June 25, 2018

Energy Regulatory Forum: Agency Counsel Update

Presenters: Meighan G. LaCasse, Counsel, Alberta Energy Regulator; Katherine Murphy, Associate General Counsel, National Energy Board; JP Mousseau, Counsel, Alberta Utilities Commission

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Editor's Note: This is the third in a series of blog posts that provides summaries of presentations from the ninth annual Energy Regulatory Forum, held in Calgary on May 28, 2018, as summarized by student attendees.

Alberta Energy Regulator Update

Meighan LaCasse noted that the AER has seen an increase in hearings over the past eight months with six notices of hearing issued, as well as another nine matters with hearing panels assigned without notices of hearing, as of May 2018. In addition to these hearing files, Ms. LaCasse outlined four AER hearings that have occurred over the past eight months as follows:

1. TransCanada White Spruce Pipeline Project in Athabasca Area

This AER decision to approve was issued in February 2018. The decision related to the environmental offset of two crude oil pipelines located in the Fort McKay-Fort McMurray area impacting the Westside Athabasca Caribou population, which is part of a broader Woodland caribou population designated as 'threatened' under the *Wildlife Act*, RSA 2000, c W-10. While the proponent had a caribou protection plan and mitigation measures, the hearing panel decided to require the proponent to establish habitat restoration in the Westside Athabasca Range to offset the impacts of the pipeline project. The goal of the plan is to ensure there is no net loss of caribou habitat in range of the proponent's pipeline project.

2. Bashaw Oil Corporation Sour Well Development in Drayton Valley

In March 2018, the AER issued a decision denying the proponent's applications to develop three sour gas well facilities in the Drayton Valley area. The issues related to well location, consultation, safety, and emergency preparedness. There were two participants at the hearing, a group of 40 landowners and the rural county.

In the decision, the AER focused on the proponent's consultation and emergency preparedness. Regarding consultation, the proponent faced significant and organized opposition from the local population. The panel concluded that although the proponent met minimum consultation requirements, it did not satisfy the spirit and intent requirements of Directive 56. Meeting

minimum requirements in this case was not enough in light of local residents' concerns and the risk of a high consequence event due to the nature of sour gas development.

There were issues with the proponent's emergency response plan (ERP). Consultation should allow companies to gather information to use in their ERP's and familiarize stakeholders with emergency plans. In this case, poor consultation led to insufficient information, which in turn led to an ERP that lacked sufficient detail to receive AER approval.

This decision is not a sign that the AER is opposed to sour gas development; however, where the nature of future sour gas project development has a potential impact on public safety, proponents may expect to be held to a higher standard than just meeting minimum safety and consultation requirements.

3. Tidewater Midstream Natural Gas Storage in Grande Prairie Area

The AER denied a request for regulatory appeal in May 2018. This decision provides useful information relating to what constitutes a "vexatious" request for appeal. Section 39 (4)(a) of the *Responsible Energy Development Act*, SA 2012, c R-17.3 (REDA) provides the AER the ability to deny a request to appeal if it considers the request to be "without merit" or "vexatious". In this case, three landowners filed requests for regulatory appeals relating to several licenses and approvals of the proponent's project for underground storage of natural gas.

The AER concluded that the requests for regulatory appeals were vexatious, based on the definition of "vexatious" outlined in s 23(2) of the *Judicature Act*, RSA 2000, c J-2. The AER also relied on the principle set out in jurisprudence that repeatedly making the same claim as a matter of strategy constitutes "vexatious" behaviour. The landowners' requests for regulatory appeals were essentially repeats of their initial statements of concern against the project. This repetition, as well as the generality and irrelevance of the concerns, voided the landowner's requests for appeals as vexatious and as violating the AER process regarding requests for regulatory appeals.

In summary, the AER concluded that repeatedly and indiscriminately re-filing statements of concern on all applications and decisions relating to the same project based on the same grounds and proceedings without any clear link to a specific application or approval or any indication of how the filer is affected, can be considered to be "vexatious".

4. Methane Emission Reductions

The Alberta Climate Change Leadership Plan (ACCLP) outlines a goal to reduce methane emissions by 45% of current volumes by 2025. Standards on how to achieve this goal are being developed and will be implemented in 2019. The reduction targets and timelines are in accordance with those outlined by the Government of Canada. It is expected that Alberta's requirements will be accepted as equivalent by Canada and that the federal requirements will not apply in Alberta.

The draft standards developed will improve measurement, reporting of methane use, detection and repair requirements in order to achieve methane emission standards for future projects in accordance with the ACCLP reduction goal. The AER commissioned three studies to develop the standards, which explore: (a) the range of costs associated to methane mitigation options; (b) Alberta fugitive emission inventory to understand current and future fugitive volumes; and (c) pneumatic device populations to understand the significance of pneumatic devices as a substantial source of methane in Alberta. In addition to these studies, the AER also hosted committee meetings that included environmental NGOs, the oil and gas industry, as well as technology groups.

The proposed methane reduction requirements will apply to AER regulated upstream oil and gas bitumen wells, oil and gas facilities, gas plants, pipeline installations, storage facilities and tank terminals. The requirements will not apply to oil sands mining schemes, midstream facilities, midstream stations, midstream pipelines, processing plants removing bitumen from oil sands, refineries, railcar loading facilities, downstream distribution pipelines, downstream facilities, and AER regulated facilities that are not related to oil, gas or bitumen.

After reviewing feedback on the drafts, the AER will begin plans to finalize and implement the methane reduction requirements beginning in 2019. At the same time, discussions will take place between the AER and Canada's Environment and Climate Change office concurring the equivalence and status of the Alberta requirements.

National Energy Board Update

Katherine Murphy provided an overview of the National Energy Board's (NEB / Board) activity over the past 12 months, relating primarily to (1) post-approval detailed pipeline route processes, and (2) constitutional matters related to the Trans Mountain Expansion Project (TMEP / TMX).

1. TMEP Detailed Pipeline Route Processes

After the TMEP received approval in 2016, the NEB has focused on adjudicating over 450 individual statements of opposition from landowners and other potentially affected parties regarding the detailed route of the pipeline. Of these, and from April 2017-March 2018, 125 hearings were granted with others being dismissed for being invalid statements of opposition or settled through alternative dispute resolution.

The NEB is unable to address matters relating to compensation and specific terms of easements under the *National Energy Board Act*, RSC 1985 N-7, (NEB Act); however, this will change under the pending legislation, Bill C-69. Additionally, the NEB cannot approve an alternative route that falls outside the corridor, or vary the corridor itself, in a detailed route hearing.

Issues raised in these hearings related to the best possible detailed route, and the most appropriate methods and timing of constructing the pipeline within the federally-approved corridor. As of early April 2018, about 12 hearing decisions had been issued from the NEB and about 66% of the TMEP's detailed pipeline route had been approved.

2. TMEP Constitutional Decision: MO-057-2017

a. City of Burnaby Bylaws Found to be Inapplicable

In December 2017, the NEB concluded concerning Trans Mountain's Constitutional Question filed October 2017, that the City of Burnaby (Burnaby) zoning and tree bylaws were inapplicable to certain project work, on the basis of federal paramountcy and interjurisdictional immunity. The decision by the NEB also relieved Trans Mountain of a federal certificate requirement that it obtain the relevant Burnaby approvals and permits.

The NEB concluded that Burnaby's process to review the permit applications at issue was not reasonable, including because the review time for the TMEP was two to three times longer than Burnaby's original estimate of six to eight weeks, Burnaby repeatedly denied Trans Mountain's reasonable requests to aid in an efficient processing of permit applications, and made it very difficult for Trans Mountain to understand what the requirements of the permit applications were and how the requirements could be met. The resulting delays in the review time were the "cause of, or a contributing or exacerbating factor to" project construction delay.

The NEB concluded that Burnaby's application of its Bylaws frustrated a federal purpose (exercise of the project authorizations and powers under the NEB Act), therefore engaging the doctrine of federal paramountcy. Burnaby's unreasonable process and delays impaired a core competence of Parliament's jurisdiction, thereby engaging the doctrine of interjurisdictional immunity. Burnaby's leave to appeal to the Federal Court of Appeal was denied in March 2018. *City of Burnaby* v *Trans Mountain Pipeline ULC, National Energy Board et al*, leave to appeal to FCA refused (see here). In May 2018, the municipality has since filed for leave to appeal to the Supreme Court of Canada.

b. New Generic Process for Permitting Matters

The NEB issued a letter decision in January 2018 in response to a motion by Trans Mountain, which established a generic process to hear future motions relating to municipal and provincial permitting processes. The process is written and will take approximately 3-5 weeks to complete. It will provide increased certainty regarding the resolution of permitting disputes and is expected to rarely be used. The Board has also retained the discretion to amend the process as individual circumstances of different motions may warrant.

3. Transitional Provisions of Bill C-69

All applications being heard under the current NEB Act on commencement day of Bill C-69 will continue to be heard under the NEB Act by Commissioners. Any environmental assessment of a NEB designated project that was commenced under the *Canadian Environmental Assessment Act*, 2012, SC 2012, c 19, s 52 (CEAA 2012), which has not yet had a decision issued, will be continued under the CEAA 2012 regime as if it had not been repealed.

Over 400 amendments to Bill C-69 were initially tabled during the Committee process, with approximately 100 carried through. These include:

i. Preamble

The preambles of both the *Impact Assessment Act* (IAA Act) and *Canadian Energy Regulator Act* (CER Act) now include recognition of the Government of Canada's commitment to implementing UNDRIP.

ii. Meaningful Public Participation

Amendments throughout Bill C-69 will require that public participation in both the CER Act and IAA Act processes be "meaningful".

iii. Time Limits for Interpretive Assessments

Regarding time limits for application integrated review panel assessments, the IAA Act assessments were reduced by half from 600 days to 300 days with the ability of the Minister to extend to 600 days.

iv. Indigenous Traditional Knowledge

"Indigenous traditional knowledge" has been replaced throughout Bill C-69, with "Indigenous knowledge".

Alberta Utilities Commission – A Mighty Wind: What's New In Renewables?

JP Mousseau from the Alberta Utilities Commission (AUC) provided an overview of wind and solar project activity in Alberta; what is currently driving the increase in renewables; as well as other emerging topics in renewables.

1. Wind Projects

As of May 2018, there is about 1500 MW of wind generation currently in operation. About 1400 MW of approved, but not yet constructed, wind projects currently exist. However, this number is subject to change as much of these approved projects include outdated wind turbine technology and will require amendment applications in order to be constructed. And finally, about 2500 MW of wind projects have been applied for and are pending approval.

2. Solar Projects

As of May 2018, there are 15 MW of solar projects currently in operation. About 280 MW of approved, but not yet constructed, solar projects currently exist. Approximately 310 MW of solar projects have been applied for and are pending approval.

3. Emerging Topics

a. Increases in Renewables

The Alberta Climate Change Leadership Plan issued in November 2015, which recommends phase out coal as a source of energy by 2030, has driven the increase in renewable energy project development. Additionally, the *Renewable Electricity Act*, SA 2016, c R-16.5 outlines a 30% increase in electricity produced in Alberta to be produced by renewables.

b. Alberta Environment and Parks

Alberta Environment and Parks (AEP) is responsible for the overall management and regulation of wildlife in Alberta. The AEP plays an important role in the renewable application process and ongoing project enforcement by reviewing environmental protection plans prepared by renewable proponents and will subsequently create a "referral report" that ranks a proponent's project risk from low to high. The proponent's plan and the AEP's referral report are to be filed with AUC applications, which will have an impact on renewable project approvals and ongoing enforcement over the long term.

c. New Issues in Wind – Overlap of Projects & Priority of Approvals

The size of projects applied for has increased significantly from about 100 MW historically to 400 MW in size. These applications require larger land areas and larger wind turbines. Due to the limited land area that offers the most viable wind production, there has been a resulting overlap of wind projects that has created issues relating to wildlife and noise.

From a wildlife perspective, the AEP sets enforceable mortality rates for animal populations (such as birds or bats) for individual projects. As more projects that are much larger in size begin to receive approval from the AUC, these set mortality rates are now impacted by multiple projects. The issue is now how wildlife mortality rates are to be set by the AEP, whether wildlife mortality rates should be set on a project basis or a land area basis.

From a noise perspective, noise impact assessments (NIA) must be enforced to limit noise levels impacting neighbouring land owners and other community residents. An issue arises when multiple projects are filed for approval at the same time, which creates the question of how the AUC prioritizes who receives approval first to fill the noise impact quota.

These two issues are exemplified by the "40 Mile" wind projects, which encompass three projects that were all filed within a period of six weeks. The AUC created a solution by seeking input from the three applicants on how to address the cumulative noise and environmental impacts due to project overlap. The applicants agreed to the proposed solution by using common noise modelling parameters and a common labelling system for turbines and receptors to address the noise impacts of all three projects. The AEP also assisted in the solution by providing a cumulative referral report for all three projects, rather than individual referral reports for each project.

The AUC concluded that priority would be given to the project first completed, with each subsequent project completion being required to take into account the noise and environmental (e.g. wildlife) impacts from the prior completed project(s). However, this solution has been deemed incorrect for amendment applications that revise turbine type, size and location, resulting in an impact on cumulative impacts on noise and environment. This new issue is being taken into consideration by the AUC to develop an updated solution.

d. Enforcement of Oldman 2 Wind Farm Project – AUC Decision (*Oldman 2 Wind Power Project Environmental Compliance* (26 January 2018) 23241-D01-2018)

A unique letter of inquiry decision by the AUC Enforcement Group relating to the Oldman 2 Wind Farm (46 MW) near Pincher Creek was recently decided. The wind project was completed in 2014 and subsequently acquired by the Ikea Group, which resulted in the AEP filing a three-pronged complaint with the AUC for the project having (a) no environmental monitor during construction; (b) disturbing bat nests during construction; and, (c) failing to implement post-construction impact mitigation measures relating to wind turbine software issues. The Ikea Group cooperated fully by self-reporting the third issue to the AEP.

In a settlement proposed by the Ikea Group through amendments to its AUC approval after the Enforcement Group investigation, nest platforms and habitat conservation were constructed through a donation of $280,000 to a local land trust; additionally, the Ikea Group implemented monitoring and compliance plans valued at approximately $300,000.

The AUC concluded in its decision that proposed settlement by the Ikea Group for the Oldman 2 project was "consistent with the amount that would be required to be paid as an administrative monetary penalty for such conduct. Further, the mitigation measures proposed by [the Ikea Group] are protective of both the public and of the environment, in that they are establishing protected conservation habitat for those species affected by [Oldman 2's] non-compliance."

This post may be cited as: Aaron Johnson, "Energy Regulatory Forum: Agency Counsel Update" (25 June 2018), online: ABlawg, http://ablawg.ca/wp-content/uploads/2018/06/Blog_AJ_AER_NEB_AUC_Summaries.pdf.