

Mounting Opposition by Municipalities, Aboriginal Communities and Environmentalists Threatens To Halt Pipeline Development

By [Julie Abouchar](#), Partner and Certified Environmental Law Specialist
© Willms & Shier Environmental Lawyers LLP



May 7, 2014

Five major oil pipeline construction and/or expansion projects in various stages of development across Canada would, if completed, collectively carry up to 3.7 billion barrels of Western crude oil a day to refineries in Eastern Canada or on to markets in the US, Europe and Asia. With a total price tag of more than \$26.7 billion, these initiatives could kick-start the Canadian economy, create tens of thousands of jobs and provide secure markets for a major expansion of oilsands production. They would also significantly boost Canada's greenhouse gas (GHG) emissions, cut across sensitive natural areas from one end of the country to the other, and increase the risk of a major rupture or marine spill that could have devastating long-term consequences. The pipeline projects also face concerted opposition and increasing legal challenges from First Nations, municipalities, landowners and environmental groups. Willms & Shier has acted and is acting as counsel to Interveners in a number of pipeline hearings.

Canada's Major Oil Pipeline Projects

<i>Energy East Pipeline Project (TransCanada)</i>
<ul style="list-style-type: none"> ◆ Description – This project would run 4,600 km east from Hardisty, Alberta to new marine terminals in Cacouna, Quebec and St. John, New Brunswick. It would also serve refineries in Quebec and New Brunswick. Some 3,000 km of existing gas pipeline would be converted and 1,500 km of new pipeline built, as well as four new tank farms, 72 pump stations, lateral connections and delivery facilities. ◆ Capacity – 1.1 million barrels per day (b/d) of oil. ◆ Cost – \$12 billion. ◆ Current Status – The company is expected to submit its application to the National Energy Board (NEB) in the third quarter of 2014. After ensuring the application is complete, the NEB will issue a Hearing Order that sets out the review schedule.
<i>Northern Gateway Project (Enbridge)</i>
<ul style="list-style-type: none"> ◆ Description – This project consists of two parallel pipelines (one carrying oil products west and the other condensate east) that would run 1,177 km from Bruderheim, Alberta across central British Columbia to a new Kitimat Marine Terminal (consisting of two tanker berths, three condensate tanks and 16 oil storage tanks).

- ◆ **Capacity** – 525,000 b/d of petroleum products 193,000 b/d of condensate.
- ◆ **Cost** – \$7.88 billion.
- ◆ **Current Status** – On December 19, 2013, the Joint Review Panel recommended the federal government approve the project (subject to 209 conditions). The Government has 180 days (until mid-June 2014) to issue its decision.

Eastern Canadian Refinery Access Initiative (Line 9 Project) (Enbridge)

- ◆ **Description** – The first phase of this project covers the flow reversal of Line 9A, running 246 km from Sarnia to Westover, Ontario. The second phase covers the reversal of Line 9B and the expansion of Line 9, running 639 km from Westover to Montreal, Quebec.
- ◆ **Capacity** – Expanded from 240,000 to 300,000 b/d of oil.
- ◆ **Cost** – \$15.9 million (Phase 1); \$110 million (Phase 2).
- ◆ **Current Status** – The NEB approved the first phase, with 15 conditions, on July 27, 2012. The NEB approved the second phase, with 30 conditions, on March 6, 2014.

Keystone XL Pipeline Project (TransCanada)

- ◆ **Description** – The Canadian portion of this project involves 529 km of new pipeline from Hardisty, Alberta to the Canada/US border at Monchy, Saskatchewan. The project involves pump stations, tanks and other related facilities. The U.S. portion includes some 2,700 km of new pipeline ending in oil storage terminal facilities on the Gulf Coast in Nederland and Houston, Texas.
- ◆ **Capacity** – 700,000 -900,000 b/d of oil
- ◆ **Cost** – \$1.7 billion (Canadian portion), \$7 billion (total)
- ◆ **Current Status** – The NEB approved the Canadian portion and the proposed tolls for the pipeline on March 11, 2010, with 22 conditions. U.S. approval is still pending.

Trans Mountain Expansion Project (Kinder Morgan)

- ◆ **Description** – This project consists of some 987 km of new pipeline and 193 km of reactivated pipeline that would run between Edmonton, Alberta and Burnaby, British Columbia. The project also includes new and modified pump stations and tanks, and expansion of the Westridge Marine Terminal.
- ◆ **Capacity** – Expanded to 890,000 b/d
- ◆ **Cost** – \$5 billion
- ◆ **Current Status** – The NEB will hear Aboriginal traditional ecological knowledge and land use evidence this summer. Full hearings will begin in January 2015. A final recommendation is due by July 2, 2015.

Opposition and Legal Challenges

First Nations, environmentalists, landowners and municipalities along proposed pipeline routes have commenced concerted opposition and legal challenges to the projects. Very recently we have seen

- ◆ a major protest against a pipeline project in southern BC
- ◆ a plebiscite opposing development of a marine terminal to export Alberta crude to Asia
- ◆ (another) municipal motion calling on Ontario to formally assess a proposed pipeline running through the province
- ◆ (another) First Nations lawsuit calling for meaningful consultation on the impact of pipeline construction on Aboriginal and Treaty rights and
- ◆ the release of two major reports linking oil and gas development with climate change.
- ◆ at least 10 legal challenges to the Northern Gateway Panel review report.

Key Issues

NEB will not address upstream environmental issues

Under the new federal environmental assessment process, the National Energy Board (NEB) will not address upstream environmental issues, such as an increase in GHG emissions, in its review of pipeline applications.

On April 10, Environment Canada quietly released its [National Inventory Report 1990-2012](#) of GHG “sources and sinks”. The Report reveals that emissions from Canada’s oil and gas sector have jumped by 70 per cent since 1990, taking the top spot on the list of domestic sources.

Just two days later, a working group of the Intergovernmental Panel on Climate Change (IPCC) released [Climate Change 2014: Mitigation of Climate Change](#) with considerably more fanfare. To limit the increase in global mean temperature to 2°C, the IPCC concludes that GHG emissions will need to be cut 40 to 70 per cent by 2050 and to “near zero” by the end of the century.

Ottawa will find meeting this target difficult. The environmental and socio-economic effects of upstream oil extraction activities (especially GHG emissions from oilsands development) and downstream use of oil transported by the pipeline lie outside the NEB’s mandate in reviewing major pipeline proposals. Environmentalists claim that, by providing greater access to world markets, the proposed oil pipelines will accommodate a major expansion of oilsands development and significantly increasing domestic GHG emissions. Proponents counter that shipping oil by rail generates even higher GHG emissions. The Canadian Association of Petroleum Producers maintains that about 75 per cent of oil-related GHG emissions comes from vehicle use, not exploration and development.¹ This procedural disconnect may be crystallizing opposition to pipeline construction and expansion, both at home and in the U.S.

¹ See <http://www.capp.ca/environmentCommunity/Climate/Pages/GHG-101.aspx>.

First Nation and Métis demand for meaningful consultation may delay/halt development

On April 8, Chippewas of the Thames First Nation, located about 20 km southwest of London, Ontario, filed for leave to appeal the NEB's recent approval of Enbridge's Line 9 pipeline project. The First Nation claims that the Crown had failed to conduct any meaningful consultation on the potential impacts of the project or accommodate potentially impacted Aboriginal and Treaty rights. The First Nation says they viewed the NEB process as an opportunity to express concerns about the project impacts and have the government consult and accommodate those concerns, but were disappointed with the government's failure to engage.

We previously wrote that a number of First Nations are pursuing legal challenges to try to postpone approval of the Northern Gateway pipeline (see [“First Nations and Environmental Groups Apply to Reopen Northern Gateway Project Environmental Joint Review Panel”](#)). These First Nations allege that the Crown could not rely on the Joint Review Panel process to satisfy its duty to consult. Meaningful consultation with each affected Aboriginal community along the route of a proposed pipeline must take place. Many Aboriginal communities are also interested in a business role in any resource development projects undertaken in their territories. First Nations are pushing for equity partnerships and business opportunities that provide ongoing economic benefits.

Emerging provincial involvement on pipeline assessment and approval

While there is overlap in the federal and provincial oversight of resource extraction, the assessment and approval of pipelines has remained, primarily, a federal responsibility. However, that may be changing.

The NEB plays a central role in the assessment of these projects. Under the *National Energy Board Act*, the NEB must conduct a public hearing for any project involving more than 40 km of pipeline. Also, federal requirements cover the impacts on species at risk under the *Endangered Species Act*, impacts on fisheries under the *Fisheries Act*, and approvals for river crossings under the *Navigable Waters Act*. There are also federal requirements for Aboriginal consultations, and permits for disposal at sea, explosives use and transport.

Proponents must negotiate a series of provincial and municipal approval processes and regulatory requirements. For example, the Energy East project must obtain authorizations under more than 50 statutes scattered across six provinces from Alberta to New Brunswick. These cover archaeological research, habitat and wetland protection, work on Crown lands, heritage properties, oversized load transport, crossing public utilities and more. Finally, the regional, municipal and other local government approvals needed may include electrical permits, access road permits, permission to cross county and regional district roads, water use, and health approval for industrial camps.

TransCanada expects the Energy East project will also be subject to a public EA hearing by the *Bureau d'audiences publique sur l'environnement* (BAPE) under Quebec's *Environmental Quality Act*, as well as a formal review process to consider the use and the acquisition of rights to agricultural land by the *Commission de protection du territoire agricole* (CPTAQ).

In Ontario, the Minister of Energy asked the Ontario Energy Board (OEB) to prepare a report on the impacts of the Energy East proposal, including its effect on natural gas rates and access to supply, the natural environment and pipeline safety, local and Aboriginal communities, and the short and long-term economy. On April 8, the OEB wrapped up public hearings and is currently preparing its final report, expected sometime this summer. While several intervenors

before the OEB supported the project's job creation potential, others insisted local communities should reap financial benefits to compensate for the risk of future spills, and many said the pipeline should be rejected outright on environmental grounds. Although the OEB has no jurisdiction over the project's final approval, its report will form the basis of the province's intervention in the upcoming NEB review.

Some are asking the province to take a more active role. On April 1, Toronto City Council passed a motion asking the Ontario Ministry of the Environment to undertake a comprehensive environmental assessment of Enbridge's Line 9 application. Toronto joins Kingston and several other municipalities along the Line 9 route to call for a provincial EA on the project. Toronto has also asked Enbridge to give notice when it plans to bring in an emergency response team to handle potential oil spills, as well as to inform the city of any maintenance work or testing it plans to do on Line 9 near GO Transit and TTC facilities over the next five years.

With hundreds of municipalities and Aboriginal communities spread along the routes of the major pipelines under development, the proponents are going to have to work hard to address the safety and emergency response issues that are being raised.

Fewer groups/individuals to address hearing panels

The NEB limits intervenors to those parties "directly affected" by a proposed project or having "relevant information" to contribute. As a result, hundreds of groups and individuals may be denied an opportunity to address the hearing panels considering upcoming pipeline projects.

On April 12, hundreds of Burnaby, B.C. residents rallied against the expansion of Kinder Morgan's Trans Mountain pipeline across south-central BC, citing concerns about increased oil tanker traffic, the size of the tank farm on Burnaby Mountain, climate change, and effects on health and safety. The same day, residents of Kitimat, B.C., the terminus of the proposed Northern Gateway pipeline, registered their opposition to that controversial project by a vote of 58.4 to 41.6 per cent in a non-binding municipal plebiscite. Grass roots opposition to pipeline proposals has not dissipated following the conclusion of the Northern Gateway hearings.

Under section 55.2 of the *National Energy Board Act*, in assessing an application, the NEB must consider the representations of any person who, in its opinion, is "directly affected," as well as any person who, again in its opinion, has "relevant information or expertise" to contribute. The NEB's decision on whether to consider the representations of any person is "conclusive". If accepted by the NEB, such individuals may participate in a hearing as an intervenor (who can file evidence and notices of motion, ask written questions, and present written and oral arguments) or as a commenter (who may submit one letter of content).

The NEB does not want to replicate the inclusive approach taken by the Joint Hearing Panel that reviewed the Northern Gateway application under the old EA rules. That panel heard oral testimony from 1,179 individuals, groups and community leaders over 180 hearing days. On April 2, the NEB issued a list of some 400 acceptable intervenors (and 1,250 commenters) for the upcoming hearing into expanding the Trans Mountain pipeline from a pool of over 2,100 applicants that had formally applied to take part. It is uncertain whether limiting the number of intervenors in the interest of procedural efficacy will harden opposition and trigger more intrusive protests in future.

Conclusion

We are carefully monitoring developments in this area.

Despite a supportive federal regulatory environment, including a streamlined environmental assessment process, the organized opposition to major pipeline proposals continues to grow. To ensure the support of municipalities, First Nations communities and landowners along the proposed routes, proponents will have to undertake meaningful consultation, address environmental concerns and upgrade pipeline integrity safeguards.

We will update you on significant developments in these areas.

[Julie Abouchar](#) is a partner at Willms & Shier Environmental Lawyers LLP in Toronto and is certified as a Specialist in Environmental Law by The Law Society of Upper Canada. She can be reached at 416-862-4836 or by e-mail at jabouchar@willmsshier.com.

The information and comments herein are for the general information of the reader only and do not constitute legal advice or opinion. The reader should seek specific legal advice for particular applications of the law to specific situations.

Willms & Shier Environmental Lawyers LLP – TORONTO

4 King Street West, Suite 900, Toronto, Ontario, Canada M5H 1B6
T: 416 863 0711 F: 416 863 1938 www.willmsshier.com

Willms & Shier Environmental Lawyers LLP – OTTAWA

45 O'Connor Street, Suite 700, Ottawa, Ontario, Canada K1P 1A4
T: 613 761 2424 www.willmsshier.com