

Fundamental Justice Issues at Stake in Gateway Pipeline Debate

Enbridge's Northern Gateway project, comprising two 1,170 kilometre pipelines from northern Alberta across Indigenous lands to Kitimat, BC, would carry 525,000 barrels a day of diluted bitumen from the tar sands to the west coast for export, and return 193,000 barrels of condensate (used to thin the bitumen) to Alberta each day, allowing the cycle to continue.

This venture poses fundamental questions of social and ecological justice.

Gateway and Indigenous Rights

Construction of the pipeline potentially transgresses the rights of the Indigenous peoples who have since time immemorial inhabited the lands and waters it would cross.

The government of Canada has a responsibility to recognize Indigenous peoples' rights to determine whether any pipeline can traverse their lands. Despite its decision to withdraw from the Kyoto Protocol, the government of Canada still has an obligation to take into account how further extraction of petroleum from the tar sands will affect the global climate.

Indigenous Nations who inhabit the interior and coastal regions of Northern British Columbia strongly oppose a project that threatens their rights and livelihoods through enormous ecological devastation in the event of an oil spill. They point to the danger of a rupture in pipelines that would cross more than 1,000 streams and rivers and a landscape prone to major landslides as well as occasional earthquakes. Enbridge boasts that it already transports 71% of western Canada's crude oil exports, while playing down the fact that its pipelines underwent 67 spills in 2006 and 65 more in 2007.

Writing as peoples whose rights "have never been relinquished through treaty or war," the Indigenous Nations of the Fraser River watershed assert that "the Enbridge Northern Gateway pipelines project ... and the federal process to approve it, violate our laws traditions, values and our inherent rights as Indigenous Peoples under international law.... Therefore... we will not allow the proposed Enbridge Northern Gateway Pipeline, or similar Tar Sands projects, to cross our lands, territories and watersheds or the ocean migration routes of Fraser river salmon."¹

Similarly, the Coastal First Nations Declaration asserts that "in upholding our ancestral laws, rights and responsibilities, we declare that oil tankers carrying crude from the Alberta Tar Sands will not be allowed to transit our lands and waters." The coastal nations have vivid memories of the Exxon Valdez oil spill in nearby Prince William Sound, Alaska, that polluted 2,100 kilometres of the Pacific coast and the grounding of the BC Ferry, Queen of the North, in the same waters that supertankers would transverse to reach Kitimat. Further, the Coastal First Nations commit themselves "to reduce our own carbon footprint, and call on others we share this land with to do the same."²

National Energy Board Hearings Not the Last Word

The current debate revolves around the hearings into the Northern Gateway project convened by the National Energy Board. Many observers expect that after hearing 4,300 depositions, most of which are expected to oppose the pipeline, the NEB will still approve Enbridge's application to build the 1,170 kilometre pipeline from Northern Alberta to Kitimat, B.C. This expectation is well founded as the NEB has only a narrow mandate to consider whether the project is in the "national interest."

In a January 16, 2012 interview with the CBC's Peter Mansbridge, Prime Minister Harper made it clear that the government, and not the NEB, will make the final decision. When asked whether he would accept a recommendation from the panel that the Gateway pipeline should not proceed, the prime minister said "We'll always take a look at the recommendation.... This government has in the past changed projects ... if reviews were not favourable."³

The NEB also has a reputation of being accommodating to the oil industry from which it receives most of its funds. For example, it bowed to industry pressure by amending its rule requiring companies exploring for oil in the Arctic to be able to drill relief wells during the same drilling season. In December the NEB said it would allow companies to get around the rule if they can present alternative methods that would "meet or exceed the intended outcome of the policy."⁴ As Jefferey Simpson writes in *The Globe and Mail*: "The National Energy Board will rubber-stamp the [Gateway] project. It always does, but not until years of hearings."⁵

While the testimonies of Indigenous peoples and ecological justice advocates before the NEB will be important for raising public consciousness, it is important to realize that responsibility for respecting Indigenous peoples' rights does not lie with the NEB but with the federal government. Similarly, the responsibility to consider the effects of expanded tar sands development on the global climate lies with the federal government and not with the NEB.

Any decision that the NEB may render to approve the pipeline will not be the last word as it is sure to be appealed to federal courts, likely ending up at the Supreme Court of Canada. While the outcome of these court challenges is unpredictable, the record of court cases involving First Nations and the National Energy Board is instructive.

The Brokenhead Ojibway Nation took the federal government to court for a lack of adequate consultation under their treaty rights before a pipeline from Alberta to Manitoba was built across their traditional territory. In May of 2009 its appeal was dismissed on the grounds that the opportunities for consultation through the NEB hearings were adequate. However, the judge made a clear statement on the inadequacy of the current system of consultation in cases where Indigenous nations, like many of those in Northern B.C., have never ceded their ancestral territories through treaties signed with the Crown. The judge wrote:

“...the NEB process may not be a substitute for the Crown’s duty to consult where a project under review directly affects an area of unallocated land which is the subject of a land claim or which is being used by Aboriginal peoples for traditional purposes.... Because this is also the type of issue that the NEB process is not designed to address, the Crown would almost certainly have had an independent obligation to consult in such a context.”⁶

Similarly, in the case of the Sweetgrass and Moosomin First Nations versus the National Energy Board involving Enbridge’s Alberta Clipper pipeline project and lands never surrendered to the Crown, the final judgement issued in December, 2009, claimed that the NEB was “not required to determine the existence of a Crown duty of consultation.”⁷ In 2010 the Standing Buffalo Dakota First Nation launched an appeal against a decision granting Enbridge access to unceded land for building its Southern Lights pipeline after the ruling found that “there is no requirement [for the NEB] to address the Crown’s duty to consult prior to making decisions regarding pipeline approvals.”⁸

B.C. Indigenous Nations that have never surrendered their lands to the Crown are already working with West Coast Environmental Law on a case seeking “a true government-to-government process with the federal government” for the review of the Enbridge Gateway project that would not depend on the outcome of the NEB hearings.⁹

What all these cases point to is the responsibility of the federal government itself, and not the NEB, to ensure Indigenous rights, especially in instances where the Indigenous Nations have never signed treaties with the British Crown or the Canadian government.

Any new export pipeline would facilitate more tar sands development

In the wake of President Obama’s decision to delay a permit for the construction of the Keystone XL pipeline from Alberta to the Texas Gulf coast, Prime Minister Harper seems more determined than ever to support the Gateway project. Mr. Harper told the President that he was “profoundly disappointed” with his decision and pledged to pursue Asian markets for tar sands oil.¹⁰ TransCanada Pipelines, the sponsor of the Keystone XL, immediately responded to Obama’s announcement with a promise to submit a new application for a route that would bypass the controversial Sand Hills area of Nebraska and its aquifer.

Indigenous Environmental Network campaign coordinator Clayton Thomas-Muller welcomed President Obama’s decision while still sounding the need for vigilance: “This is one battle won for our Mother Earth. Other battles linked to the Canadian tar sands continue. We remain vigilant ... working ... to stop the proposed Enbridge Northern Gateway Pipeline and other pipelines throughout Canada.”¹¹ Tar sands producers have backed both pipeline projects lest they find themselves “locked in bitumen” with nowhere to sell expanded production.

In fact, at 3.8 million barrels a day (mbd), current pipeline capacity for transporting bitumen is large enough to handle both current and already approved tar sands production capacity.¹² Current production capacity is 1.9 mbd and approvals have already been granted for adding another 1.8 mbd of capacity for a total of 3.7 mbd.¹³ Hence the construction of any new export pipeline, whether the Northern Gateway or the Keystone XL, would involve the approval of new tar sands projects.

The British Columbia Coastal First Nations' news release accompanying their declaration cited above states that the Enbridge pipeline would increase tar sands production by 30%.¹⁴ If the expansion of the tar sands is allowed to continue, Environment Canada projects that greenhouse gas emissions from the production and upgrading of bitumen will grow by 88% between 2010 and 2020, making it virtually impossible to meet even the federal government's modest emission reduction goals, let alone the reductions required to bring our emissions down to 40% to 50% below their 1990 levels as is required to prevent runaway climate change.¹⁵

KAIROS has adopted a policy statement calling for "no further approvals for tar sands projects" out of concern for Indigenous peoples whose rights, health and livelihoods are threatened by tar sands projects and out of concern to contain climate change.¹⁶ Climatologist James Hansen maintains that to reduce greenhouse gas emissions sufficiently to keep global temperature increases below two degrees Celsius we must avoid any expansion of the tar sands. He warns that the release of the massive amounts of carbon contained in the tar sands would push us past a tipping where a runaway greenhouse effect endangering life on Earth would be inevitable.¹⁷

Conclusion

The rights of Indigenous Peoples and the danger to life on Earth posed by further expansion of the tar sands are fundamental issues of social justice. They cannot be dealt with adequately by the NEB, but must be engaged with by the federal government and, ultimately, all Canadians.

1 The Save the Fraser Declaration may be accessed at <http://savethefraser.ca/>

2 The Coastal First Nations Declaration is posted at <http://dogwoodinitiative.org/no-tankers/downloadable-files/cfn-declaration-with-release-and-backgrounder>

3 See "Harper says pipeline debate should be left to Canadians" January 16, 2012 at <http://www.cbc.ca/news/politics/story/2012/01/16/pol-harper-mansbridge-interview.html>

4 Shawn McCarthy. "NEB set to allow alternatives for relief-well rule in Arctic." *The Globe and Mail*. December 16, 2011. Page B3.

5 Jeffrey Simpson. "'Foreign money' is a hypocritical diversion." *The Globe and Mail*. January 11, 2012. Page A15.

6 Cited in Richard Girard. *Out on the Tar Sands Mainline: Mapping Enbridge's Web of Pipelines*. Ottawa: Polaris Institute. May 2010. Page 20.

7 Cited in *Ibid*. Page 20.

8 *Ibid*. Page 21.

9 *Ibid*. Page 21.

10 Cited in Bruce Campion-Smith. "Ottawa looks to Asia after U.S. rejects Keystone pipeline project." *Toronto Star*. January 19, 2012.

11 Cited in "Native Americans Applaud President Obama's decision rejecting the Keystone XL Pipeline." News Release from the Indigenous Environmental network. Bemidji, Minnesota. January 18, 2012.

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- 12 See Michelle Mech. *A Comprehensive Guide to the Alberta Oil Sands*. May 2011. p.47. at http://greenparty.ca/files/attachments/a_comprehensive_guide_to_the_alberta_oil_sands_-_may_2011.pdf
- 13 See R.B. Dunbar. *Existing and Proposed Canadian Commercial oil Sands Projects*. Calgary: Strategy West. January 2011. at http://strategywest.com/downloads/StratWest_OSProjects_2011_01.pdf
- 14 See Coastal First Nations Declaration and news release posted at <http://dogwoodinitiative.org/no-tankers/downloadable-files/cfn-declaration-with-release-and-backgrounder>
- 15 See John Dillon. "Poverty, Wealth and Ecology in Canada." Toronto: KAIROS. November, 2011. Pages 18-19 at <http://www.kairoscanada.org/wp-content/uploads/2011/11/SUS-CJ-11-10-PovertyWealthEcology.pdf>
- 16 "Drawing a Line in the Sand: Why Canada needs to limit tar sands expansion and invest in a green economy", KAIROS Position Paper, July 2010, at <http://www.kairoscanada.org/fileadmin/fe/files/PDF/EcoJustice/TarSands/10-08-TarSands.pdf>
- 17 James Hansen, *Storms of my Grandchildren: The Truth About the Coming Climate Catastrophe and Our Last Chance to Save Humanity*, New York: Bloomsbury, 2009, pp. 184-185, 236.