NEB Recommends Approval of the Trans Mountain Expansion Project

February 25, 2019

Introduction

On February 22, 2019, the National Energy Board ("**NEB**" or the "**Board**") released its reconsideration report (the "**Reconsideration**") on the Trans Mountain Expansion Project (the "**Project**"). The Reconsideration follows the August 2018 Federal Court of Appeal decision that set aside the NEB's previous approval of the Project and the federal government's subsequent direction for the NEB to reconsider the Project to take into account Project-related marine shipping. In its lengthy report, the Board recommends the approval of the Project subject to the 156 conditions that it had proposed in its previous recommendation and 16 new recommendations that are aimed at mitigating the environmental impacts of marine shipping that are beyond the scope of the Board's regulatory authority. This recommendation flows from the Board's finding that the Project is in the Canadian public interest and is required by present and future public convenience and necessity. The NEB's decision is timely as it sends a signal for potential relief of the oil and gas industry's pipeline bottleneck days following the Alberta government's announcement of a deal to market crude by rail.

The Decision

In the Reconsideration, the Board makes three key findings with respect to the Project's environmental effects. First, the Project-related marine shipping is likely to cause significant adverse environmental effects on the Southern resident killer whale population and on Indigenous cultural use associated with same. Second, the marine shipping is likely to result in significant increases of greenhouse gas emissions. Finally, while unlikely to occur, the environmental effects from a worst-case spill would be significant. Ultimately, the Board concludes that the potential adverse effects can be justified in light of the Project's considerable benefits and the availability of mitigation measures.

Following the guidance from the Federal Court of Appeal, the Board's 16 new recommendations identify measures that fall within the federal government's jurisdiction notwithstanding that (1) the Board does not have authority to regulate marine shipping and (2) Trans Mountain may not have control over the implementation of the proposed measures. The Board's regulatory mandate remains limited to the requirements of the

156 conditions, while the Governor-in-Council has the requisite authority and flexibility to adopt the Board's recommended mitigation measures in any number of ways. Read the 16 recommendations at the end of this post.

The release of the Reconsideration starts the 90-day clock for the federal government to make its final decision for the Project.

Implications

The Board's approval of the Project is welcome news to the oil and gas industry and an important step toward the resolution of Canada's pipeline bottleneck and low oil price. At the provincial level, Alberta has adopted measures aimed at addressing the oil price slump, including the mandatory curtailment of crude oil production and the recently announced crude-by-rail deal. However, production cuts and alternative options to bring Alberta's oil to the market are intended to be only temporary solutions. Successful development of pipelines remains the most effective option of marketing Canadian crude oil. The Reconsideration illustrates how the NEB may make recommendations for matters outside its regulatory authority in discharging its public interest mandate. Further, the Reconsideration provides a precedent for how the NEB may address environmental impacts in future projects. The NEB's positive recommendation for the Project is a significant development for the oil and gas industry as it continues to navigate a complex regulatory environment.

BLG will continue to monitor this and other regulatory developments on the front burner and provide updates.

The Board's Recommendations

The NEB's recommendations include various measures aimed at monitoring and reporting on environmental impacts, and encouraging continuous engagement with Indigenous peoples. The 16 recommendations are summarized as follows:

1. Develop a plan to assess the cumulative effects on the Salish Sea and a long-term strategy to manage these effects;
2. Release an annual public report of the progress of measures to address the cumulative effects on the Salish Sea;
3. Develop a marine bird monitoring and protection program;
4. Expedite the completion of the feasibility study for establishing a Southern Strait of Georgia National Marine Conservation Area Reserve and establish it if considered feasible;
5. Develop an offset program for increased underwater noise and increased strike risk posed to marine mammal and fish species listed in the *Species at Risk Act*;
6. Consider the specific measures related to marine vessel usage and design;
7. Update federal marine shipping oil spill response requirements;
8. Develop a regulatory framework for mandatory enhanced tug escort in the Salish Sea for Project-related tankers;
9. Consider the need for a Canada/United States Transboundary Vessel Traffic Risk Assessment;
10. Support greenhouse gas reduction measures related to marine shipping;
11. Facilitate opportunities to engage the Indigenous Advisory and Monitoring Committee on the marine safety system;
12. Continue engagement activities targeting coastal Indigenous communities, recreational boaters, fishing vessel operators, and small vessel operators with respect to navigation safety and prevention of collision with large vessels;

13. Combine current initiatives and investigate new paths for the delivery of government grants to promote innovation in new oil recovery technologies;
14. Accelerate the development of the Enhanced Maritime Situational Awareness initiative and the extension of the Automatic Identification System to smaller passenger vessels;
15. Review the federal marine oil spill compensatory framework to compensate for non-use values for Indigenous and non-Indigenous communities; and
16. Develop a formal complaint resolution program to facilitate discussions on port-related impacts and resolve complaints relating marine vessels anchored at anchorages managed by the Vancouver Fraser Port Authority.

By

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