



LIBRARY of PARLIAMENT
BIBLIOTHÈQUE du PARLEMENT

BACKGROUND PAPER



Pipelines: Government Decision-Making

Publication No. 2012-14-E
13 September 2012

Penny Becklumb

Industry, Infrastructure and Resources Division
Parliamentary Information and Research Service

Pipelines: Government Decision-Making
(Background Paper)

HTML and PDF versions of this publication are available on IntraParl (the parliamentary intranet) and on the Parliament of Canada website.

In the electronic versions, a number of the endnote entries contain hyperlinks to referenced resources.

Ce document est également publié en français.

Library of Parliament ***Background Papers*** provide in-depth studies of policy issues. They feature historical background, current information and references, and many anticipate the emergence of the issues they examine. They are prepared by the Parliamentary Information and Research Service, which carries out research for and provides information and analysis to parliamentarians and Senate and House of Commons committees and parliamentary associations in an objective, impartial manner.

CONTENTS

1	INTRODUCTION.....	1
2	THE CANADIAN REGULATORY REVIEW PROCESS.....	1
2.1	Certificate of Public Convenience and Necessity	1
2.2	Environmental Assessment	2
3	THE AMERICAN REGULATORY APPROVAL PROCESS	3
4	EXAMPLES OF APPLICATIONS OF THE PROCESSES: THE KEYSTONE XL PIPELINE AND THE NORTHERN GATEWAY PIPELINE.....	4
4.1	The Keystone XL Pipeline.....	4
4.2	The Northern Gateway Pipeline.....	5

PIPELINES: GOVERNMENT DECISION-MAKING

1 INTRODUCTION

Recent proposals by Canadian companies to build the Keystone XL Pipeline from Alberta to Texas, and the Northern Gateway Pipeline from Alberta to the British Columbia coast, have received a great deal of public attention. While certain individuals and groups have mounted a vigorous opposition to one or both pipeline projects, the Canadian government has publicly stated its support for both.

Ultimately, the decision whether to allow one or both of these projects to be carried out should strike an appropriate balance between economic, environmental and social interests raised in the course of the proposals' regulatory review.¹ In the spring of 2012, the government introduced changes to the Canadian regulatory review process in order to streamline and expedite the regulatory review of future pipeline proposals as well as those currently underway.² This paper summarizes the new Canadian regulatory review process for pipelines, as well as the existing process in the United States, and discusses how these processes apply specifically to the Keystone XL Pipeline and the Northern Gateway Pipeline proposals.

2 THE CANADIAN REGULATORY REVIEW PROCESS

In Canada, a company that proposes to build a significant international or interprovincial oil or gas pipeline requires approval of the federal government in the form of a certificate of public convenience and necessity, as well as a positive federal environmental assessment decision statement.³ In 2012, the processes associated with both of these requirements were changed and integrated, as discussed below.

2.1 CERTIFICATE OF PUBLIC CONVENIENCE AND NECESSITY

Under the *National Energy Board Act*, the National Energy Board (NEB) is responsible for considering applications for a certificate to build and operate a major international or interprovincial pipeline.⁴ In deciding whether to issue a certificate, the NEB considers if the project is in the public interest. This consideration is based mainly upon economic factors, but also includes "any public interest that in the (NEB's) opinion may be affected by the issuance of the certificate or the dismissal of the application,"⁵ such as the social and environmental consequences of the proposed pipeline.

Depending on its location and possible effects, a project may require consultation with Aboriginal groups. In addition, the NEB holds public hearings for pipeline projects that would be more than 40 kilometres in length in order to give interested persons the opportunity to express their points of view and to gather information needed for the NEB to make its report and recommendation as to whether or not the certificate should be issued.

In the past, public hearings for particularly long or complicated pipeline routes could run for months or even years to gather input from a wide range of interested parties. Changes made to the process in 2012 set an extendible time limit of 15 months after a company has submitted a complete application for the NEB to complete its review and hearings and provide a report to the Governor in Council.⁶ The report sets out the NEB's recommendation as to whether or not the certificate should be issued, as well as all terms and conditions the NEB considers necessary or desirable to which the certificate should be subject if it is issued. The Governor in Council then has three months to review the report and decide whether to order the NEB to issue the certificate to the company subject to the terms and conditions set out in the report, or to dismiss the application for a certificate. Before the process was changed in 2012, the NEB had the power to decide not to issue a certificate.

As a result of the 2012 changes, the Governor in Council now has the power, before making a final decision, to refer the NEB's recommendation or any of the terms and conditions set out in the report back to the NEB for reconsideration up to two times. In reconsidering its recommendation or terms and conditions set out in its report, the NEB must take into account any factor specified by the Governor in Council.

2.2 ENVIRONMENTAL ASSESSMENT

The second principal regulatory requirement that must be fulfilled before a company may build a major pipeline is to obtain a favourable federal environmental assessment decision under the *Canadian Environmental Assessment Act, 2012* (CEAA, 2012).⁷ The CEAA, 2012 sets out a new environmental assessment process that, for major pipeline projects under the NEB's jurisdiction, integrates the federal environmental assessment process into the certificate process.⁸

Under the CEAA, 2012, the NEB is responsible for carrying out the environmental assessment of a major pipeline proposal.⁹ Public participation in environmental assessments of such projects is now limited to "interested parties," who are those directly affected by the pipeline, as well as those with relevant information or expertise.¹⁰

Once the NEB has concluded its environmental assessment, it submits a report setting out its recommendations to the Governor in Council at the same time as it submits its report for the certificate requirement, discussed in section 2.1, "Certificate of Public Convenience and Necessity." The Governor in Council may, up to two times, refer any of the NEB's recommendations back to the NEB for reconsideration. In reconsidering its recommendations, the NEB must take into account any factor specified by the Governor in Council.

Once the NEB has finalized its recommendations, the Governor in Council decides whether the pipeline project is likely to cause significant adverse environmental effects and, therefore, whether it will be allowed to proceed. Even if it is likely to cause such effects, the project may still proceed if the Governor in Council decides that the effects are justified in the circumstances. The Governor in Council then directs the NEB to issue a decision statement to the pipeline company informing it of the decision.

Positive decision statements set out the mitigation measures and the follow-up program that the pipeline company must implement in relation to the pipeline.¹¹

In addition to the federal environmental assessment requirement, every province has enacted its own environmental assessment legislation.¹² A proposed pipeline project may require a provincial environmental assessment in addition to a federal one. If a proposed pipeline is to cross land subject to a comprehensive land claims agreement with an Aboriginal group, it may be necessary to follow an environmental assessment regime established under that agreement.

3 THE AMERICAN REGULATORY APPROVAL PROCESS

In the U.S., a company planning to construct and operate an oil pipeline that crosses the international border must first obtain a presidential permit from the Secretary of State.¹³

If the State Department determines that the environmental effects of the proposed pipeline may be significant, the *National Environmental Policy Act* requires the department to prepare an environmental impact statement (EIS) following the process prescribed in the Act. An environmental consulting firm may be retained, at the expense of the applicant, to prepare the EIS under the direction and control of the State Department. The EIS process includes opportunities for public review and comment.

Once the EIS is finalized, the State Department seeks opinions from at least eight other federal officials, stating whether they believe it would be in the national interest to issue the presidential permit. These other officials include the Secretary of Defense, the Attorney General, the Secretary of the Interior, the Secretary of Commerce, the Secretary of Transportation, the Secretary of Energy, the Secretary of Homeland Security, and the Administrator of the Environmental Protection Agency. These officials have 90 days to provide their views to the Secretary of State.

The Secretary of State may also solicit input on the application from state, local or tribal government officials, or from a foreign government, as the secretary deems appropriate.

The Secretary of State must then consider all the views and comments provided, including any public comments submitted, in order to decide whether issuing the permit would be in the national interest. This determination takes into account not only environmental and safety issues raised in the EIS, but also other issues such as energy security and foreign policy considerations.

Before issuing or denying the permit, the Secretary of State notifies the previously mentioned federal officials of the proposed determination. The officials then have 15 days to notify the Secretary of State if they disagree with the determination, in which case it may be referred to the President for a final decision.

4 EXAMPLES OF APPLICATIONS OF THE PROCESSES: THE KEYSTONE XL PIPELINE AND THE NORTHERN GATEWAY PIPELINE

4.1 THE KEYSTONE XL PIPELINE

TransCanada Corporation has proposed the Keystone Pipeline System. The project is being built in four phases.

- Phase I is a pipeline that begins in Hardisty, Alberta, and runs through Saskatchewan and Manitoba before heading south through Steele City, Nebraska, and terminating in Illinois. It commenced operation in June 2010.
- Phase II, which went into service in February 2011, extended the Keystone Pipeline from Steele City, Nebraska, to Cushing, Oklahoma. In Canada, Phase II included the construction of new pump stations.
- Phases III and IV were originally both known as the “Keystone Gulf Coast Expansion” or “Keystone XL.”
 - Phase III would continue the Phase II pipeline from Cushing, Oklahoma, to terminals on the Gulf Coast in Texas.
 - Phase IV would see the construction of another pipeline starting in Hardisty, Alberta, and taking a shorter route through Montana to connect with the system in Steele City, Nebraska.

In 2008, TransCanada applied to the U.S. State Department for a presidential permit to build the American portion of the Keystone XL Pipeline, and to the NEB for a certificate to build the Canadian portion.

The State Department prepared an EIS, solicited input from other federal officials, and was considering the application in the fall of 2011 when protesters staged demonstrations in Washington to voice their opposition to the pipeline. Two main concerns were raised:

- that the pipeline would transport oil from the Alberta oil sands, which many people believe has a greater environmental impact than oil from other sources;¹⁴ and
- that the pipeline’s proposed route would cross environmentally sensitive areas, including wetlands of special concern and areas with shallow groundwater.

In response, the State Department decided in November 2011 to examine alternative routes before making a decision, which would delay the presidential permit decision until the first quarter of 2013.¹⁵ In December 2011, Congress imposed an earlier deadline for making a decision by passing unrelated payroll legislation that included an add-on provision, forcing a decision on the permit application within 60 days.

In January 2012, within the 60-day time period, President Barack Obama agreed with a State Department recommendation to deny the presidential permit for the proposed Keystone XL Pipeline on the grounds that there was insufficient time to obtain necessary information to determine whether the project is in the national interest.¹⁶

In February 2012, TransCanada decided to proceed with building Phase III of the system, from Oklahoma to Texas, as a stand-alone project that does not require State Department approval because the pipeline will not cross the international border. That phase, which is now known as the “Gulf Coast Pipeline Project,” has been approved. On 4 May 2012, TransCanada submitted a new application to the State Department for Phase IV of the project, the Keystone XL Pipeline, which would run from the Canadian border along a different route through Nebraska to Steele City.¹⁷ The review process is expected to be completed by the first quarter of 2013.¹⁸

In contrast, the approval for the Canadian portion of the Keystone XL Pipeline was relatively uncontroversial. The NEB began considering TransCanada’s application in 2008. It carried out both the certificate and environmental assessment processes before issuing TransCanada a certificate in 2010, permitting it to build the Canadian portion of the Keystone XL Pipeline.¹⁹

4.2 THE NORTHERN GATEWAY PIPELINE

Enbridge has proposed the Northern Gateway Pipeline, which would actually be two parallel pipelines. One pipeline would carry oil from the oil sands west from a source near Edmonton, across British Columbia, to the Port of Kitimat on the Pacific coast. The parallel pipeline would carry condensate east from Kitimat to near Edmonton.²⁰ The project also includes integrated marine infrastructure and marine transportation of oil and condensate.

Under the former federal environmental assessment process, a joint review panel was established both to review the application for a certificate under the *National Energy Board Act* as well as to carry out the federal environmental assessment.

The project has proven to be highly controversial, in large part due to the risk of an oil leak along an inaccessible portion of the pipeline route or a tanker accident along the rugged British Columbia coast. More than 4,300 people and groups registered to comment at the public hearings, which were originally scheduled to run for more than two years, and 130 First Nations vowed to block development.²¹ However, on 6 July 2012, changes to both the certificate process and the federal environmental assessment process came into force, affecting the regulatory review of this proposed project. Consequently, the Minister of the Environment and the NEB set a time limit of 31 December 2013 for the review panel to submit its report to the Governor in Council for a final decision.²²

NOTES

1. The business decision to build an oil or gas pipeline such as the Keystone XL or the Northern Gateway is fundamentally different from the decision to invest in other assets, such as a factory. The very high fixed cost associated with building pipelines means that for this business endeavour to be economically appealing, the flow of oil or gas through the pipeline needs to be maximized or otherwise optimized. For example, it might make no economic sense for each individual company to build its own small pipeline to carry oil, but when oil is combined from multiple projects in a single large pipeline, the economics of the project could improve significantly. Therefore, the inherent economics of pipeline projects often results in a monopoly position for the pipeline owner. Because the owner is not subject to normal market pressures, the Nation Energy Board [NEB] is involved in regulating pipeline tolls and profits. (The NEB is an independent federal agency that regulates international and interprovincial aspects of the oil, gas and electric utility industries. See NEB, [Who we are & our governance](#).) For these reasons, the federal government is charged with deciding whether to allow a pipeline to be built in the first place, taking into consideration the public interest.
2. Changes to the regulatory approval process were enacted in the budget implementation Act, the [Jobs, Growth and Long-term Prosperity Act](#), S.C. 2012, c. 19. Under s. 115(1), the relevant changes came into force on 6 July 2012 by order of the Governor in Council ([PC 2012-0970](#)) (the Governor in Council is the Governor General acting on the advice of the federal Cabinet).
3. In addition to the two principal regulatory requirements, a proposed pipeline project will also require various (and potentially numerous) government permits for specific portions, such as those crossing a highway or accessing Crown lands.
4. Note that the certification requirement only applies to pipelines that are within the NEB's jurisdiction (interprovincial or international pipelines) and that the NEB has not exempted under s. 58 of the [National Energy Board Act](#), R.S.C., 1985, c. N-7. The NEB may not exempt pipelines exceeding 40 kilometres (km) in length from the certification requirement.
5. *National Energy Board Act*, s. 52(2)(e).
6. The Governor in Council is the Governor General acting on the advice of the federal Cabinet.
7. The requirement stems from s. 13 of the [Canadian Environmental Assessment Act, 2012](#) [CEAA, 2012], S.C. 2012, c.19, s. 52, as well as items 38 or 39 in the Schedule of the [Regulations Designating Physical Activities](#), SOR/2012-147. It applies only in respect of the construction, operation, decommissioning and abandonment of:
 - an oil and gas pipeline more than 75 km in length on a new right-of-way;
 - an offshore oil and gas pipeline, if any portion of the pipeline is outside the limits of a study area delineated in an environmental assessment conducted under an earlier authority; and
 - an oil or gas pipeline in a wildlife area or migratory bird sanctuary.
8. See Penny Becklumb and Tim Williams, [Canada's New Federal Environmental Assessment Process](#), Publication no. 2012-36-E, Parliamentary Information and Research Service, Library of Parliament, Ottawa, 2012.
9. A proposed pipeline project may be required to undergo a federal environmental assessment even if it is not under the NEB's jurisdiction (for example, a pipeline to be built entirely within a province). In such a case, the Canadian Environmental Assessment Agency, rather than the NEB, is responsible for carrying out the environmental assessment. See CEAA, 2012, s. 6 and [Regulations Designating Physical Activities](#), ss. 1 and 14.

PIPELINES: GOVERNMENT DECISION-MAKING

10. CEAA, 2012, ss. 19(1)(c) and 28.
11. A follow-up program is a program for “(a) verifying the accuracy of the environmental assessment of a designated project; and (b) determining the effectiveness of any mitigation measures” (CEAA, 2012, s. 2(1)).
12. For the most part, environmental assessment requirements applicable in the territories have been established through comprehensive land claim agreements that are codified in federal law, with some exceptions.
13. The requirement is set out in [Executive Order 13337: Issuance of Permits With Respect to Certain Energy-Related Facilities and Land Transportation Crossings on the International Boundaries of the United States](#), 30 April 2004. For more information, see U.S. Department of State, [Applying for Presidential Permits for Liquid Pipelines](#).
14. See “[Tar Sands and the Carbon Numbers](#),” Editorial, *The New York Times*, 21 August 2011; and Natural Resources Defense Council, “[Say No to Tar Sands Pipeline: Proposed Keystone XL Project Would Deliver Dirty Fuel at a High Cost](#),” *Fuel Facts*, March 2011. See also Congress of the United States, House of Representatives (50 members), [Letter to the Honorable Hillary Clinton, Secretary of State](#), 23 June 2010. In the letter, the members questioned whether issuing a presidential permit to allow the pipeline to be built is consistent with the U.S. Administration’s clean energy and climate change priorities.
15. U.S. Department of State, “[Keystone XL Pipeline Project Review Process: Decision to Seek Additional Information](#),” News release, 10 November 2011.
16. U.S. Department of State, “[Denial of the Keystone XL Pipeline Application](#),” News release, 18 January 2012.
17. See U.S. Department of State, [New Keystone XL Pipeline Application](#).
18. Ibid.
19. NEB, [Reasons for Decision: TransCanada Keystone Pipeline GP Ltd.](#), Hearing Order OH-1-2009, March 2010. See pages 71 and 72 for reasoning regarding the environmental assessment.
20. Condensate is a mix of hydrocarbon liquids used to thin oil for pipeline transport.
21. See Derrick Penner, “[Public hearings on Enbridge’s Northern Gateway pipeline to begin Jan. 10](#),” *The Vancouver Sun*, 3 April 2012.
22. See the Honourable Peter Kent, Minister of the Environment, and Gaétan Caron, Chair of the NEB, [Letter to the Secretary to the Joint Review Panel](#) (re: amendment to the joint review panel agreement), 3 August 2012.