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## Northern Gateway Approved Despite Uncertain Environmental Effects: Is This What Sustainable Development Looks Like?

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Decision commented on: National Energy Board, [Northern Gateway Decision Statement](#)

On June 17, 2014 the National Energy Board issued a decision statement to Enbridge under section 54(1) of the *Canadian Environmental Assessment Act, 2012*, [SC 2012, c 19](#), s 52 announcing that the federal Governor in Council had approved the Northern Gateway pipeline subject to the 209 conditions recommended by the Northern Gateway panel (The panel report was the subject of earlier ABlawg comments [here](#) and [here](#)). The Governor in Council accepted the panel's recommendations that the pipeline will have significant adverse environmental effects to populations of woodland caribou and grizzly bears, but that these effects are justified in the circumstances. I will comment on this approval by comparing it to another major resource project decision issued on the very same day, June 17, 2014 – albeit one issued on the other side of the globe in New Zealand.

This approval of Northern Gateway by the federal Conservatives was a foregone conclusion. Before the Northern Gateway review panel even commenced formal hearings in January 2012, the federal Minister of Natural Resources issued an open declaration that Canada needs more access to Asia-Pacific markets for resource exports. In the words of Minister Oliver himself:

Canada is on the edge of an historic choice: to diversify our energy markets away from our traditional trading partner in the United States or to continue with the status quo. Virtually all our energy exports go to the US. As a country, we must seek new markets for our products and services and the booming Asia-Pacific economies have shown great interest in our oil, gas, metals and minerals. For our government, the choice is clear: we need to diversify our markets in order to create jobs and economic growth for Canadians across this country. We must expand our trade with the fast growing Asian economies. We know that increasing trade will help ensure the financial security of Canadians and their families. (See [Natural Resources Canada, Media Room](#)).

Oh sure, the law tells us the National Energy Board is an independent administrative agency. But let's inject some realism here. In the face of the Minister's open declaration, the only real decision in this whole process was what conditions to attach to the approval. After hearing evidence and considering submissions for 180 days, the Board arrived on 209 conditions it

deemed necessary to mitigate the risks and adverse socio-ecological effects associated with the pipeline and its associated infrastructure to ensure the project is in the public interest. The conditions are set out in the Appendix to the panel report (See [here](#)).

My concern is that this project was given the green light despite so many uncertainties concerning these socio-ecological effects. For example, readers may recall that there was extensive disagreement before the panel on whether Enbridge conducted adequate research to fully assess the impact of the project on threatened caribou and marine species. The panel concluded it was uncertain whether Enbridge could successfully mitigate impacts on caribou populations and that there was insufficient knowledge on the effects of vessel traffic and noise on marine species. Enbridge asserted it would conduct more detailed surveys and gather more baseline data after the project receives regulatory approval, and use the information to develop species protection plans. The panel and subsequently the Governor in Council accepted this position incorporating these commitments into the conditions. See conditions 57 to 59, which require Enbridge to conduct a pre-construction assessment of caribou habitat impacted by the project and conditions 51 and 191, which require Enbridge to prepare a construction phase and operations phase marine mammal protection plan.

Is this what sustainable development looks like? A widely contested project with potentially severe and in some cases uncertain socio-ecological impacts gets approved in order to open new markets for bitumen, and we will sort out the difficulties later. Never mind who exactly will hold Enbridge to account for the content and integrity of its post-approval assessments and plans.

Canada might learn a thing or two about sustainable development by reading the *Trans-Tasman Resources Marine Consent Decision* issued by New Zealand's Environmental Protection Agency (NZ EPA) on the same day that Northern Gateway was approved. The Trans-Tasman decision is available [here](#). Trans-Tasman applied to excavate iron ore from the bed of the Tasman Sea off the western coast of New Zealand's north island. This was the first application for a resource consent under the [Exclusive Economic Zone and Continental Shelf \(Environmental Effects\) Act](#), Public Act 2012 No 72 (the EEZ Act) and, like the Northern Gateway project, it promised economic gains but only in exchange for uncertain and potentially significant environmental risks. The NZ EPA denied the application.

I am familiar with the Trans-Tasman application because the hearing took place during my stay in New Zealand as an academic visitor with the Te Piringa Faculty of Law at the University of Waikato. I was studying the role of public participation in resource project decision-making in New Zealand, and came across a local group organized as [Kiwis Against Seabed Mining](#) (KASM) which had become the front of opposition to the Trans-Tasman mining proposal. My introduction to KASM was instructive because it led me to the broader controversy in New Zealand concerning offshore resource development in the country's exclusive economic zone and the enactment of the EEZ Act in 2013.

The size of New Zealand's exclusive economic zone far exceeds its land mass, and has attracted a large amount of interest from resource exploration companies in recent years. In turn, the New Zealand government foresees a windfall of future royalties from this largely untapped and unknown region. The EEZ Act was enacted in 2013 to provide a regulatory framework to

manage the environmental effects of offshore resource development such as oil exploration and seabed mining. The objective of the EEZ Act is the familiar sustainability rhetoric – enable economic growth while maintaining ecological integrity – but it is tricky business because these are large capital-intensive projects in remote locations that bring environmental risks that are considered low probability with severe consequences. Sound familiar?

The EEZ Act sets up a typical licensing framework for resource development projects. Most proposals require the consent of the Environmental Protection Agency, with the exception of those deemed to have low environmental impact such as scientific studies or mineral prospecting (section 20). An applicant for a resource consent must file prescribed documentation and an environmental impact assessment completed to the satisfaction of the regulator (section 38). With the exception of activities prescribed by regulation, all resource consent applications are subject to a full public hearing if requested. Any person may trigger and/or participate in the hearing; you will not find any reference to a ‘directly affected’ test for standing in this framework. The Environmental Protection Agency received 4700 submissions on the Trans-Tasman application, and all but 20 of those submissions were opposed to the mining project.

The mining activity was proposed for a 65 square kilometre region between 22 and 36 kilometers offshore. The process involves the excavation of seabed materials which are processed on a floating platform to extract iron ore. Approximately 90% of excavated seabed would be returned to the ocean floor along with tailings, creating a sediment plume approximately 1000 square kilometres in size. The project had a project lifespan of 20 years. Submissions at the hearing revealed significant uncertainties on the effects of the project on primary productivity in the water ecosystems, impacts on endangered marine mammals, and impacts on existing indigenous and commercial fishing interests. The EPA panel hearing the application also questioned the economic benefits of the project beyond royalties paid for resource development. The EPA denied the resource consent on the basis of the uncertainties and was not convinced the applicant’s proposed conditions and adaptive management scenarios would ensure sustainable development (See the executive summary of the decision [here](#)).

No doubt we should be cautious about reading too much into a comparison between resource project decisions governed by different statutory regimes in countries separated by half the globe. Nonetheless, for me the comparison is instructive and both CEAA 2012 and the EEZ Act share a common purpose of promoting sustainable development. The Trans-Tasman decision is an illustration of what precaution looks like in practice and is a sincere effort to ensure sustainable development of resources. The Northern Gateway decision is an illustration of throwing caution to the wind.

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