

Proposal for a First Nations Review Process for the Enbridge Gateway Pipeline

Background

The proposed Gateway Pipeline would have direct and indirect impacts on numerous First Nations, both along the pipeline corridor and along the west coast where tanker traffic is proposed to travel to export oil and import condensate. First Nations wish to have a comprehensive review that is open and fair, and accountable to their communities.

The proponent has thus far filed its Preliminary Information Package with the federal government, but many questions are left unanswered as to how the affected First Nations would be engaged in the decision making process. A number of these First Nations have proposed a First Nations Review Process that would be parallel to the federal review process, which is likely to be comprised of a joint review panel between the National Energy Board and the Canadian Environmental Assessment Agency.

Many of the participant First Nations share common concerns about government decision making processes and their lack of recognition of First Nations as decision-makers. To this end, participant First Nations desire a process that recognizes and respects both their Aboriginal rights and title, as well as their responsibility as stewards of the land and water to make sound decisions on land use. In order to achieve this, First Nations must design a process that is suitable and accountable to their communities. First Nations' participation in government-led processes has often been challenged by the predetermined nature of the review process itself, and ultimately the outcome or final decision. For example, the National Energy Board has identified only two cases where project proposals have been rejected.

The federal government, by way of Aboriginal Relations representatives from Natural Resources Canada, as well as National Energy Board representatives, has indicated a willingness to look at new ways of engaging First Nations in decision-making on the Gateway pipeline. There has been an admission by these representatives that existing processes have not served First Nations well, and that the Gateway project poses new and unique challenges to the federal government to consult with non-treaty First Nations on a pipeline project of this magnitude. First Nations do not have confidence that many of the outstanding issues can be addressed without a separate process designed and implemented by First Nations themselves.

Purpose

- To provide First Nations potentially affected by the Gateway pipeline a review process that is fair, open, and accountable to their communities;
- To establish a process that is designed, implemented, and guided by the First Nations who stand to be impacted by the proposed pipeline;
- To protect the constitutional rights of the affected First Nations.

Collective Declaration of Participant First Nations

Given the number and diversity of First Nations potentially affected by the proposed Gateway pipeline, it has been recognized that a concerted effort towards unity and collective cooperation is required to ensure the success of the First Nations Review Process. To this end, the participant First Nations propose a Declaration of Alliance for all participant First Nations to sign before the process officially commences.

Jurisdiction and Decision Making Authority

In addition to recognizing the diversity and autonomy of the participant First Nations, the proposed First Nations Review Process would also recognize and respect each First Nation's decision making authority. It is the view of the Steering Committee that in order for First Nations to make informed and legitimate decisions on land use, a comprehensive review of the best available information and research is required. Thus, the First Nations Review Process will allow First Nations to both share their knowledge on the land, and to hear testimony of other experts that will inform decision making.

In recognition of the individual First Nations' decision making authority, the guiding principle of the First Nations Review Process is *free, prior and informed consent*. *Free, Prior and Informed Consent* (FPIC) is a framework for greater equity and a pathway to co-management for First Nations in large development projects – it also stems from many international conventions (i.e. Convention of Biological Diversity, etc) and policies of various United Nations and other intergovernmental organizations (i.e. World bank Group, UNICEF, etc). FPIC recognizes First Nations inherent and prior rights to their lands and resources and respects their legitimate authority, and is gaining recognition in international law.

The elements of FPIC are as follows:

- **Free:** Implies no coercion, intimidation or manipulation;
- **Prior:** Implies consent has been sought sufficiently in advance of any authorization of commencement of activities and respect time requirement of indigenous consultation/consensus processes;
- **Informed:** Implies that information provided covers at a minimum the following aspects, and is in form that is accessible and understandable:
 - The nature, size, pace, reversibility and scope of any proposed activity;
 - The reason(s) or purpose of the project and/or activity;
 - The duration of the above;
 - The locality of areas that will be affected;
 - A preliminary assessment of the likely economic, social, cultural and environmental impacts, including potential risks and fair and equitable sharing in a context that respects the precautionary principle;
 - Personnel likely to be involved in the execution of the proposed project (including indigenous peoples, private sector staff, research institutions, government employees and others);
 - Procedures that the project may entail.

- **Consent:** Consent, unlike consultation implies an ability to determine to what uses the land can be put. This reflects the character of Aboriginal title, which remains unceded along the majority of the pipeline corridor and the coastal impact areas. First Nations should be able to participate through their own freely chosen representatives and customary or other institutions. Decisions to grant or withhold consent must be ratified through customary or traditional institutions.

Independent mechanisms of oversight and redress can be established within each First Nation to verify *free, prior and informed consent* as described above.

Number of First Nations Participants Required for Legitimacy

Given the large number of independent First Nations potentially affected by the proposed pipeline, the Steering Committee will determine what percentage of affected First Nations participating will be required to achieve legitimacy. However, because the recommendations of the panel will be non-binding, they will still be available to non-participating First Nations as supplementary information for their own decision making purposes.

Scope

The Scope of the inquiry will be set:

- Initially by the Steering Committee (participating First Nations) through the Terms of Reference;
- Revised by the Panel, once selected and in consultation with the Steering Committee; and
- Further revised upon input from participant First Nations through preliminary hearings.

The following initial scope is proposed:

The investigation of the potential direct and indirect environmental, social, cultural and economic impacts of:

- The Proposed Pipeline:
 - the construction,
 - maintenance,
 - operation and
 - the decommissioning of the proposed pipeline and
- Related Activities:
 - the construction, maintenance, operation and decommissioning of the pipeline and tanker terminal in Kitimat;
 - the operation of tanker traffic off the Coast of British Columbia;
 - any exploration, construction, clearing, transportation or other activities that are likely to result in relation to the development of the proposed pipeline and or the terminal in Kitimat.
- Cumulative Impacts Assessment: Comprehensive assessment of cumulative impacts by individual First Nation territory. This includes secondary development and secondary impacts such as development of previously undeveloped oil and gas reserves.

Harmonization with Federal Review Processes

The Steering Committee expects that the federal government will wish to harmonize the First Nations Review Process with the federal review process. The Steering Committee, with participation from other interested participant First Nations, can negotiate the harmonization of the parallel processes based on a government-to-government relationship.

Process Outline

1. Scoping
2. Panel Hearings
3. Investigation
4. Final Recommendations of the Panel
5. Individual First Nation Deliberation

Hearings

The main process by which the panel would conduct its investigation is by public hearings. The panel would receive evidence at a central hearing location or locations (possibly Edmonton, Prince George, Kitimat), and would also travel to participant First Nation communities for public hearings where appropriate. These hearings would be open to public and media audiences.

It is proposed that these hearings be set as **issue-based hearings** and **community-based hearings**.

Issue-based hearings would be held at one or more central hearing locations. At these hearings, the panel would receive evidence from persons who are recognized by the panel as experts in relation to the issue being heard and persons or groups with a direct and significant interest in the issue, and relevant information in relation to the issue. Participants and intervenors will have opportunities to question witnesses at these hearings, either directly or through submissions to the panel, according to the panel's determination.

Community-based hearings would be held at central locations within participant First Nation communities, where the panel would receive testimony from community members relevant to the potential impacts of the pipeline and related activities. Communities would be updated on evidence already heard in issue-based hearings before each community hearing, so that their comments and responses can be made in light of that information. Community hearings would be organized in a manner appropriate to the culture and the community to maximize the value of information gathered and disseminated.

Investigation

A third, investigative stage to the inquiry is also proposed. At this stage, the panel will also be authorized to determine when full investigation would be served by consultations between panel members and experts, First Nation community members or representatives, or other persons. These consultations would not be public, but would contribute to the panel's investigation, report and recommendations.

Participation, Questioning and Cross-Examination

At formal hearings, it is proposed that questioning of Experts and Intervenors would primarily be done by the panel and commission counsel. To focus the process on the most important issues, Experts could submit written submissions in advance of their testimony, with summaries of the major problems and issues they have identified.

Participants and Intervenors may submit proposed questions to the panel for incorporation into the panel's questions. Where a participant or intervenor feels strongly that the investigation would benefit by providing the party the opportunity to cross-examine directly, the party would apply to the panel for such an opportunity.

Panel Report and Recommendation

It is proposed that the Panel would, after full Investigation make a Report to Participant First Nations. This Report will describe the risks of the Project and Related Activities; the possible mitigation measures that could minimize those risks; and the possible benefits that could come to First Nations from the project.

It is also proposed that the Panel should conclude with a non-binding recommendation to Participant First Nations as to whether in the Panel's opinion the risks outweigh the benefits to Participant First Nations, and also include a list of conditions that would have to be met were the project to proceed.

FNRP Panel

The Panel will consist of three commissioners. The Panel will appoint a Chair from its members. Panel members will be selected by the Steering Committee of participating First Nations. Panel members will be individuals of high public credibility, with a record of impartiality. Ideally, there will be at least two members with a First Nations background, and a mix of scientific, political and jurist or commission experience

The Panel would be supported by a staff and legal counsel, and will engage expert advisors where it deems appropriate. Panel members will be part-time for 12-18 months, with some periods of full-time commitment required during hearings.

Mandate

The panel will have a mandate to:

- a) investigate the potential environmental, social, cultural, and economic effects upon participant First Nations from the proposed Pipeline and related activities (the "Impacts");
- b) evaluate costs and benefits from the perspective of First Nations, and review appropriateness of accommodation proposals;
- c) report to participant First Nations upon those Impacts; and
- d) provide recommendations to participant First Nations

- i. as to whether in the panel's opinion, the risks of negative Impacts of the project outweigh the possible beneficial Impacts to participant First Nations; and
- ii. what conditions would in the panel's opinion, be essential to the project proceeding.

The Panel is advisory. Each First Nation will retain its own decision-making authority following the panel's report.

Steering Committee

The FNRP Steering Committee has been in existence since February 2006 guiding the development of this proposal and the overall objectives of the First Nations Review Process. The Steering Committee is open to any appointed individual from affected First Nations. Elected or Hereditary Chiefs may appoint individuals or volunteer themselves to the committee.

Supporting Staff

Support staff will assist the panel members and the steering committee and will be designated by the steering committee and the panel. A Project Director will oversee the support staff and report to the panel and the steering committee. Other support staff will include researchers, technical advisors, legal counsel, media coordinator, and a logistics coordinator for the hearings.

Participants, Experts and Intervenors

Participant First Nations

Participants would be those First Nations whose territory stands to be affected by the Pipeline and Related Activities. Those First Nations represented on the Steering Committee would be Participants, and once the panel is convened, standing as Participant would be granted by application to panel. Participant funding will be available to participating First Nations.

Intervenors

Intervenors would be First Nations and non-First Nations individuals and organizations who have a "genuine interest" in the Proposed Project or Related Activities. Standing would be granted by application to panel, or upon invitation by the panel, and could be with respect to a particular Issue or to the entire Investigation.

It is for instance envisioned that First Nations or non-First Nation communities that have experienced similar projects might be invited to participate as intervenors.

Proponent and Government

The Project proponent, Enbridge, and other levels of government will be invited to participate as parties. The proponent may also choose to apply for Intervenor status.

Experts

Experts will testify in relation to specific issues. They would be identified by commission counsel and staff, and by suggestions from Participants and Intervenors.

Timeline

It is estimated that the First Nations Review Process will take between 12-15 months. The FNRP would parallel the federal process, thus it is anticipated that the proponent would apply to the two processes at approximately the same time.

Budget and Funding

The estimated budget for the FNRP is \$2.4 million. This includes the following approximate items:

- Panel Commissioners (including travel and expenses): \$300,000
- Staff Wages (Project Director, Steering Committee Honoraria, Researchers, Legal Counsel, Technical Experts, Media Coordinator, and Logistics Coordinator for Hearings): \$1,000,000
- Report Drafting, Printing, and Distribution: \$30,000
- Participant Funding for Individual First Nations: \$900,000

The Steering Committee is seeking start-up funding that will support the initial scoping stage, fundraising efforts, and the Steering Committee's work. Start-up costs are estimated at \$100,000.

Funding for the FNRP will come from:

- a) Provincial and Federal governments, (drawing in part upon the Crown's legal duty to consult with First Nations about projects that will infringe upon aboriginal rights);
- b) The proponent (or proponents);
- c) Non-governmental organizations.

Transferability

It is anticipated that this inaugural First Nations Review Process will establish a foundation for similar collective decision making efforts for First Nations where major projects potentially impact multiple First Nations.

Attached: Press Release and Backgrounder announcing the First Nations Review Process.