
NATIONAL ENERGY BOARD MODERNIZATION PANEL

SUBMISSIONS OF THE TOWNSHIP OF LANGLEY

FEBRUARY 8 2017

1. The Municipality of the Township of Langley (“Langley”) has insight not only into how the National Energy Board (“NEB” or “Board”) is operating in its role as “lifecyle” regulator, but also in its assessment and approval role. Langley (area, 316 km², population of approximately 113,000) has the existing Trans Mountain pipeline travelling approximately 17 km through the community, and will have the second Trans Mountain pipeline constructed through it. Langley has regular interactions with Trans Mountain and the NEB regarding the existing pipeline, and was an active intervenor throughout the Trans Mountain Expansion Project NEB assessment process.
2. Langley’s principle observation for this NEB Modernization Panel, which is based upon the perspective brought by both of these experiences, is that the NEB structure and processes appear built around regulation of energy first, and only as an afterthought do the inevitable matters of community infrastructure, safety, and environment get shoe-horned in to the regulatory picture.
3. If the NEB is going to be the body that regulates and approves inter-provincial pipelines, then it must fundamentally, and as a matter of legislated structure and Board outlook, fairly and completely address the inevitable reality that pipelines create costs, risks and burdens for municipalities and that these must be addressed overtly and transparently through legislation and the regulatory process.
4. The Board has a legislated mandate to regulate in the Canadian public interest. However, even the scope of this review, as set out under this Panel’s Terms of Reference, focus is on the Board’s efficiency as energy regulator, without mention of the Board’s regulatory role regarding the interface of this energy infrastructure with the environment and infrastructure in the communities that host the pipelines:

Scope of Review

Efforts to modernize the NEB will deal with a focused set of issues related to the Board’s structure, role, and mandate pursuant to the NEB Act. Specifically, these efforts will aim to position the NEB as a modern, efficient, and effective energy regulator and regain public trust.

5. If the NEB is going to regulate in the public interest, it must regulate not only to meet the needs of the transport of energy, but also the needs of the communities that host the means of transport. Municipalities have specific legislative, jurisdictional, infrastructure and land based interests and obligations that make them important and unique stakeholders in inter-provincial pipeline development. Despite this, and despite the extensive efforts on behalf of municipalities across the nation to put these interests before the NEB, municipalities were not listed among the “key stakeholders” to be consulted in this NEB Modernization Panel process.

6. The Township of Langley wishes to highlight three main ways in which the NEB must change to reflect a modern approach to regulation of energy infrastructure projects:
 - a. Real costs of the pipeline must not be borne by the communities that host the pipeline;
 - b. The NEB must be neutral, diligent and fair in the lifecycle regulation of the pipeline; and
 - c. Stakeholder consultation in NEB processes must be meaningful.
7. Each of these points has been a significant issue for Langley, as described briefly below.
8. It is important to note at the outset that the goals of municipalities are not in opposition to the NEB or to energy companies.
 - a. Langley was clear before the NEB in the TMX assessment process that Langley did not take a position before the Board as to whether the TMX was necessary to the public interest. The Township did, however, submit along with several other local governments, that it would not be in the public interest to allow the TMX to be developed and operated at the expense of the local communities that would host the pipeline. The Township and other local governments submitted that in order for the TMX to be found to be in the public interest, conditions must be attached to any approval that would seek to ensure that no additional cost or burden or unnecessary risk is placed upon local governments and taxpayers by the TMX.
 - b. With respect to “life cycle” regulation of pipelines, the Township of Langley has also plainly stated to the NEB on a number of occasions that it shares the goal of ensuring safety around pipelines.

Financial Burden to Municipalities

9. The Township of Langley submitted to the NEB in the TMX assessment process that no increased financial burden should be put on any local government or local tax payers due to the construction or operation of the TMX. Local communities should not bear costs that would not arise but for the construction and operation of the pipeline. This should be a guiding principle for a modern NEB.
10. Along with several other municipalities (Cities of Surrey, Coquitlam, Abbotsford and Burnaby), Langley led independent expert evidence before the NEB in the TMX assessment process to demonstrate the real and quantifiable impacts on communities from a project like the existing and (then) proposed TMX pipelines.
11. Trans Mountain acknowledged in its application that the TMX pipeline will have long term and continuous impacts on planning and infrastructure development for municipalities. While Trans Mountain submitted (without evidence) that these impacts overall would not be significant, Langley and other municipalities submitted independent expert evidence that the

financial impacts to municipalities are very significant: amounting to approximately \$12,800,000 over 50 years for the Township based on annual averages.

12. These costs arise from municipalities' ordinary activities. The sort of infrastructure at issue includes buried utilities such as water, sewer and storm systems; roads, boulevards, sidewalks, parks trails and overland drainage (ditches). The pipeline creates additional costs for local tax payers in relation to fundamental and unavoidable municipal activities, including:
 - a. building road and utility infrastructure to expand and accommodate increasing populations, and
 - b. maintenance on existing roads, sewers, parks trails, ditches.
13. There is no basis in law, the national or public interest, or in the fair distribution of benefits and burdens, that requires the taxpayers of these municipalities to subsidize these true costs of the privately held benefit the TMX would bring to the applicant company.
14. Despite this, while the Board appears to have recognized that there will be significant costs to local communities from the pipeline (and indeed, no evidence was filed to the contrary), the Board determined that the company's voluntary "Community Benefit Program" would offset future infrastructure or service costs (p. 259, NEB 2016). There was no evidence upon which to conclude this, and the Board had clear submissions from the municipalities that there is no relationship between a "Community Benefit Program"—assuming one is entered into—and the significant increased costs borne by municipal tax payers. Indeed, here is what the Board itself found about "Community Benefit Programs":

The Board finds a **modest** benefit to local communities and the environment along the Project from the establishment of a Community Benefit Program, including:

 - local emergency management capacity enhancements;
 - improvements to community parks and infrastructure;
 - support for events and educational programs; and
 - Environment Stewardship Program. (p. xiii, NEB 2016)
15. With respect, these initiatives have nothing to do with the significant cost impacts arising from the pipeline interference with fundamental municipal road and utility infrastructure activities that were in evidence. They are not responsive to those costs, nor do they provide compensation to local tax payers for those costs. Trusting that the company might commit to voluntary improvements to municipal parks or support for community events does not address the millions of dollars shortfall communities will bear in operating and infrastructure costs that would not be borne but for the project.
16. The NEB's regulatory role is not discharged by leaving it to the discretion of the company to determine how it might offset this financial burden to local taxpayers by the distribution of "Community Benefits Programs." The legislation, and the Board's application of the legislation, must provide for fair and transparent mechanisms to compensate municipalities for these costs. Neither present taxation, damage compensation, nor community benefits mechanisms accomplish this now.

17. Proper assessment (and if warranted, approval) under a modern NEB must be based on evidence and upon transparent and articulated criteria and principles that include:

- a) a complete assessment of all of the true costs of the proposed pipeline;
- b) the pipeline should not proceed (it is not in the public interest) without measures that go as far as possible to prevent burdens and harms to local communities, and
- c) when the reasonable limits of that prevention are reached, there must be certain and enforceable mechanisms in place to ensure compensation—so that residual costs are borne by the company, not the communities that must host the pipeline.

The NEB must be neutral, diligent and fair in the assessment and lifecycle regulation of pipelines

18. In the assessment of proposed projects: The expectation of the Township—and, it is submitted, of most Canadians—is that it is the regulator’s role to ensure that adequate mechanisms are in place (or are ensured in the future) *before* it can be determined whether a project can proceed safely without placing unacceptable risk and cost upon local communities and tax payers. Several matters that are fundamental to the wellbeing and interests of the local community were not determined by the NEB in the TMX approval process, but were instead left to the discretion of the company, e.g.:

- a. Emergency Response Plans and Leak Detection Systems: While the Board recognized that TMP’s current plans were inadequate, it required only that TMP file future plans, but made no provision for oversight of these future plans by the NEB. The mere fact of filing future documents, regardless of the quality of their contents, will satisfy the NEB’s conditions (see conditions 115 and 124).
- b. Protection of Municipal Water Sources: While the Board recognized that protection of municipal water sources from pipeline incidents is important, (based on evidence filed before it by Langley and others), it required only that TMP file an “inventory” of those water wells that TMP choses to ground-truth, rather than file concrete measures, for oversight and approval by the NEB, that will protect, monitor and mitigate against impacts to ground water (see condition 93).
- c. Increased Infrastructure Costs to Municipalities: As described above, despite the concrete quantitative evidence of increased infrastructure costs borne by municipalities due to the pipeline, the Board deferred any regulation of that by pointing instead to the voluntary initiative of the pipeline company to enter into community benefit agreements.

19. In the regulation of existing pipelines: The Township of Langley has spent significant time and resources on matters that have arisen under the Board’s “life cycle” regulation of the existing pipeline. This has arisen in particular under s. 112 of the *National Energy Board Act*, which regulates specific activities within prescribed distances from the pipeline.

20. On more than one occasion, the NEB has supported the pipeline company in the company's allegations of "unauthorized activity" against Langley, in cases where the legislation was clear in allowing the municipal maintenance activities that were undertaken by Langley. The details of the incidents need not be recounted here. For this Panel's purposes, it is important to note that Langley's experience has been that the NEB has consistently taken the side of the pipeline company, even without providing Langley the opportunity to respond. This is a fundamental issue of procedural fairness, but it has also led to unnecessary expenditure of time and money by the municipality. The Township of Langley is diligent in its municipal operations, including with respect to the prescribed safety regulations around pipelines.
21. A modern NEB must have staff trained to undertake informed and neutral regulation of issues that arise with respect to municipal operation and pipeline safety issues.

Stakeholder consultation must be meaningful

22. The Board's deference to the pipeline company has not been remedied by the new *Pipeline Safety Act* and *Damage Prevention Regulations*. These Regulations have shifted burdens, obligations, costs and liabilities to municipalities and continue to frustrate and delay the ability of municipalities to undertake routine services. These burdens include failing to extend to municipalities the indemnities provided to landowners (ref: s. 86 *NEB Act*) and introducing increased rather than decreased liability for municipalities (ref: joint and several liability s. 16 *Regulations*).
23. Part of this Panel's mandate is:

"The review may also validate areas of strength within the NEB and confirm that actions underway (e.g., the *Pipeline Safety Act* coming into force) are sufficiently robust."
24. However, the recently enacted *National Energy Board Damage Prevention Regulations* and the *Pipeline Safety Act* were not responsive to municipal input. A stark example is the contrast between the express exemption of certain routine agricultural activities from the activities that trigger the need for pipeline company or NEB permission on one hand, and the absence of any such exemption for routine municipal works on the other. This is despite the Township of Langley's clear articulation to the NEB during the initial public comment period that routine activities like ditch cleaning, milling, paving and routine highway maintenance and manual (non-machine) tree removal and replanting should be exempted.
25. These recommendations arose because, as set out above, the Township of Langley has been forced to expend human resource time and expense because of the mis-application of the law by the NEB based on plain allegations of the pipeline company (without opportunity for response).

26. Moreover, the new definition of “ground disturbance” will create confusion and uncertainty. It excludes from the definition of “ground disturbance” activities to a depth of less than 30 cm “that do not result in a reduction of the earth cover over the pipeline to a depth that is less than the cover provided when the pipeline was constructed.”
27. With respect, that is an unworkable definition, as the ongoing relative depth of the pipeline (after accretion and erosion), is a matter within the pipeline company’s means of knowledge, not the municipality’s. And yet, this definition puts the responsibility on the municipality. The point for the Modernization Panel is that this was an issue that was squarely raised by the TOL during the public comment process, but it was ignored by the NEB, without explanation or even response.

Closing

28. Cumulatively, the list of practical matters that are of import to municipalities that have not been addressed in the recent TMX pipeline approval process or the *Pipeline Safety Act* development process, is significant. It speaks to a regulator that is not presently attuned to the practical impacts of pipelines on the municipalities that host them. This is an essential aspect of regulating in the public interest, and it must be taken up in the modernization of the National Energy Board.

All of which is respectfully submitted,

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