



Mounting Opposition Threatens To Halt Pipeline Development

By Julie Abouchar

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 U.S., 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 face concerted opposition and legal challenges from First Nations, municipalities, landowners and environmental groups.

John Donihee Receives NWT's Premier's Award for Collaboration



Congratulations to our colleague John Donihee on his receipt of a Government of the Northwest Territories "Premier's Award for Collaboration"! The award ceremony was held on June 4, 2014 at the Legislative Assembly in Yellowknife.

The Premier's Award for Collaboration recognizes the outstanding achievements of teams that contribute to the Government of the Northwest Territories' goals and that make an outstanding contribution to improve services for Northwest Territories' residents.

John's award recognizes his participation in a working group of government and First Nations representatives to draft the new *Northwest Territories Wildlife Act*, enacted in November 2013.

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Coming Soon! Julie Abouchar
Co-Authors new book on Ontario
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Note: *The information and comments herein are for the general information only and do not constitute legal advice or opinion. Please seek specific legal advice for particular applications*

Canada's Major Oil Pipeline Projects

Energy East Pipeline Project (TransCanada)

- ◆ **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. **Read about Energy East's first court challenge in the sidebar on page 4.**

Northern Gateway Project (Enbridge)

- ◆ **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 approved the project with conditions on June 17, 2014. **Read about the federal government's June 17, 2014 decision in the sidebar on page 3.**

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 US 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. US 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

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
- ◆ the release of two major reports linking oil and gas development with climate change, and
- ◆ at least 10 legal challenges to the Northern Gateway Panel review report.

Key Issues

1. 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 cut 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. This disconnect may be crystallizing opposition to pipeline construction and expansion, both at home and in the U.S.

Federal Government Approves Northern Gateway Pipeline

The Federal Government approved the Northern Gateway pipeline on June 17, 2014, adopting the 209 conditions recommended by the Joint National Energy Board Review Panel last December. The federal approval is a step along the road to construction rather than the end of the approval process for Enbridge. Enbridge faces four key permitting and legal hurdles

- ◆ meet 209 federal conditions, including preparing spill modeling and response plans and giving financial assurance
- ◆ obtain numerous permits from and meet the five conditions, imposed by B.C., including deploying world leading marine oil response, prevention and recovery and addressing legal requirements for Aboriginal and treaty rights
- ◆ respond, with the Federal Government, to both ongoing litigation and potential new litigation commenced by Aboriginal communities and environmental groups
- ◆ build trust with Aboriginal communities. Greg Rickford, Minister of Natural Resources, noted, “the proponent clearly has more work to do in order to fulfill the public commitment it made to engage with Aboriginal groups and local communities along the route”.

2. First Nation and Métis demand for meaningful consultation may delay or halt development

On June 11, Chippewas of the Thames First Nation, located about 20 km southwest of London, Ontario, were granted 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.

3. Emerging provincial involvement on pipeline assessment & approval

The assessment and approval of pipelines has remained, primarily, a federal responsibility. However, the importance of provincial permits cannot be underestimated. For example, the BC government has established five conditions for acceptability of the Northern Gateway pipeline (see sidebar on page 3).

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

TransCanada's Energy East Pipeline Faces First Court Challenge

TransCanada's Energy East Pipeline met its first court challenge when the Council of Canadians filed a motion with the Federal Court of Appeal on May 15, 2014.

The proposed Energy East pipeline would transport oil from Hardisty, Alberta, to Saint John, New Brunswick. TransCanada is preparing to file its full application with the NEB later this year. The NEB is conducting open houses and has developed a List of Issues.

The motion by the Council of Canadians asked the Court to set aside the List of Issues and also raised substantive process concerns. The Council states that the List of Issues does not include a consideration of the potential impacts that the pipeline may have on climate change emissions, increased oil sands production on downstream First Nations or that it is exporting unrefined oil. The Council's procedural concern is that the NEB has departed from its past practice of allowing interested parties to comment on the List of Issues for major projects.

The Federal Court will hear from the NEB and will then decide whether or not to allow the appeal to proceed.

Quebec's *Environmental Quality Act*, and 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 will have to work hard to address the safety and emergency response issues that are being raised.

4. 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 B.C., 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

Ottawa Announces New Rules for Pipeline Approvals and Operations

On May 14, 2014, the Federal Government announced new rules for the way pipelines are approved and run.

The proposed amendments to the *National Energy Board Act* include \$1 billion absolute liability for oil spills, greater consultation with First Nations and expanded oversight by the NEB.

UN's Special Rapporteur Releases Report on the Rights of Indigenous People

James Anaya, the United Nation's Special Rapporteur on the rights of indigenous peoples, released his report, "[Situation of Indigenous Peoples in Canada](#)", on May 12. The extensive report, which followed Mr. Anaya's eight-day visit to Canada in October 2013, addressed socio-economic issues. It also referenced some of Canada's major resource development plans, including the Enbridge Northern Gateway and Kinder Morgan Trans Mountain pipelines.

The report noted the complexities of Canada's duty to consult and the lack of a consistent framework for consultation. It urged Canada to put in place a framework that allows for genuine input and involvement at the earliest stages of decision-making. It urged governments to maximize benefits for indigenous peoples from extractive opportunities within their lands.

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

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 are carefully monitoring developments in this area and keep you up-to-date on significant developments.

Council of Canadian Academies Raises Questions on Environmental Impacts of Fracking: Current Regulations Not Based on Strong Science

By John Georgakopoulos

The Council of Canadian Academies (CCA) has concluded that development of shale gas reserves is having “profound economic, environmental, and social impacts across much of North America”. CCA further states that targeted science and management strategies are needed to better understand and mitigate those impacts.

While the Canadian regulatory framework governing shale gas development is evolving, CCA says that “many aspects are not based on strong science and remain untested.” In addition, there is no national plan, coordination or federal facilitation of individual provincial efforts to regulate the sector. First Nations’ rights may also be affected in several provinces and need to be considered. CCA concludes that “there can be advantages in the ‘go slow’ approach” currently adopted in several Eastern provinces, and that there are “similar advantages in identifying areas that are too environmentally vulnerable to develop.”

CCA’s report, [The Environmental Impacts of Shale Gas Extraction in Canada](#), was released May 1, 2014. CCA is an independent, not-for-profit organization that supports science-based assessments of major public policy issues in Canada.

The Primary Concerns about Fracking

In September 2011, former federal Environment Minister Peter Kent asked CCA to assemble a panel of experts to address the following question: What is the state of knowledge of potential environmental impacts from the exploration, extraction and development of Canada’s shale gas resources, and what is the state of knowledge of associated mitigation options? CCA found that the rapid expansion of shale gas development in Canada over the past decade has occurred “without a corresponding investment in monitoring and research addressing the impacts on the environment, public health, and communities”.

The primary concerns are

- ◆ degradation of the quality of groundwater and surface water, including safe disposal of large volumes of wastewater
- ◆ risk of increased greenhouse gas (GHG) emissions, including fugitive methane emissions during and after production, exacerbating anthropogenic climate change
- ◆ disruptive effects on communities and land

- ◆ adverse effects on human health
- ◆ local release of air contaminants, and
- ◆ potential for triggering small to moderate-sized earthquakes in seismically active areas.

CCA says that, depending on future natural gas prices and government regulation, further development of Canadian shale gas resources “could potentially span many decades and involve the drilling of tens of thousands of hydraulically fractured horizontal wells”. While shale gas extraction is already well advanced in British Columbia and Alberta, additional reserves exist in Quebec, New Brunswick, Nova Scotia, Ontario, the Yukon and the Northwest Territories

Long-Term Leakage of Fluids and GHGs a Concern

The assessment of environmental impacts is hampered by a lack of information about many key issues. In particular, the problem of fluids and natural gas escaping from improperly formed, damaged or deteriorated seals on wells. CCA says that if wells can be sealed, “the risk to groundwater is expected to be minimal”. However, much of the data on the behavior and movement of hydraulic fluids has not been obtained, is not publically available or is of “variable quality”.

Several factors make the long-term impacts related to fluid leakage greater for shale gas development than for conventional oil and gas development. These include the

- ◆ larger number of wells needed for shale gas extraction
- ◆ diverse chemicals used in hydraulic fracturing operations
- ◆ potential development of shale gas resources in rural and suburban areas that rely on groundwater resources, and
- ◆ (possibly), repetitive fracturing process itself.

The potential impacts on groundwater, including the upward migration “of natural gas and saline waters via complex underground pathways”, is also not currently monitored in any systematic manner. In addition, CCA says conventional methods of monitoring gas leakage may be inaccurate, and leakage outside the main well casing is rarely measured.

Process Improvements have Lessened Impacts but More are Needed

CCA says that there have been a number of process improvements to lessen the potential for environmental impacts, including

- ◆ recycling of flowback water
- ◆ placing more wells per pad
- ◆ drilling longer laterals resulting in fewer pads and roads
- ◆ using fewer and more benign chemicals
- ◆ relying more on tanks rather than ponds to store wastewater
- ◆ better pond designs, and
- ◆ in some cases, switching from diesel fuel to natural gas in on-site engines.

However, comprehensive investment in research and monitoring is needed, and “many of the pertinent questions [on impacts and their mitigation] are hard to answer objectively and scientifically”. In addition, greater attention must be paid to the implementation of best current practices and the response to accidental releases that cannot be reduced to zero. Although current technologies and practices could minimize many, but not all, relevant risks, some of these are untested or are not economically feasible. CCA concludes

Because shale gas development is still at an early stage in Canada, there is opportunity to put in place the management measures required supported by appropriate research to reduce or avoid some of the negative environmental effects of this development.

We will continue to follow developments in the shale gas sector and will provide updates.

Municipalities To Implement Ontario's 2014 Provincial Policy Statement and Planning Decisions in Line with Section 35 of the *Constitution Act, 1982*

By Julie Abouchar

A new commitment introduced in Ontario's 2014 Provincial Policy Statement (PPS) may have far-reaching effects for municipalities across the province. The section 4.3 commitment, in effect from April 30, 2014, requires municipalities to implement the PPS consistent with the recognition and affirmation of existing Aboriginal and Treaty rights in section 35 of the *Constitution Act, 1982*. Some municipalities are already strengthening relations with Aboriginal neighbours through protocols, agreements and Official Plan policies. These set expectations and standards of engagement and can lessen risk from planning decisions.

Section 3 of the *Planning Act* requires that planning decisions by various municipal and provincial bodies, including the Municipal Board, "shall be consistent with" the PPS. Key questions to ask as PPS 2014 is implemented include whether Ontario is signaling an intention to delegate "procedural aspects" to local planning authorities. If so, what is the required process? What oversight or guidance will the Crown retain and how will it be exercised? And who will pay for the additional consultation costs?

NEW PUBLICATION Coming in Fall 2014 from Canada Law Book!

Ontario Water Law

By Julie Abouchar, B.Sc., LL.B., LL.M and Theresa McClenaghan, LL.B., LL.M

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Ontario Water Law provides a thorough examination of the current regulatory framework for all aspects of water in Ontario. It will help municipalities, Conservation Authorities, companies and their legal counsel to

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