

TransCanada Energy East Pipeline (EEP) – NEB Panel Hearing

The National Energy Board is the independent regulatory body responsible for weighing the cost benefit balance of industrial projects that transverse provincial and national boundaries. Ultimately they decide whether these projects are to the benefit of Canada, although the Cabinet of Ministers have the final say whether things are approved. Once a project's application is deemed complete they go through a 21 month panel review where stakeholders, proponents, indigenous groups and specialists (called intervenors) all give their opinion on what concerns and/or benefits the project might entail. A panel of three people act as mediator between proponents and special interest groups/people where they are given 20 minutes to voice concerns and questions.

EEP is one such project which has recently entered this process, with panel hearings recently held in Saint John (week of August 8th) and Fredericton (August 15th and 16th). Kingsclear First nation along with the other 5 Maliseet/Wolastoqiyik bands were among the intervenors Tuesday August 16th. All bands shared the similar themes and adopted each of the Maliseet presentations into their own, and all have stated that we do not have an official stance on the pipeline; we await careful review of the application in full from our technical experts at MSES, and the completion of our Traditional Land Use Studies.

St. Mary's First Nation (SMFN) was the first of the communities to speak represented by Megan Fullarton. Early in her presentation she focused on the concepts of consent and Aboriginal title:

“If the proponent is not willing to deal with us and our concerns respectfully, we can not consent to their project. The project would need to bring significant benefit to us. A project on Maliseet territory that interferes with our Aboriginal title needs to benefit the Maliseet”.

Aboriginal title arises from the fact that Maliseet territory was never surrendered as in other parts of the country. The Peace and Friendship treaties (our treaties recognized in NB) state that we were the original inhabitants, and have a right to hunt, fish, and gather. Megan stated:

“Aboriginal title gives us the right to decide how our land and its natural resources will be used, and to benefit from development on our land. Energy East would be a major interference on Aboriginal title”

She also focused our history since colonization and its effects on us today. She states:

“European settlement of our lands has deprived us of most of our hunting grounds and has dramatically reduced key species. Atlantic salmon are nearly gone; black ash and butternut are very difficult to find; caribou are gone; and many of our medicines have become very difficult to find. We have constitutionally protected harvesting rights that in many cases have become very hard or impossible to exercise”

Part of this interference would arise due to the elevated levels of marine shipping that would occur due to the shipment of bitumen (the crude moved by the proposed pipeline) through Saint John to international markets. This has a potential for disastrous effects in

the Bay of Fundy which would see a nearly 3 fold increase in tanker traffic if the pipeline was approved. Most of the Maliseet have commercial fishing licenses in the Bay. For some reason the NEB has deemed the Bay of Fundy aspect of the project as unnecessary to review, which is bazaar as without the Bay component the project would be a non-starter.

“One of the impacts that the Maliseet are most concerned about is harm to the Atlantic salmon. The inner Bay of Fundy salmon population is endangered. Salmon used to be central to Maliseet diet and our relationship to salmon is central to our traditional way of life, our culture, our way of understanding the world”

The next presentation was from Madawaska Maliseet First Nation (MMFN) represented by Consultation Coordinator (CC) Russ Letica. He acknowledges:

“Our communities and members share a common territory, history, culture, language, as well as being -- as well as Aboriginal and treaty rights. We share a deep relation with our traditional territory and have embraced the duty of protecting it and ensuring that it is used -- that its use is in the keeping of the values and beliefs of our ancestors, and foremost, in the best interest of future generations”

We have had many projects effect our rights previously and further industrial processes only stand to further the devastation through cumulative effects. Energy East is one such project which may add to the onslaught.

“From a more technical perspective, we are concerned with the effects of increased marine shipping, with the integrity of the pipeline, the safety and security associated with the construction and operation of this pipeline, and the effects of accidents or malfunctions that may occur in connection with this pipeline, along with any emergency response planning and all contingency planning on spills”

Russ wrapped up MMFN's presentation with, “In your Saint John panel session, you stated that you would strive to consent with Indigenous nations. What we would like to know is, what does consent mean to you?”. The proponent responded by saying that “consent” is a legal question (of which he was poorly equipped to answer), but the definition of striving is certainly something that he could define. Christian Matossian (EEP's aboriginal liaison) stated;

“The engagement, you know, has to be respectful, has to be inclusive, and I mentioned this a few times over these sessions that that has be inclusive of groups within the community of rights holders, demand-driven

...

It has to be frequent. It also has to be a transparent process. And I think, you know, what's been mentioned in some feedback we've received from you, and I think the latest it was letters at the beginning of June, we have to be responsive and meaningfully respond to issues and concerns that have been identified”

To which Letica responded, “I would just like to put on record that the definition of consent is to permit, approve or agree; to comply or yield”.

Kingclear First Nation (KFN) followed. Chief Gabriel Atwin opened with brief

comments before Gordon Grey spoke on water. Chief Atwin was brief but poignant:

“The Proponent speaks of rigid safety measures and indestructible components preventing rupture or leaks. Any release of oil will cause irreversible damage to our already weakened ecosystem, and would be devastating and kill life on and in our land and waterways”

At which time he passed the presentation over to Gordon Grey, whom reiterated that the Maliseet stand in unity and expressed further concerns about safety:

“It is difficult for TransCanada to state with absolute certainty that an accident will or will not occur. The size and magnitude of any release is also very difficult to predict. Understanding the impacts of spilled crude oil on water quality and aquatic systems is also very complex and should not be overly simplified”

Concerns regarding waterway crossings were first expressed. Specifically the type of crossing methods vs contingency crossing methods, depth of cover, Horizontal Directional Drilling (HDD) mud spills, spill scenarios in snow and ice covered waterways, and environmental interactions with diluted bitumen.

Often listed in its application large and sensitive bodies of water were listed as HDD crossing, however as a contingency method a trenched method was listed. This is problematic, because the HDD method is the safest way to cross. Should the water crossing be listed as important enough for the HDD method, why should it be downgraded due to convenience? To which TransCanada responded by stating they had a very good track record at successfully installing HDDs and that they would work closely with local regulators and DFO to ensure that appropriate methods were employed.

A question regarding sensitivity was raised at this point by Mr. Grey, “What was your habitat-sensitivity ranking process for sites with brook trout or potential species at risk? Why were a range of habitat sensitivities used and how could sites be considered as low-sensitivity habitat?”. TransCanada's answer was wholly insufficient as they stated, “At this point I’m not in a position to be able to just describe the detailed ranking that we used. But we did in our assessment look at each of the watercourse crossings”. These assessments were up and downstream of the potential crossing and held them to standards defined by DFO.

Further questions regarding seasonal variability were then brought up concerning their stream assessment standard:

“Baseline data gathering is important as it sets the standard for what water quality you can aim for when mitigating effects on watercourses. However, sampling occurs once in a lot of cases. The one-and done method certainly oversimplifies the chemical makeup, [turbidity], dissolved oxygen [and] fish sampling as all these parameters change naturally over the course of a year
Is TCPL going to address the concern, go back and assess streams at different times of the year?”

They responded that they would do assessments once more just prior to construction onset. While a two-and done method is better, this is still concerning.

Oromocto First Nation (OFN) was next represented by Chief Shelley Sabattis and CC Fred Sabattis Jr. They gave their presentation on fish and fish habitat. Chief Sabattis gave a brief statement acknowledging the other Wolastoqiyik presentations before passing the presentation to CC Fred Sabattis Jr. He states:

“according to TransCanada no serious impacts to fish have been identified and therefore no fisheries offsetting measures are anticipated This concludes and assumes that all proposed mitigation measures are fully effective and no spills will occur in sensitive habitat or during sensitive periods for fish. This assumption is not supported with evidence or in practice”

Of particular concern are the American Eel and Atlantic Salmon as both are listed on the as threatened (A.Eel) and endangered (A.Salmon) species. American Eel are particularly prone as assessments on their populations are limited due to their low survivability during electro-fishing (the method they use to capture and count for population estimates).

Concerns regarding herbicide use were raised. Although there is a 30m buffer around watercourses for herbicide use, there are stipulations which allow their use if approved by the regulatory body responsible. The populations of certain species are damaged to an extent where listing under SARA is appropriate, but it would appear mitigation half measures are acceptable. There should be a policy to protect SARA species whereby no effects on populations are evident during construction. Regardless of those measures a considerable risk to sensitive watercourses and wetlands would persist should there be a malfunction, rupture or leak during operations. Mr. Sabattis concluded the presentation:

“TransCanada and the NEB is failing to consider the full impact of the pipeline on Maliseet Aboriginal and treaty rights, specifically proven right to fish from our waters, a right that has already been severely diminished. Without this key information, the full impacts cannot be assessed and we cannot offer our required consent”

He raised some questions at this point concerning access roads and watercourse crossings, specifically whether there was any issues around habitat loss, and issues around road runoff, sedimentation and dust. TransCanada stated that for the most part they would be using their right-of-ways for traveling along the corridor. They would try to limit dust by traveling during wet weather conditions, or apply water as needed. In sensitive areas they would be putting down mats and/or straw as well. As for Run-off and sedimentation they would be using diversion berms and sediment and erosion control structures. Finally concerning watercourse crossings themselves, TransCanada assured us of the use of temporary bridges or the placement of culverts as necessary and appropriate.

Next was Tobique First Nation (TFN) represented by CC Deana Sappier who focused on the socio-economic aspects of the project. Ms. Sappier states an obvious but often forgotten truth:

“TransCanada relies on broad comments to describe Maliseet society and culture with no references to peer-reviewed literature or any quantitative measures or indicators. Specifically, TransCanada relies on industry and government sources without looking at anything coming out of any Maliseet communities or Maliseet sources. This is inherently wrong. Other people cannot speak for us; we speak for ourselves”

Further that TransCanada has not looked within communities to address fine-grain details, and without a baseline data set concerning communities at large, how can any monitoring be done should the project go through. This is necessary as it is one measure to ensure that promises to us concerning jobs, revenue, etc actually happen and are not completely hollow. Ms. Sappier states, “Given that the Maliseet communities will also bear the majority of impacts and risks of the pipeline, they should share in the potential benefits of the pipeline”.

It currently appears that their promises should be held at arms length. Despite promoting their pipeline as yielding up to 195 person years of labour, most of these jobs would be of a temporary variety. Further, due to the small workforce represented by the Maliseet, outsourcing of these Aboriginal jobs would be likely to realize this level of engagement. Obviously the job of installing a pipeline is a very technical, TransCanada knows what sort of training and skillset is required to be a potential employee during construction and operation yet hasn't bothered to survey the Maliseet communities to determine whether or not any are qualified. Baseline information gathering on their part is sorely lacking.

In the question period following Ms. Sappier's presentation there was expressed concern regarding long-term commitment to our relationship. TransCanada's response was to elaborate on the current employment in pre-construction (archaeological field technicians) and to ensure us that further opportunities would follow:

“the key to that long-term relationship is ongoing respectful engagement addressing and responding to the effects that we learn through the current engagement process and the ongoing engagement process, and of course following through on our commitment to maximize those benefits”

After some discussion Ms. Sappier brought to attention the fact that the field crew went from 17 to only 8 positions in the course of a year, calling into question their commitment to ongoing training and building long-term relations. TransCanada replied that despite smaller numbers, the ratio of Aboriginal participation was actually a majority this year vs only 50% last year. A valid argument, but little consolation to those not hired.

Woodstock First Nation (WFN) represented by legal council Gillian Paul spoke on the duty to consult. Ms. Paul establishes the duty to consult with the following:

“The proposed pipeline stands to threaten the use of Maliseet lands, waters, and resources. All of the Maliseet communities are within close proximity to the project. However, their reserve lands are only a small portion of their geographic identity. They traditionally used and continue to use a much larger area than their reserves. They continue to have a deep spiritual connection to their territory and have proven rights to hunt, trap, fish, and engage in other harvesting and traditional practices in this territory”

The duty to consult is triggered when our constitutionally protected rights could be negatively impacted by legislation or industrial projects. Despite the length thus far into the application process no date has been set to meet with the federal government. We have been informally introduced to the department of environment worker who will be heading our discussions in Luc Desroche, but as previously mentioned no solid timetable

has been set. The NEB has also made a concession in the introduction of traditional oral evidence hearings, but the earlier sessions proved hostile and our session has been put off until at earliest January of 2017. We still are unsure of how this evidence will be used informing a decision. Ms. Paul concludes:

“if the NEB is one avenue in which the Crown will fulfill its duty to consult and accommodate, then the Maliseet need to have a say in the process. Unilateral and arbitrary decisions need to stop being thrust upon them. They need to be provided with sufficient funding to meaningfully participate”

Other speakers on this day included Jillian Jordan who expressed concerns about effects of the proposed pipeline on her property which is near the terminal facility in Saint John, and the Union of Municipalities of New Brunswick which expressed support, but still had concerns regarding jobs and the environment.

My name is Gordon Grey and I am the Liaison for KFN, all things Energy East cross my desk. If you have any concerns or questions feel free to contact me at the bandhall during regular business hours, via email at greywag@hotmail.com call at 363-3028 ext 162, or text my cell 259-6163.