

Legal update

Major decisions for proposed Canadian export pipelines

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Energy

Oil and gas

There have been major decisions recently concerning proposed Canadian export pipelines by the government of Canada, the government of British Columbia, and the new Trump administration in the United States.

Federal government issues decisions on three major pipeline projects

Late last year the federal government announced its approval of two major pipeline projects: Kinder Morgan's long-awaited Trans Mountain Expansion project and Enbridge's Line 3 project. At the same time, the federal government announced its rejection of Enbridge's Northern Gateway project.

The federal government's decisions on these projects were somewhat unsurprising given summer hints and fall announcements about federal environmental policy on climate change. The decisions were also generally consistent with the federal government's election platform concerning pipeline projects, reforming the environmental assessment regime, and enhancing marine shipping safety and spill response preparedness. The federal government's decisions also hint at a federal *quid pro quo* of requiring provinces to have strong climate change regimes in place before federal project approvals will be issued.

Federal and Provincial Carbon Policy Regimes Affirmed

During the 2015 election, the Liberal Party committed to taking a different view on the Northern Gateway pipeline from the Harper government. Prime Minister Trudeau announced the federal government would oppose the Northern Gateway pipeline, stating that "the Great Bear Rainforest is no place for a pipeline" and Canadians "need to get our resources to market, but we need to do that in responsible, sustainable, thoughtful ways."

The Northern Gateway project's provincial and federal approvals were *both* overturned in court in 2016 due to an invalid provincial agreement that removed the need for a provincial environmental assessment certificate and the province's failure to consult with First Nations on this agreement, as well as the federal government's inadequate post-hearing First Nations consultation practices. The federal government has now directed the National Energy Board to dismiss the Northern Gateway project application.

The Trudeau government declared, during the same election cycle, that it would not pre-judge the Trans Mountain Expansion project, which was still undergoing its environmental assessment at the time. The Trans Mountain Expansion project has since completed its environmental assessment and undergone further *ad hoc* aboriginal consultation and review for greenhouse gas emissions issues, and has now received federal authorization to proceed.

As a rationale for the Trans Mountain Expansion approval, the federal government cited the new federal carbon policy and Alberta's aggressive provincial climate change policies. The National Energy Board hearing process was heavily criticized for not addressing upstream carbon impacts and leaving these considerations to other processes. The federal government's position, when taken with the federal conditions attached to the recent Pacific NorthWest LNG project

approval, suggests the federal government (i) puts a significant emphasis on climate change considerations, (ii) remains keenly aware of public opinion and is sensitive to resource development concerns, and (iii) will use federal project approvals to leverage policy decisions from provincial government.

Crude Oil Tanker Traffic Ban

The federal government's pipeline decisions were followed by an update on the federal government's pledged ban on crude tanker traffic along the BC coast. The ban does not extend to liquefied natural gas tanker traffic, non-"persistent" hydrocarbons like gasoline, or small fuel oil barges. Draft legislation has been promised for 2017. The federal government also recently announced \$1.5 billion of federal funding for ocean protection, which will include funding for a marine safety system, restoring marine ecosystems, and research into oil spill cleanup methods.

The federal government's attention to marine spill preparedness and response mirrors the British Columbia provincial government's proposed changes to strengthen provincial marine spill preparedness and response requirements.

BC sets conditions for Trans Mountain pipeline

On January 10, 2017, the British Columbia provincial government issued a revised environmental assessment certificate (EAC) for the Trans Mountain Expansion project. The EAC removes the final major legal obstacle from the project. While the regulatory risk has diminished, court challenges have been filed and continued public protests can be expected at remaining permitting steps.

The need for a revised EAC arose from a January 2016 BC Supreme Court decision that the project could not simply rely on the National Energy Board's environmental assessment certificate in place of its own provincial EA certificate.

The provincial government approval layers an additional 37 conditions onto the federal conditions. The provincial conditions address an assortment of issues ranging from aboriginal consultation and engagement to wildlife impacts mitigation and monitoring, environmental offsetting, and marine spill preparedness. Regarding marine spills preparedness, the EA certificate contains eight detailed conditions that impose additional reporting and planning obligations on the proponent.

Importantly, the proponent and the province have also entered into a revenue-sharing arrangement under which the company will pay BC between \$25 to \$50 million per year for 20 years. These revenues will be a source of funding for environmental projects such as marine preservation and environmental monitoring, remediation of contaminated sites, and restoring habitat.

British Columbia's Premier Christy Clark subsequently announced that the provincial government's longstanding five conditions for approving a pipeline have now been met. In time for the May election, the Premier concluded that the project:

- has completed an environmental review process;
- includes a world-leading marine oil-spill prevention, response, and recovery system;
- uses world-leading practices for land oil-spill prevention, response, and recovery;
- addresses legal requirements regarding aboriginal and treaty rights; and
- ensures that BC receives a fair share of the fiscal and economic benefits of the project.

Next Steps

A number of aboriginal and environmental groups have announced forthcoming legal action and protests to the approval of the Trans Mountain Expansion project, while others have announced they will continue to negotiate with the government. If and when construction on the Trans Mountain Expansion project begins, protests are expected.

Some local politicians, First Nations leaders, and environmental activists have all promised to interfere with any construction. Conversely, if and when the project begins operating (theoretically scheduled for 2019), discounts on Canadian oil are expected to decline, with commensurate economic benefits.

President Trump signs executive order respecting Keystone XL pipeline

The Keystone XL pipeline was proposed by TransCanada Corporation as part of its Keystone pipeline system. It would better connect Canadian crude supply to US Gulf Coast refineries, and thereby achieve a price closer to world pricing. The project has long been approved in Canada, but – after long delays before the State Department – was ultimately refused a presidential permit by President Obama in November of 2015.

On January 24, 2017, President Trump signed executive orders respecting the Keystone XL pipeline project as well as the Dakota Access pipeline. The Keystone XL presidential memorandum did not specifically approve the Keystone XL pipeline, but put in place procedures that would expedite the review process.

TransCanada was invited to promptly re-submit its application to the State Department for a presidential permit, and the Secretary of State was directed to facilitate an expeditious review and reach a final decision, including a final decision on any permit conditions, within 60 days of the submission of TransCanada's application. The State Department was also directed to utilize its previous environmental impact statement issued in January 2014. The presidential memorandum also directed the Department of the Army and Department of the Interior to expeditiously review all Keystone XL applications for related approvals and authorizations should a presidential permit be issued.

At the time the orders were signed, and consistent with his campaign messaging, President Trump stated that both pipeline projects would be subject to "renegotiation," noting that new projects should use US-made steel pipe. The requirement for US-made steel pipe was contained in a separate presidential memorandum that directed the Secretary of Commerce to develop a plan under which all new pipelines, as well as retrofitted, repaired or expanded pipelines, inside US borders, including portions of pipelines, use materials or equipment produced in the United States to the maximum extent possible.

How this separate order may affect Keystone XL is somewhat unclear. Press reports have suggested that much of the Keystone XL pipe has already been manufactured and delivered to various staging areas along the pipeline's right of way and was produced by pipe mills in Canada, India, Italy and the United States. While TransCanada resubmitted its presidential permit application on January 26, 2017, it remains to be seen what the commercial response of major producers will be towards multiple approved potential Canadian export pipelines.

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