



JAN 12 2018

Dr. Shelagh Montgomery
Executive Director
Mackenzie Valley Land and Water Board
4922-48th Street
7th Floor, YK Centre Mall
YELLOWKNIFE, NT X1A 2P6

Dear Dr. Montgomery,

Re: Closing Arguments for water licence MV2017L1-0002 and land use permit MV2017P0013 application – Enbridge Pipelines (NW) Inc.

The Government of the Northwest Territories (GNWT) is pleased to provide its closing arguments in relation to applications for the water licence MV2017L1-0002 and the land use permit MV2017P0013 for Enbridge Pipelines (NW) Inc. to the Mackenzie Valley Land and Water Board (MVLWB or the Board). The GNWT has participated actively throughout the process, including submitting a technical intervention and attending the public hearings. The GNWT provides the attached closing arguments for the Board's consideration.

Should you have any questions or concerns please contact Ms. Lorraine Seale, Director, Securities and Project Assessment, by email at lorraine.seale@gov.nt.ca, by phone at (867) 767-9180 ext.24020, or Arusa Shafi, Project Assessment Analyst, Securities and Project Assessment, by email at arusa.shafi@gov.nt.ca or by phone at 867-767-9180 ext. 24023.

Sincerely,

Lorraine Seale
Director
Securities and Project Assessment
Lands
Government of the Northwest Territories

Attachments: Closing Argument
Security Estimate and Costing Scenario

Introduction

On March 23, 2017 Enbridge Pipelines (NW) Inc. (Enbridge) applied to the Mackenzie Land and Water Board (MVLWB) for a water licence and land use permit for works associated with the replacement of a section of pipeline beneath the Mackenzie River, the Line 21 Segment Replacement Project (the project). Enbridge also applied to the National Energy Board (NEB) for authorizations associated with the project. The Government of the Northwest Territories (GNWT) has actively participated in both regulatory processes, including attending the NEB hearings held from October 23-26, 2017 in Fort Simpson, and the MVLWB public hearings held from October 27-28, 2017 and January 8-9, 2018 in Fort Simpson.

On September 29, 2017 the GNWT submitted its technical intervention, which included three recommendations, and provide comments on the draft water licence and draft land use permit. Based on information provided since that time, the GNWT has amended some of these recommendations and comments, as set out below. All other GNWT recommendations submitted on September 29 are unchanged.

The GNWT notes that the project is limited to the Line 21 Segment Replacement and the entirety of the Line 21 pipeline is not being reconsidered at this time. The GNWT acknowledges that several parties to this proceeding expressed concerns about the impacts of the project as well as broader concerns about Line 21. The GNWT is very pleased that Enbridge has made significant progress in addressing the concerns expressed by the Dehcho First Nations, Łı́ı́dlı́ Kú́é First Nation (LKFN) and Sambaa K'e First Nation (SKFN). The GNWT encourages all parties to continue to work together on these matters.

The GNWT also acknowledges the socio-economic importance of Line 21 to the NWT. The Line 21 segment replacement project will provide significant employment and contracting opportunities to NWT residents, particularly in the Dehcho region, and the re-activation of Line 21 will have important benefits for the NWT, particularly the Sahtu region and the Town of Norman Wells.

The GNWT has emphasized in our submissions to both the NEB and the MVLWB the value of collaboration between the two boards, harmonizing conditions where possible. This will be significant in the decision-making process and for project operations. Post-decision, if the project is approved, for operations, ongoing collaboration could also provide enhanced opportunities for input by Indigenous governments and organizations and the public. Since the Type B water licence involved a public hearing, the Minister of Environmental and Natural Resources will make the final decision on approval of the licence.

At the reconvened public hearing Enbridge, thanked the MVLWB for setting a work plan that contemplates issuance of the land use permit prior to the water licence being approved, which would to enable Enbridge to undertake certain winter activities. The GNWT has no concerns with this approach and its associated timelines.

Authority of the MVLWB over all potential Deposits of Waste to Waters

The MVLWB has the authority to require turbidity monitoring to detect the presence of drilling "waste," as that term is defined in the *Waters Act*, resulting from an inadvertent return. While the NEB has the authority to regulate drilling, the NEB is not the only regulatory body with authority to regulate waste resulting from drilling.

The NEB and MVLWB have advised parties that for the Line 21 Segment Replacement, the NEB will regulate activities on the right-of-way and the MVLWB will regulate activities off the right-of-way. As sumps may be located both on and off the right-of-way, both the NEB and MVLWB have the authority to regulate this waste stream.

As opposed to drilling waste deposited and contained within in-ground sumps, an inadvertent return of drilling fluids during drilling operations under the Mackenzie River is very unlikely to remain within the defined right-of-way. The current in the Mackenzie River will result in a migration of waste downstream.

This provides a compelling basis for the MVLWB to regulate this unintended potential deposit of waste in the water licence by ensuring early detection of and preventing excessive quantities of such potential waste from being deposited in the Mackenzie River through a robust turbidity monitoring plan.

There will not be any conflict if both the NEB and MVLWB authorizations require Enbridge to monitor turbidity to detect the presence of drilling waste and take certain actions if such waste is detected. As both the NEB and MVLWB are boards established under federal legislation, a conflict will only exist if dual compliance is impossible. In *Greater Vancouver (Regional District) v. Darvonda Nurseries Ltd.*, 2008 BCSC 1251, a decision in the environmental regulatory law context, Justice Wedge of the British Columbia Supreme Court held at paragraphs 104 to 106 that no conflict exists solely because a law or permit imposes further or stricter restrictions or conditions than another law or permit. Justice Wedge's reasoning is equally applicable to this context. Compliance by Enbridge with whichever of the turbidity monitoring requirements is stricter in any regard will not result in a breach of the turbidity monitoring requirements of the other board and so there will not be any conflict.

If there is an exceedance under the MVLWB's turbidity monitoring plan, a requirement that Enbridge temporarily cease drilling and take appropriate actions to prevent further deposit of that drilling waste in the Mackenzie River is fully within the MVLWB's authority. As the MVLWB has the authority to regulate the deposit of all types of waste in waters, it logically follows that the MVLWB also has the authority in a water licence to require temporary cessation of any activity that results in an unintended deposit of waste to a body of water. This would result in a lawful incidental effect over the NEB's authority to regulate drilling. The NEB's authority to also regulate drilling waste and require temporary cessation of drilling if there is an exceedance does not oust the MVLWB's authority over the same matters.

If the MVLWB and NEB wish to avoid duplication, despite duplication being entirely lawful as noted above, the GNWT believes that the MVLWB should regulate this unintended potential deposit of waste by requiring a turbidity monitoring plan. The MVLWB's process will allow for public review of and comment on the draft turbidity monitoring plan prior to finalizing the plan, whereas there is no such public review under the NEB's process. Having a board that is based on the principles of co-management and located in the Northwest Territories consider any comments received and regulate this unintended potential deposit of waste will greatly assist in ensuring a robust turbidity monitoring plan.

As the GNWT noted in its closing oral argument to the NEB, we encourage the NEB and MVLWB to coordinate their decision-making processes to ensure that, where desired, duplication is avoided and, most importantly, that all issues that have been raised and are within the authority of one or both boards receive due consideration by at least one board.

Term of Water Licence

During cross-examinations of intervenors, the Board staff asked for recommendations on the term of the water licence. It was noted that Enbridge had requested a term of three to five years. The GNWT notes that the project is anticipated to be completed during 2018 (Year One) and the recommended security estimate contains an assumption for three years of monitoring, for a *minimum* term requirement of four years. GNWT anticipates that the board will issue the associated land use permit for a five year term, as requested by Enbridge.

Recommendation (new):

Based on project duration, minimum monitoring requirements and the anticipated term of the associated land use permit, the GNWT recommends a water licence term of five years.

Sump Monitoring

As part of GNWT's September 29, 2017 comments on the draft water licence, the GNWT recommended that groundwater wells be considered within the Surveillance Network Program (SNP) if liquids are disposed of in sumps. During the first day of the reconvened public hearing, in response to a question from the Board, the GNWT noted that based on Enbridge's commitment to use bentonite as the only drilling additive, groundwater wells may not be necessary.

The GNWT acknowledges Sambaa K'e First Nation's comments in its oral closing arguments, specifically, that groundwater associated with drilling may also have elevated salt concentrations.

It is the GNWT's understanding that drilling activities associated with Enbridge's proposal will be relatively shallow, where saline groundwater is not expected to be encountered, and that saline drilling fluids (e.g. potassium chloride) are not proposed for use.

Throughout this review process, the GNWT has identified that drilling waste management and disposal is a key component of this project. To this end, the GNWT has recommended the submission of a sump construction and monitoring plan, to be approved by the Board prior to the commencement of this component of the project.

Such a plan should contain information regarding the handling and analytical testing of sump contents, disposal methods, and any monitoring and maintenance activities. This will ensure that the disposal of drilling waste is conducted appropriately and that the land and water remains protected. Should such a plan become a requirement of the water licence, the GNWT is committed to providing its technical review and comments in a timely manner to the MVLWB.

Plan submissions

During the reconvened public hearing, Board staff requested clarification on submission dates related to the Turbidity Monitoring Plan and Sump Monitoring and Construction Plan. The GNWT acknowledges that there were inconsistencies in these recommendations regarding submission dates. As noted during our response, the GNWT believes the primary objective regarding these plans are that they be approved prior to the commencement of activities to which they relate. To that end, the GNWT provides the following recommendations on the submission dates. These recommendations replace the corresponding recommendations in the GNWT's September 29, 2017 intervention.

Recommendation (amended):

In the GNWT's comments on the draft water licence submitted on September 29, 2017, the GNWT recommended that a formal requirement for a Turbidity Monitoring Plan be included as a condition of the licence. The GNWT also recommended that this plan include a management response framework including action levels and proposed management responses. The GNWT recommends that the Board approve this plan prior to the commencement of drilling.

Recommendation (amended):

The GNWT recommends a Sump Construction and Monitoring Plan be required in the water licence and that this plan be submitted by Enbridge and approved by the Board prior to sump construction.

Securities

Following the GNWT's presentation on the first day of the reconvened public hearing, there were various questions from Board staff on the security estimate completed by the GNWT. Staff requested clarification on references from the GNWT and Enbridge regarding "general agreement" between those parties on the GNWT's estimate. The GNWT responded that the minor differences related to the area of disturbance calculated, Enbridge's removal of a floating dock and the number of years required for monitoring. On the second day of the reconvened public hearing, Enbridge concurred with the GNWT's response.

In addition, the Board staff requested clarification on whether the GNWT's security estimate included winter activities. The GNWT responded that the initial security estimate assumed that work would be undertaken between May 1 and October 31. On the second day of the reconvened hearing, Enbridge clarified to the Board that some initial work such as land clearing may occur as early as March. The Board staff indicated concern through these lines of questioning that winter activities may not be covered under the current security estimate.

Since the completion of the reconvened public hearing, the GNWT and Enbridge have worked together to update the security estimate. Based on new information provided through these discussions, the GNWT was able to complete an updated security estimate which is attached to these closing arguments. As such, the GNWT provides the following amended recommendation regarding securities:

Recommendation (amended):

The GNWT recommends that security for this undertaking total \$856,835. Security under the water licence should be set at \$333,926 to cover water related liability and security under the land use permit should be set at \$522,909 to cover land related liability.

Compliance and Enforcement

The GNWT Department of Lands (Lands) will issue a licence of occupation on Commissioner's land for areas to be temporarily occupied for construction and amend the existing Easement Agreements to take into account any realignment of Line 21 off the existing right-of-way. Lands inspectors are responsible for compliance and enforcement of the land use permit, Easement Agreements and licence of occupation. The GNWT water resource officers are responsible for the compliance and enforcement of the water licence. Inspection frequencies will be determined using the GNWT's integrated risk assessment approach.

The land use permit and the water licence inspection reports will be made available via the MVLWB's public registry. The GNWT officials regularly respond to public queries and address concerns brought forward by the public, and will do so for this project.

Archeological Impact Assessment (AIA) Land Use Permit condition

In its September 29, 2017 comments, the GNWT recommended that the Board add the standard archeological impact assessment condition to the land use permit. In November 2017, the GNWT reviewed the final report of the AIA conducted by Enbridge, and determined that no further archaeological work is required.

The GNWT therefore retracts its recommendation that the land use permit include the standard AIA condition.

Consultation and Engagement

The GNWT recognizes the constitutionally protected rights of Indigenous peoples, and is committed to undertaking consultations with Indigenous governments and organizations (IGOs) when a proposed government action or decision may have an adverse impact on their asserted or established Aboriginal and/or treaty rights. This commitment is key to building respectful relationships with IGOs and furthering reconciliation.

As GNWT stated its October 19, 2017 letter to IGOs, the GNWT is relying on the consultative process of the MVLWB and the applicant's engagement to assist in fulfilling the GNWT's duty to consult for the Enbridge project. The GNWT also encouraged IGOs to identify concerns and recommendations to the MVLWB and to work closely with Enbridge, who is the best source of information for the project.

The GNWT was very encouraged to hear the January 8, 2018 joint statement by LKFN and Enbridge at the reconvened public hearing announcing that they had reached agreement on the terms of a participation agreement and an environmental management agreement. The GNWT notes that, as stated in the LKFN and SKFN closing arguments for this proceeding, Enbridge, LKFN, SKFN, Pehdzeh Ki First Nation and Jean Marie River First Nation have entered into an environmental management agreement regarding the Line 21 replacement project and the ongoing operation of Line 21. The GNWT encourages all parties to continue to collaborate on these matters.

On Dec 15, 2017, the GNWT wrote to MVLWB recommending the addition of a draft water licence review period to the work plan. Given the discussions that occurred at the reconvened public hearing, the GNWT now believes that such a review period is no longer necessary.

As the GNWT stated at the reconvened public hearing, and as noted above, the Enbridge project will require a licence of occupation for the portion of the project on Commissioner's Land and an amendment of the Easement Agreements. The GNWT will be consulting on these applications in accordance with its legal obligations, Treaty 11, and the Dehcho First Nations Interim Measures Agreement.

Conclusion

The GNWT thanks all parties for their participation in this process and the Mackenzie Valley Land and Water Board for providing the opportunity to submit closing arguments for water licence MV2017L1-0002 and land use permit MV2017P0013 applications for Enbridge Pipelines (NW) Inc. The GNWT is confident that the Line 21 replacement project can be conducted in a way that protects the environment and the economic, social and cultural well-being of residents and communities in the Mackenzie Valley.

Costing Scenario: Enbridge Pipelines Inc. - Line 21 Segment Replacement Project - MV2017L1-0002 and MV2017P0013

In order for Enbridge Pipelines Inc. (Enbridge) to replace a segment of the Line 21 Pipeline under the Mackenzie River, approximately 9 km east of Fort Simpson, Enbridge has applied to develop and maintain 3.8 ha of temporary workspaces, two (2) accommodation camps, a barge landing on the Mackenzie River and development of a 2.5 km ROW/access road from the Mackenzie Highway. The Project includes installation of up to 2500 meters of new pipeline below the Mackenzie River and slip plane of the south slope, using a horizontal directional drilling (HDD) method. The existing segment of pipe will be decommissioned in place. ENR has reviewed the Enbridge MV2017L1-0002 water licence and MV2017P0013 land use permit applications and has assessed the scope of work by Enbridge for the project to be as follows:

- Mobilization and demobilization of equipment in the spring (March 1, 2018) and fall of 2018, respectively. This includes the use of a river barge on the Mackenzie River.
- Adding gravel and a geotextile liner to the access trail from the dock for equipment access. A ditch will also be installed along the access trail for runoff.
- Adding matting for equipment and vehicle access to the south project footprint area from the Mackenzie Highway (approximately 11 km).
- Adding matting throughout various areas of the south work space and camp in the Project Footprint as a staging area and for two (2) watercourse crossings.
- Installation of a temporary clear-span bridge structure at one (1) water course crossing. This includes the use of gravel and geotextile fabrics.
- Reducing vegetation in the project footprint and in the existing 5 m work space along the ROW, and in the fire guard around the valve station.
- Setting up drilling rigs at both staging area and access pads on the north and south side of the River. Drilling rigs will be set up at both work spaces to conduct HDD and pipe pulling activities from both sides of the Mackenzie River.
- HDD activities, replacement segment construction and installation, and replaced segment decommissioning. Includes installation of the replacement segment of up to 2500 m of NPS 12 pipe.
- The use of storage tanks and temporary holding cells for drilling waste will be installed at both the north and south work spaces.
- Reclaim entry and exit sumps that contained drilling mud immediately after completion of drilling and remediate.

- Removing the access mats at the end of the construction season.
- Re-contouring of work pad areas to match adjacent bank morphology upon completion of HDD activities.
- Equipment and machinery for this work will include all those listed in Appendix VI of the Water Licence Application, which will be stored at the site during the construction work.

For the RECLAIM Estimate for the site using the RECLAIM Model (v.7), ENR has presumed the following:

- Removal of all heavy equipment – 78 pieces from Appendix VI.
- Removal of accommodations and camp complex assumed to be approximately 45 trailers within the work area (not including accommodation barge).
- Water use and domestic waste will only to be generated from May 1, 2018 to October 31, 2018.
- Removal of temporary holding cells *and* storage tanks for the disposal of drilling waste installed in both the north and south work spaces that will have to be removed at the end of construction (i.e. drilling waste to be disposed on site).
- Removal and restoration of all three (3) water crossings.
- Restoration work at staging area and access pads and accommodation camps (11.1 ha total).
- Scope of work will include scarifying and vegetating both camp and work areas pads where gravel and geotextile was placed and removal of all hazardous wastes.
- Demobilization of remaining unused fuel assumed to be 20% of the amount specified in the Project Description.
- Covering 2 sumps constructed on the north and south end of the replacement line each assumed to be 50mx50mx3m.
- Post-closure site assessment monitoring rounds, commencing the following year for three (3) years. This will include inspections and monitoring to assess soil and water contamination, vegetation status and river bank erosion (incl. water sampling).
- Access via helicopter – \$1,000/hour - two hour minimums.
- Remediation Work crew consist of 10 labourers, work done over 30 work days.
- Workers mob and demob each day by road until crossings removed and then smaller site assessment and monitoring crew by helicopter (assumed 28 days road and 2 days helicopter).
- Assumed 12 hour shifts.