



The Joint Review Panel's decision on the scope of the environmental assessment for Enbridge Northern Gateway Pipelines

OVERVIEW:

On January 19, the federal Joint Review Panel released its decision on the List of Issues to be covered in the environmental assessment of the Enbridge Northern Gateway Pipelines, and what additional information Enbridge must provide to the Panel.

The Panel rules that Enbridge has failed to provide adequate information on the risks of pipeline oil spills created by building this pipeline in challenging, remote terrain and sensitive ecosystems, and how it plans to deal with those risks. Enbridge was ordered to provide more evidence as to how it will account for these risks in its project design and response plans. This ruling comes as no surprise, because of the significant and obvious gaps in the information provided in Enbridge's application, and the many submissions pointing out Enbridge's failure to provide sufficient information.

However, **the Panel decides to reject consideration of a number of key issues** raised by numerous First Nations, community groups, conservation groups and individuals. As a result, it appears as though the Panel will overlook critical issues raised by the proposed pipeline, which need to be considered in order to make a fully-informed decision about the Enbridge project. For example, the Enbridge environmental assessment:

- will NOT consider the broad climate change and greenhouse gas implications of the project and the related increase in tar sands production, or the impact of the Enbridge project on Canada's international commitments to reduce greenhouse gas emissions;
- will NOT consider the land, water, air, health and social impacts of the increased tar sands developments facilitated by this pipeline;
- will NOT consider the environmental and climate change impacts of burning the oil and fuel that travels through Enbridge pipelines and tankers; and,
- will NOT consider the question of whether this tar sands pipeline scheme should be a part of Canada's energy future, given the need to transition away from fossil fuels.

In the Panel sessions, many people took the position that considering these questions is essential to the credibility of the environmental assessment. While we may not be able to predict exactly how much additional tar sands oil production will result and where, it is certainly foreseeable that this pipeline will drive an increase in production over time – entailing significant environmental, health and social impacts, and contributing to climate change. It was arguably open to the Panel, given its power to determine the public interest, to consider these matters, but it apparently decided to take a limited view of its jurisdiction. By leaving these key, big-picture considerations out, the environmental assessment of the Enbridge pipelines will make its decision in the dark.

In addition, **nothing in the Panel ruling addresses the serious concerns of First Nations with the process.** The JRP does not respect the decision-making authority of Indigenous peoples. The JRP was unilaterally imposed on First Nations by the federal government. Its terms of reference and list of issues to be considered were developed without meaningful consultation. The JRP lacks the authority to fully assess potential impacts on Aboriginal Title and Rights, and there is still no established process outside of the JRP to assess these impacts. As a result of these flaws in consultation, there continues to be significant, ongoing legal risk to the Enbridge project.

Summary of decision:

The Panel considers whether to add topics to the list of issues to be considered, and whether to require Enbridge to provide additional information on particular issues. The following is intended as a brief summary of some of the key points of the decision:

1. The Panel's Decision on what issues it should consider:

a) Items NOT added to the list of issues: The Panel rejects consideration of a number of critical issues raised by First Nations and other groups:

- ***Greenhouse gas emissions and climate change:*** It does not appear that the Panel will expand the consideration of greenhouse gas emissions and climate change impacts of the project beyond the emissions directly caused by the construction and operation of the pipeline. It will only consider federal policy on greenhouse gas emissions and international commitments as they relate specifically to the project's environmental effects, which means it will not examine broader climate change implications of the related tar sands production or oil consumption as it is not going to consider the environmental effects of upstream or downstream activities associated with the pipeline. The Panel will not consider the impact of the project on Canada's ability to meet its greenhouse gas reduction commitments.

The Panel does not say that it will consider the impact of the project and wilderness fragmentation on climate change adaptation.

- ***Tar sands development impacts:*** The Panel will not consider impacts of "upstream" tar sands development. It states "we do not consider that there is a sufficiently direct connection between the Project and any particular existing or proposed oil sands development, or other oil production activities, to warrant consideration of the environmental effects of such activities as part of our assessment of the Project." The Panel states that tar sands impacts are a provincial responsibility, and it wishes to avoid unnecessary duplication by examining them. In addition, the Panel states that there is no "sufficiently direct connection with any existing or proposed oil sands development, or other oil production activities" to look at the environmental impacts of production, since this is a project to transport oil, not to extract oil, and the oil could come from any number of locations in Alberta. The Panel states that unless tar sands environmental impacts somehow enter into its cumulative effects analysis, it will not consider them; given the Panel's finding that there is no direct connection with oil production, this is unlikely.
- ***"Downstream" use of oil/fuel:*** The Panel says it will be "inappropriate and unmanageable" to consider downstream use of the fuel, that it would be too "speculative... uncertain or insufficiently discernable or material in our view to merit detailed consideration." Plus, as the use of that fuel would be outside Canada, the Panel determines it is for other countries to regulate.
- Disappointingly, one of the reasons given to exclude consideration of both upstream tar sands and downstream fuel use impacts is that "the Panel's Terms of Reference were created following consultation with the public and Aboriginal groups," and consideration of these issues "was not included within the scope of the project." Members of the public and First Nations alike asked the federal government repeatedly, over several years, to ensure that these issues were included in the Terms of Reference. The federal government chose to ignore these calls. Now the Panel appears to rely on that consultation as a reason *not* to include these issues within its scope.
- ***Whether Enbridge pipeline fits into Canada's energy future:*** The Panel finds that it have no mandate to consider Canada's overall energy policy or the appropriateness of future tar sands development. This does not come as a surprise; many people concerned about

Enbridge's project had the sense that this question was beyond the scope of the JRP, and that is why thousands of people called for a broader Public Inquiry.

b) Issues that need no further elaboration and are already covered: On a series of other questions, the Panel also decides not to make any changes to the List of Issues, finding that the matters are already covered in the existing List and the Panel's Terms of Reference:

- Alternatives to the project: the Panel states that it is already required to consider project alternatives. However, it clarifies that it will only consider "alternatives that can meet the project need and achieve the project purpose". Enbridge's applications states that the "need" for the project is to give Canadian oil producers full value for their oil by diversifying market access, and preventing condensate shortages, and the purpose is to transport oil and condensate between Alberta and the coast. The Panel states that it will *not* consider any alternatives that are inconsistent with this need and purpose.

This is a very weak view of the alternatives analysis and explicitly avoids consideration of the option of not undertaking the project. Without comparing the value of undertaking the project with the value of not going ahead, the Panel will have a difficult time evaluating whether the project is genuinely in the public interest.

The Panel will consider the environmental effects of alternative means of carrying out the project.

- Constitutional issues: the Panel avoids making any finding on constitutional issues, except to say that the JRP agreement establishing the Panel does not alter the powers or duties contained in any statute, and does not limit the Panel's ability to consider any matter that it sees relevant under s. 52 of the *National Energy Board Act*.
- Contribution to sustainability: The Panel decides that the List of Issues is broad enough to allow it to conduct a sustainability-based analysis of the project, "as appropriate". A sustainability-based analysis typically includes such factors as: socio-ecological system integrity, intra and inter generational equity, resources maintenance, socio-ecological civility and democratic governance, precaution and adaptation.

The Panel does not commit to undertaking a contribution to sustainability analysis. The Panel's decision not to explicitly specify these in the list of issues to be considered raises questions as to whether it will ultimately consider them; in other areas the Panel adds detailed considerations simply to clarify what was it states was already included in the List, but it has not done so for these sustainability factors.

c) Changes made to the list of issues: The original List of Issues included very general categories. The Panel makes a number of revisions to the List of Issues, generally not expanding the scope of the review, but clarifying in more detail what it will consider under each category. The Panel adds additional detail in relation to:

- land use;
- abandonment of the project;
- general environmental matters, e.g.: detailing considerations such as effects on protected areas, wildlife, fish and habitat for both, atmosphere including GHG emissions of the project, vegetation, species at risk, marine environment, water, hydrology and wetlands, soils, terrain and geology, cumulative effects, effects of the environment on the project;
- socio-economic effects, e.g.: a variety of effects are listed such as human occupancy and resource use, traditional land and resource use, social and cultural well-being, and human health. The Panel will also consider employment and economy – under the *Canadian*

Environmental Assessment Act, this consideration should be limited to the way that the environmental effects of the project affect employment and economy, not a consideration of employment in general.

- consultation: the new list adds mention of “consultation with the public and Aboriginal groups”; details also added about impacts on “Aboriginal interests” and rights (see below);
- routing;
- design, construction and operation, e.g.: details added dealing with project risk;
- financial matters, e.g.: financing the project, tolling charges to be levied on shippers;
- safety and accident response, e.g.: additional details on the likelihood of failures and potential spill volumes, available compensation for spills, safety measures;
- follow-up and monitoring (this is a new category).

2. FIRST NATIONS: As noted above, nothing in the Panel’s decision addresses the significant problems raised by Indigenous peoples in relation to the JRP process and its failure to recognize their decision-making authority. The Panel essentially provides additional detail as to the issues related to “Aboriginal interests” that are within its scope, and some guidance as to how it plans to consider those issues.

The Panel adds “public and Aboriginal consultation” as a single matter on its list of issues, but also added some detail to the List of Issues in that it specifies consideration of the project’s impact on “Aboriginal interests” including “socio-economic effects ..., asserted and proven Aboriginal rights (including Aboriginal title), [and...] treaty rights.” The Panel states it will “fully consider” evidence on these issues, and potential mitigation of these impacts, before making its decision.

The Panel requires Enbridge to make “all reasonable efforts to consult with potentially affected Aboriginal groups and to provide information about those consultations to us.” The Panel will then consider the sufficiency of Enbridge’s consultation and the adequacy of the evidence. The Panel will also consider evidence from Indigenous peoples, as well as information from government authorities, and others, to inform its understanding of the project’s impacts on “Aboriginal interests”.

The Panel does not indicate that it will review the adequacy of the Crown’s consultation prior to making a decision. It also states that because the JRP process is broad and the Panel has remedial powers to order conditions on the project, the primary way for Indigenous peoples to present their concerns should be through consultation with Enbridge or participation in the review process.

The Panel did not have the power to address the central concerns about the inadequacy of Crown consultation and the failure to recognize Indigenous authority to make decisions about the land. These larger concerns are matters that only the federal government can address.

3. What additional information does the Panel require Enbridge to file?:

The Panel finds Enbridge’s application failed to provide detailed coverage of the engineering and spill risks of the project, and requires Enbridge to provide additional information on how its designs account for these risks and its plans for dealing with the risks.

A. Topics on which Enbridge is NOT required to file more information: The Panel does not require Enbridge to file any additional information on a whole host of issues raised by participants in the Panel sessions, including more information on: how Enbridge plans to consult, how Enbridge plans to use Aboriginal Traditional Use studies and Aboriginal consultation, whether Enbridge has any firm commercial support, the need for the Project and project alternatives, environmental issues such as cumulative effects and matters related to climate change, financial liability, responsibility and compensation; security; socio-economic matters; monitoring and compliance; and numerous other issues.

The Panel finds that Enbridge's filings after its application, including its response to the federal government's concerns about its application, addressed some concerns raised in the Panel sessions, and notes that Enbridge has committed to filing additional information such as a general oil spill response plan, and information related to the marine component such as TERMPOLE studies and a Quantitative Risk Assessment, all to be filed in early 2011. The Panel seems to expect that this will answer additional questions raised in the sessions.

The Panel explains that some of these issues are related to matters outside the scope of its assessment, and as a result, no additional information is required. For matters within its scope, the Panel provides explanations as to why no additional information is required:

i) Consultation: The Panel finds that no additional information is required from Enbridge to describe its consultations with the public or Indigenous peoples.

ii) Aboriginal Traditional Knowledge: The Panel does not require Enbridge to submit additional information on Aboriginal Traditional Knowledge, and found that it does not need more information, or completed studies, to proceed to a hearing. The Panel expects that further information would be introduced in the hearings on this subject and encourages the completion of these studies and their incorporation into Enbridge's assessment in keeping with ethical standards and the requirement of confidentiality.

iii) Evidence of commercial support: Enbridge will not be required to demonstrate any firm commercial support for its project prior to the Panel conducting its assessment. Numerous participants, including competitor Kinder Morgan, had argued that there was inadequate evidence of commercial support to support the project going to a hearing, and that firm evidence of commercial support was a legal requirement to proceed. The Panel finds that while several recent projects considered by the NEB had demonstrated commercial support in their applications, this is not a legal requirement. While the NEB Filing Manual sets out a "requirement" that Enbridge provide "a detailed description of the transportation contract arrangements underpinning the projected throughput," the Panel notes that the Filing Manual simply provides guidelines. As a result, the Panel will proceed with the assessment in the absence of evidence of firm commercial support.

The Panel notes that Enbridge had obtained \$100 million in funding support from unnamed prospective customers, and that while these contributions are not firm commitments to the project, these companies have nevertheless assumed a financial risk that shows some level of commitment to the project. The Panel states that it will consider the questions of financial commitments and viability as part of its assessment of the "need" for the project, as required by the List of Issues.

B. Topics on which Enbridge is required to provide more information

iv) Engineering: The Panel rejects Enbridge's assertion that its project has no unique engineering challenges. It has required Enbridge to provide a great deal of additional information before it will release its hearing order. The Panel finds that Enbridge's conceptual pipeline design is lacking in detail, fails to adequately address risk factors that are specific to building this particular project in this particular terrain, and does not show how these risks will be addressed. These risk factors are not integrated with the potential environmental and socio-economic impacts from oil spills along the pipeline route or at sea, meaning that the Panel can't properly evaluate Enbridge's proposed mitigation or prevention measures. The Panel requires that these deficiencies be corrected prior to its release of a Hearing Order. The Panel highlights the following risk issues that Enbridge hasn't sufficiently addressed:

- Mountainous terrain along more than half the route
- Pipeline route through risky terrain (avalanches, slides, earthquakes); through unique environmental habitat (fish habitat); and through communities dependent on the land (eg: for subsistence and culture)
- Route through Rocky and Coastal mountain areas prone to massive slope movements
- Tunnels through potential acid-generating rock and associated risk to ground stability
- High oil transportation volumes resulting in large potential oil spills
- Far-reaching environmental and human consequences of oil spills in populated and environmentally-sensitive areas
- Difficult access to right of way (on land and in tunnels) in all seasons

As for how to remedy these weaknesses, the Panel requires Enbridge to provide maps of potential oil spills in *each kilometre* of the pipeline, accounting for pipeline flow rate, elevation, properties of the oil and condensate, proximity of stop valves, detection and response capability, and geographical conditions. Enbridge must also provide charts showing worst-case spill scenarios and volumes.

The Panel requires Enbridge to prove that it has designed its project using a risk-based approach that goes beyond simply meeting industry standards (CSA standards), including in its choice of pipe materials, welding design, right-of-way monitoring in seismic and complicated terrain, valve design for spill reduction, spill containment structures and emergency response strategies.

4. Hearing locations

The Panel will not hold hearings in cross-Canada locations outside of BC and Alberta. It says it will hold hearings “in proximity to the pipeline route and marine aspects of the project.” Further details of hearing locations will be determined later. It is not clear whether hearings will be held in major population centres in the relevant provinces such as Vancouver, Victoria, or Edmonton.

This is unfortunate because Canadians right across the country have a direct interest in this project and the environmental and climate change impacts that it will have – bringing oil tankers and pipelines right into the heart of the Great Bear Rainforest, a unique ecosystem that can be found nowhere else on the planet.

The information provided in these materials is for public education purposes only. If you have particular questions about a specific legal question, please contact one of West Coast’s lawyers at 1 800 330-WCEL.

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