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## The Not Quite Twelve Days of Northern Gateway

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**Decision Commented On:** [Report of the Joint Review Panel for the Enbridge Northern Gateway Project](#)

When the Joint Review Panel's report for the Northern Gateway Project (the NGP Report) was first released, I knew that exam marking and other commitments would prevent me from posting a timely comment (in contrast, see [here](#) and [here](#)). I had hoped to make up for my tardiness by eventually writing a post using a holiday theme, as the Environmental Law Centre's Jason Unger did so well with respect to other environmental law developments [here](#). My own idea was to write something along the lines of 'The Twelve Days of Christmas.' Alas, it is mid-January and it seems that the time for such ornamentation has passed; a plain and simple discussion of some of the more interesting aspects of the NGP Report will have to do.

### 1. This is What a Justification Looks Like

Having [recently called out](#) the federal government for failing to provide a justification for its decision to approve Shell's Jackpine mine oil sands expansion project (an approach that serves no interest other than the government's, as even [industry would stand to benefit](#) from knowing why one project is justified while another, e.g. Taseko's original Prosperity mine, is not), it was reassuring to see that at least this Joint Review Panel (JRP) shares my understanding of this obligation under the *Canadian Environmental Assessment Act, 2012*, [SC 2012, c 19](#).

Thus, while concluding that the NGP is likely to result in significant adverse environmental effects with respect to caribou and grizzly bears, the JRP recommended that these "can be justified in the circumstances, as set out in Chapter 2" (see NGP Report, Volume II, Chapter 8, Environmental Assessment). Chapter 2, many readers will know by now, is the JRP's discussion, in its role under the *National Energy Board Act*, [RSC, 1985, c N-7](#), as to whether the NGP is in "the public interest." Notwithstanding its potential environmental burdens, the JRP ultimately concluded that the NGP is in the public interest, citing various societal benefits including primarily jobs and job-training for Aboriginal communities but also "research, monitoring, and planning initiatives and techniques with relevance beyond the project" and economic benefits, first and foremost the importance of "opening Pacific Basin markets" (NGP Report, Volume II, Chapter 2, s. 2.4.3 and 2.4.4.).

Of course, not everyone will agree with this conclusion. The good news, for Enbridge and the federal government anyway, is that they don't really have to; accountability at this stage of the environmental process is primarily intended for the ballot box, not the court room. The one caveat to this is that, as with every exercise of statutory authority, the justification must be able to withstand judicial scrutiny. While the subjective and policy-laden nature of this particular exercise points to a highly deferential approach by the judiciary, it seems clear that the JRP must have *some* basis for its various conclusions. My sense is that herein lies the reason for the federal government's reluctance to engage in any real justification for Shell Jackpine, as even this relatively low bar can create problems. For example, factored into the JRP's public interest determination for Northern Gateway was its opinion that a large spill is highly unlikely, a conclusion that appears [questionable](#) at least. And even if Canadian courts ultimately deem such probing

too onerous within the rubric of “reasonableness” review, such details can provide fodder for public commentary that can undermine the government’s position in the court of public opinion (regarding the economic case for increased oil sands production, for example, see University of Alberta Professor Andrew Leach’s commentary [here](#)).

## 2. The JRP’s Failure to Consider Greenhouse Gas Emissions Associated with Increased Oil Production

Probably the most discussed aspect of the NGP Report (see [this excellent discussion](#) on CBC’s *The 180* beginning at around the seven minute mark) is the JRP’s treatment (or lack thereof) of “upstream” greenhouse gas emissions (GHGs), and specifically the apparent asymmetry between the JRP’s decision to consider the need to open markets for projected increases in oil production – the vast majority of which would uncontrovertibly be from the oil sands – but not the GHGs associated with this projected growth. The JRP explained its approach as follows:

Many people said the project would lead to increased greenhouse gas emissions and other environmental and social effects from oil sands development. We did not consider that there was *a sufficiently direct connection between the project and any particular existing or proposed oil sands development or other oil production activities* to warrant consideration of the effects of these activities. We based our decision on four factors:

- Provincial and federal energy and environmental authorities already regulate oil sands development and other oil production activities;
- Northern Gateway applied only for a transportation project and did not indicate any intention to develop oil sands or other oil production;
- The Bruderheim Station would not be located near oil sands developments and could receive oil from a variety of sources;
- Oil sands projects and activities were not included in our terms of reference under the Joint Review Panel Agreement. The agreement was reached after consultations with the public and Aboriginal groups...

NGP Report, Volume I (“Connections”), s. 2.2.2 (emphasis added).

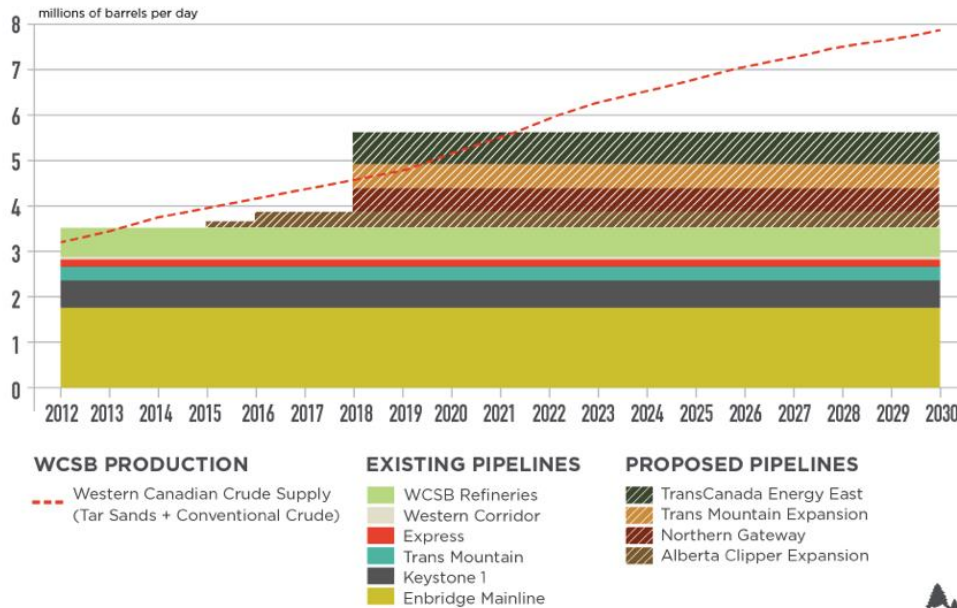
I find both the JRP’s framing of the issue and its approach very odd. From a strictly legal perspective, the relevant question is not whether there is a sufficient connection to any particular existing or proposed oil sands development or other production activity, and certainly not whether *such projects or activities* were included in the Terms of Reference (ToR), but rather simply whether the GHGs associated with the production of bitumen that will be transported by the NGP are an “environmental effect” of that project (see NGP Report, Volume II, Appendix 4, Terms of Reference, which defines “environmental effect” very broadly to mean “any change that the project may cause in the environment.” The result is essentially the same when you consider s. 5 of *CEAA, 2012*).

This, then, brings us to the very same “chicken and egg” issue that has plagued the Keystone XL pipeline (KXL) and that has caused energy (and myriad other) analysts to spill tons of virtual ink over: Are pipelines such as KXL and NGP simply one form of bringing oil to market (alongside [rail](#), for example), or do they enable increased production? If the answer is that production will increase irrespective of new market access or increased pipeline capacity then assessing GHGs does not seem necessary (though not harmful and probably useful, as further discussed below). If they enable new production, then the case for considering the GHGs associated with a projected growth from 447,900 cubic metres (2.8 million barrels) per day in 2010 to 990,800 cubic metres (6.2 million barrels) per day by 2035 (NGP Report, Volume II, s. 3.1) seems quite strong. And while I would not purport to answer that question here, Figure 3.2 of the NGP Report (*Northern Gateway Forecast of United States versus China and India Oil Demand*) does suggest that market access, or lack thereof, could be a limiting factor for oil sands production. So too for pipeline capacity, as the following graph prepared in the context of KXL illustrates:

# PIPELINE AND TAR SANDS CAPACITY

WESTERN CANADIAN SUPPLY FORECAST (WCSB)  
VERSUS TAKEAWAY CAPACITY WITHOUT KEYSTONE XL

The Keystone XL tar sands pipeline is a critical part of the industry's plan for tar sands oil production expansion. In the unlikely event that all new proposed pipelines were built, industry would be unable to meet projected supply takeaway needs without Keystone XL.



Sources: CAPP, *Crude Oil, Forecasts, Markets and Pipelines*, June 2013;  
Goldman Sachs, *Getting oil out of Canada: Heavy oil diffs expected to stay wide and volatile*, June 2013.



Whatever the case, there certainly seems to be little merit in the JRP's first factor. If the reference to provincial authorities is intended to suggest a jurisdictional issue here, the law is settled that there isn't one (see *Quebec (Attorney General) v. Canada (National Energy Board)* [1994] 1 SCR 159 at para 66). Furthermore, if the reference to other authorities *generally* is intended to suggest that a consideration of GHGs here would somehow be duplicative or unnecessary, this too misses the mark. One need only look at the JRP reports for three of the most recent oil sands mines – [Kearl](#) (at pp. 54 – 60), [Joslyn North](#) (at pp. 102 – 105) and [Shell Jackpine](#) (at pp. 49 – 51) – to find that the treatment of GHGs in this context is cursory and inadequate. In each case, the JRP's conclusions defer to government policy (arguably in contravention of Madame Justice Tremblay-Lamer's ruling in the [Kearl Litigation](#)) and hinge on the adequacy of a future federal regime that [consistently fails to materialize](#). Most importantly, they are entirely project-specific; nowhere is there any discussion of the GHGs associated with multiple oil sands project, to say nothing of a total projected growth to 6.2 million barrels/day by 2035.

This brings me to my final point which I alluded to above. As the JRP noted in its discussion of the public interest, “[h]aving an independent expert tribunal take the time to collect, digest, and understand all aspects of a complex application results in thorough, reasoned recommendations and conditions. This provides the decision maker with expert views, based on tested evidence, on which to base a decision” (NGP Report, Volume II, s. 2.3.1). Bearing in mind the relatively loose language of the ToR (see definition of “environmental effect” above) and that environmental assessment (EA) is a simply a *process* for decision-making that does not dictate any particular result, why *not* consider the GHGs associated with increased oil production and avoid what could be a crucial political and legal objection to the NGP?

### 3. Ecosystem Services Mark their Canadian Debut in the EA Context

In the context of considering the NGP's economic burdens and benefits (NGP Report, Volume II, s.

2.4.4), the JRP noted that the concept of “ecological goods and services” was described during the hearing but that, based on the hearing record, the estimated costs for damages to ecosystem goods and services were not well quantified and based on a methodology that is not currently broadly accepted.

Ecosystem goods and services have [most recently been defined](#) as “the direct and indirect contributions of ecosystems to human well-being,” which can further be divided into one of four broad categories: regulating services (*e.g.* flood mitigation, water purification), provisioning services (*e.g.* food), habitat or supporting services (*e.g.* spawning grounds) and cultural services (*e.g.* recreational opportunities) (see [here](#) for an excellent explanation of these categories). The idea of analogizing the environment to a form of capital stock that gives rise to the flow of various services first broke into the policy mainstream in 1997 following the publication in the United States of “[Nature’s Services](#),” followed shortly thereafter by the first attempt to quantify the [global value of ecosystem services](#) (US \$33 trillion/year). The concept has since been adopted by the United Nations’ [Millennium Ecosystem Assessment](#) (2005), which grimly reported that two thirds of the earth’s ecosystems are in decline and urged governments to adopt policies that “recognize the true value of nature.” In Canada, ecosystem services research dates back to at least 2004, with the publication of Simon Fraser University Professor Nancy Olewiler’s study, [The Value of Natural Capital in Settled Areas of Canada](#). The concept has now made its way into various government [documents](#) and [policies](#), with a significant new effort, [Measuring ecosystem goods and services in Canada](#), being launched by Statistics Canada last year.

While an assessment of the NGP record with respect to ecosystem services will have to await a future post, the least that can be said is that their debut here is a positive development that is bound to alter the way EA is done in Canada going forward (for another potential application of the ecosystem services concept in Canadian environmental law, see [here](#)).

There are other aspects of the NGP Report that merit further discussion, including its approach to adaptive management (we now have three different JRP reports in as many years that take different views on the extent to which AM can be relied upon in making a determination as to the likelihood of significant adverse environmental effects under *CEAA*), the precautionary principle, species at risk and Aboriginal consultation. Readers should stay tuned to ABlawg for analysis of those issues.

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