continued when the members of the original Panel recused themselves from the EE Project review. The suspension of the time limit would continue until a replacement panel could be appointed, and the hearing resumed.

On 9 January 2017, a replacement Panel was named and that Panel decided to void all decisions made by the original Panel. This meant that the original 15 month time limit that started on 16 June 2016 was no longer valid. Before the replacement Panel could deem the application to be complete, thereby starting a new 15-month time limit, the proponent requested a 30-day suspension of the review process. The proponent subsequently provided notice to the NEB on 5 October 2016 that it was withdrawing its application for the EE Project. All NEB activities related to the review of the EE Project ceased. There were no excluded periods or timeline suspensions as the legislative time limit had not restarted.

Issues and Outcomes
The original Panel issued a Hearing Order containing a List of Issues to be considered as part of its review of the EE Project. That Hearing Order was one of the decisions ultimately voided by the replacement Panel.

The replacement Panel sought public input on topics to be considered before issuing its final List of Issues. A review of the EE Project was never completed by either Panel so there is no report to refer to for a complete summary of the issues and how they were resolved.
Reviews under Bill C-69

In Bill C-69, the Impact Assessment Act allows for the passage of Regulations Designating Physical Activities, sometimes referred to as the “Project List” that will identify which projects will be subject to an impact assessment. While the Government is currently creating these regulations we have assumed for this submission that the NGP Project, the TMX Project, and the EE Project (the Projects), all deemed “mega projects” due to their scale and scope, would be designated under these regulations and subject to the review process proposed under the Impact Assessment Act (IA Act).  

Provided the Projects were subject to Bill C-69, the Impact Assessment Agency of Canada would work closely with the Canadian Energy Regulator (CER) to deliver an integrated review process that follows the provisions set out in the IA Act and meets the requirements of the CER Act and any other relevant legislation. The NEB is working with the CEAA to prepare for implementation and develop more detailed processes that follow the framework set out in Bill C-69.

In accordance with the proposed legislation, some of the key process differences for an assessment under the proposed IA Act would include:

- A legislated 180 day early planning phase as outlined in the IA Act;
- An impact assessment, with different legislated factors;
- The assessment would be conducted by an integrated review panel:
  - The integrated review panel would consist of at least one (but not a majority) of CER Commissioners, who would be named by the Minister of Environment and Climate Change Canada (ECCC);
  - The Minister of ECCC would set the Terms of Reference for the integrated panel;
- The timeline for the review would be between 300 and 600 days; and
- A decision to suspend timelines would follow the criteria set out in regulation, rather than legislation.

The Terms of Reference would set out a framework for the integrated review process, based in part on the results of the early planning phase. The integrated review panel charged with making the decision in this process would then be responsible for making a number of specific process-related decisions within that framework for the project. It is not possible to determine all of the specific choices a panel would make when it faced a specific set of circumstances. However, the panel would continue to conduct a process that is fair and transparent, and that respects the principles of natural justice, while adhering to the legislated timelines. The GIC would continue to make the final decision. The Government’s handbook “Better Rules for Major Project Reviews” provides an overview of the different steps of the impact assessment process; a diagram is copied on the following page for reference.

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3 Projects under the CER’s jurisdiction that are not designated would be assessed solely under the proposed Canadian Energy Regulator Act or the Canadian Oil and Gas Operations Act, as applicable.
**FIGURE 1 - THE PROPOSED NEW SYSTEM AT A GLANCE**

**STEP 1**
Early Planning
(up to a maximum of 180 days)

- Impact Assessment Cooperation Plan
- Indigenous Engagement and Partnership Plan
- Public Participation Plan
- Drafted Impact Statement Guidelines
- Permitting Plan

**Deliverable**
Public participation & transparency
Cooperation with jurisdictions
Engagement with Indigenous peoples

**STEP 2**
Impact Statement
(Proponents take the time they need)
- Proponent prepares draft Impact Statement
- Agency reviews for conformity with Impact Statement Guidelines and posts on the Registry for public comment

**STEP 3**
Impact Assessment
Led by the Agency
(up to a maximum of 300 days)
Agency assesses Impact Statement and prepares Impact Assessment Report

--- OR ---

Led by a Review Panel
(up to a maximum of 600 days)
Assessment by Review Panel or Joint Review Panel

--- OR ---

Led by an Integrated Review
with lifecycle regulators
(300 days, up to a maximum of 500 days)
May be conducted jointly with other jurisdictions

**STEP 4**
Decision-Making
Decision
(up to a maximum of 30 days)
Minister of ECCC determines public interest

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Decision
(up to a maximum of 90 days)
Cabinet determines public interest

**STEP 5**
Follow-up, Monitoring, and Compliance & Enforcement
- Indigenous and community monitoring committees, as needed
- Compliance & enforcement by the Agency and Federal Authorities or by lifecycle regulator

Note: Regional and strategic assessments would be proactively conducted outside of individual project reviews. This will help inform project assessments, manage cumulative impacts, and support decision-making.