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Our Matter Number: 1119021

Sent By Electronic Filing

Ms. Sheri Young
Secretary to the Joint Review Panel
Enbridge Northern Gateway Project
444 Seventh Avenue S.W.
Calgary, AB T2P 0X8

Dear Ms. Young:

Re: Enbridge Northern Gateway Project
Hearing Order OH-4-2011
Kinder Morgan Canada Inc. ("Kinder Morgan")
Comments on Potential Conditions

Kinder Morgan wishes to provide comments on the potential conditions issued by the Joint Review Panel ("JRP") on April 12, 2013.[1] As the operator of pipelines regulated by the National Energy Board (the "NEB" or "Board"), Kinder Morgan understands that certificate conditions for an application are generally related to the individual facts and circumstances of the facilities proposed in the application. However, we believe a number of the proposed conditions may have a material impact on pipeline and infrastructure development in Canada and consideration should be given to the conditions from this perspective. Our comments are intended to assist the JRP in understanding the potential outcomes of the proposed conditions if they become generally applicable to industry. Specific conditions are cited as examples of broader issues for industry rather than to propose specific amendments.

1. Timing Issues

Several of the proposed conditions contain NEB approval requirements and filings deadlines several years prior to operations. For example, plans related to the marine terminal and research programs must be filed for NEB approval three years prior to operations.[2]

[1] JRP Potential Conditions (12 April 2013) ["Conditions"].

[2] Example: Conditions, 164-166.

We are concerned that requiring reports to be filed for approval several years before operations can create significant schedule risks for infrastructure development projects. For example, a project with a two year construction schedule could take three years to complete with such conditions. Any changes to the construction schedule and anticipated date of operations would affect the filing deadline. Project proponents need sufficient schedule certainty in order to plan major expenditures on labour and materials.

To mitigate such risks, it is relevant for regulators to consider whether the filing deadlines and approval requirements prescribed in conditions could materially alter a project's schedule. Filing deadlines should be set at a reasonable time before operations in order to minimize the risk that such deadlines materially affect the critical path for a project.

2. Filing, reporting and approval

Many of the conditions require NEB approval, and in some cases the participation of other parties in the approval process, in order to be satisfied.[3] Fulfillment of those conditions will require additional time, a Board process and potentially litigation. For example, certain reports must be filed with the NEB for approval prior to commencing construction activities.[4] Other conditions require reports to be filed for approval by the NEB prior to construction with a summary of how concerns from other government agencies and Aboriginal groups were addressed.[5]

In our view, conditions that require subsequent board approvals and that attract the potential for additional regulatory processes should be the exception and not a new standard or norm. There must be clear, well understood rationales given as to why additional approvals are in the public interest. As an alternative, the NEB may utilize its existing powers and processes to ensure that when filings are made to satisfy imposed conditions an additional approval process is not required.

3. Regulatory Approach

The NEB has implemented "goal oriented regulation" as a new regulatory approach that allows regulated companies more flexibility to achieve regulatory compliance for pipeline safety and environmental protection. Goal oriented regulation is promoted by the NEB as a shift from a purely prescriptive regulation towards a more performance-based

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[3] Example: Conditions, 43-46, 54-57, 74-77, 144-145 & 153-155.

[4] Example: Conditions, 75-77.

[5] Example: Conditions, 74.

system to encourage innovation and safer systems.[6] We believe that goal oriented regulation is consistent with the JRP's mandate to mitigate any significant adverse environmental effects of the project and the NEB's strategic plan.[7]

The NEB has applied a goal-oriented regulatory approach in hearings for major projects. The principles for goal oriented regulation were set out in the NEB's Mackenzie Gas Project decision[8]. The Land Matters Consultation Initiative proceedings, currently before the Board, provide regulated companies with flexibility in achieving an NEB action plan for funding pipeline abandonment within a specified timeline.[9] In our view, the Board's move towards goal oriented regulation promotes safe and efficient infrastructure development.

A number of the conditions may be interpreted as reflecting a return to a prescriptive approach to regulation. These conditions prescribe detailed audit requirements instead of setting a goal oriented approach to allow the proponent flexibility in mitigating any adverse effects. Such conditions tend to focus on operational aspects that are covered by existing codes and regulations rather than setting goals for the proponent to mitigate any significant adverse effects.[10]

Conditions that prescribe technical requirements beyond existing codes will increase project development costs and uncertainty regarding what standards will be applied to each project. Instead, conditions should reference existing codes and set goals. For example, the NEB's *Onshore Pipeline Regulations*[11] rely on CSA standards for technical requirements and require companies to establish management systems to meet environmental and safety goals. In contrast, a number of the potential conditions, for example those related to geohazard assessment[12], prescribe requirements beyond those stated in the relevant codes and regulations. To better facilitate the development of

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[6] Matrix Solutions Inc., "Evaluation of Goal-Oriented Regulations prepared for the National Energy Board" (October 2004); National Energy Board, "Management Response to Evaluation of Goal Oriented Regulation" (August 2005).

[7] Agreement Between the National Energy Board and the Minister of the Environment Concerning the Joint Review of the Northern Gateway Pipeline Project (2012) at 11; National Energy Board, "Strategic Plan" (2012).

[8] National Energy Board Reasons for Decision GH-1-2004, Volume 2, Chapter 10.

[9] National Energy Board Reasons for Decision RH-2-2008, at 39.

[10] Example: Conditions, 75-77 & 134.

[11] SOR /99-294. It refers to CSA Standard Z662 – Oil and Gas Pipeline Systems.

[12] Example: Conditions, 75-77.

infrastructure projects, conditions should ideally establish goals for the project proponent to meet through reasonable and flexible mitigation options rather than prescribing a particular solution in accordance with the principles of goal-oriented regulation.

4. Commercial Conditions

We also observe that several of the proposed conditions are likely to affect the manner and risks involved in procuring pipeline facilities and services. For example:

- Three layer composite coating or high performance composite coating is required for the entire pipeline[13] although other pipeline coatings are commonly used in the pipeline industry depending upon the ground conditions encountered;
- Complementary leak detection systems[14] must be identified that can be practically deployed over extended distances of pipeline;
- The construction of purpose-built tugs[15] involves significant cost and lead time; and
- A volume is prescribed for the secondary containment facilities at the marine terminal[16] without reference to existing codes.

If broadly applied to industry, such conditions may limit the ability of pipeline companies to obtain competitive quotes because there are few sources of the required materials or services. The effect of conditions that require the use of a particular material or service may be to grant commercial benefits to certain suppliers through the regulatory process beyond the requirements of existing codes. Since several export pipelines are currently proposed, there will be a heightened demand for labour and materials in the coming years. The commercial effect of conditions that may exacerbate shortages of labour and materials should be a relevant consideration for the JRP.

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[13] Example: Conditions, 7.

[14] Example: Conditions, 112-113.

[15] Example: Conditions, 5.

[16] Example: Conditions, 134.

Conclusion

Kinder Morgan wishes to thank the JRP for the opportunity to present these high level perspectives regarding its proposed conditions. Our comments are intended to ensure that the wider implications of the proposed conditions on the pipeline industry and infrastructure development are given appropriate consideration in the deliberations and final recommendations of the JRP. We trust these comments are helpful and fulfill this purpose.

Should you have any questions or concerns, please do not hesitate to contact the undersigned.

Yours truly,

Shawn H.T. Denstedt, Q.C.
SD:sln

cc. OH-4-2011 List of Parties