

Enbridge Northern Gateway Project

Joint Review Panel

File OF-Fac-Oil-N304-2010-01
21 August 2013

To: All Parties to OH-4-2011

Northern Gateway Pipelines Inc. (Northern Gateway)
Enbridge Northern Gateway Project Application of 27 May 2010
Hearing Order OH-4-2011
Notice of Motion filed by Northern Gateway

On 1 May 2013, Northern Gateway filed a motion requesting that the Panel provide direction regarding the definition of “construction” used in the Panel’s potential conditions. Northern Gateway brought the motion because the Haisla Nation had taken the position that Northern Gateway could not undertake activities such as geotechnical investigations because these activities constitute construction as contemplated in the potential conditions.

On 14 May 2013, the Panel issued its ruling on the motion (Ruling no. 164). It states that the last sentence of the definition of “Construction” was intended to convey that investigations associated with normal surveying operations or data collection activities would not be considered as “Construction” work.

This ruling confirms that in issuing its potential conditions, it did not intend to preclude Northern Gateway from continuing work associated with potential pre-construction condition compliance, that it would otherwise be entitled to perform.

As noted by the Haisla in its comments, any further submissions on the terminology to be used (including the term “Construction”) in the ultimate conditions, and any submissions regarding the level of investigation allowed during the pre-construction period can be raised in final argument.

Northern Gateway was the only party to address this issue in final argument. At page 378 of its written argument, Northern Gateway requested “immediate clarification” of the definition of the word “construction” as used in the Potential Conditions and whether it should be understood as including conducting geotechnical investigations. In support of the request, Northern Gateway said:

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1392. Having reviewed conditions imposed on other NEB-regulated pipelines, Northern Gateway has been unable to identify any prior instance in which the definition of construction included geotechnical investigations. It is submitted that, so long as they are not undertaken for the purposes of "installing or preparing to install" the oil pipeline, the condensate pipeline or the Kitimat Terminal, pre-construction activities ought not to be considered to constitute commencement of construction.

1393. Northern Gateway recognizes that the definition clearly states that "[c]onstruction activities do not include activities associated with normal surveying operations or data collection activities". However, the definition includes "conducting geotechnical investigations." In order to meet pre-construction conditions as proposed by the JRP in the Potential Conditions and in order to meet commitments made by Northern Gateway in its written evidence and throughout the hearing process, it is necessary for Northern Gateway to continue to undertake investigative activities such as geotechnical investigations. Northern Gateway's argument as to why the definition of construction should not include "conducting geotechnical investigations" was provided in its Notice of Motion and is not repeated here.

1394. Northern Gateway makes this request for immediate clarification so that it may continue with pre-construction investigation activities that must be completed prior to receipt of the JRP's report.

Geotechnical investigations are required to determine the nature of the subsurface geology to enable the optimum location of a pipeline and to determine its design. These investigations include geophysical surveys, bore holes, and the digging of test pits. The *National Energy Board Act* allows companies to undertake these activities prior to the approval and construction of a pipeline. Therefore, the Panel is of the view that the definition of construction under the potential conditions does not include geotechnical investigations that are not being undertaken for the purposes of installing or preparing to install the proposed Northern Gateway oil pipeline, condensate pipeline or the Kitimat Terminal.

Northern Gateway requested this clarification as soon as possible and no party objected to the request. Accordingly this ruling is being released prior to the Panel's report which is to be released by the end of the year.

Yours truly,



for
Sheri Young
Secretary to the Joint Review Panel