March 10, 2011

National Energy Board
444 Seventh Avenue SW
Calgary, Alberta T2P 0X8

Attn: Louise Niro, Regulatory Office

Via electronic filing
Original via courier

Dear Sirs/Mesdames:

Re: Enbridge Northern Gateway Project
Panel Results and Decision, 19 January 2011

I am writing on behalf of my clients the Living Oceans Society, the Raincoast Conservation Foundation and ForestEthics (together, the “Sustainability Coalition” or the “Coalition”) with respect to the Panel Session Results and Decision (the “Decision”) issued on January 19, 2011 by the Joint Review Panel (the “Panel”) for the Enbridge Northern Gateway Project (the “Project”).

The Coalition is concerned that the Panel continues to exclude the consideration of the impacts of induced upstream oil sands development and that the Panel has sent conflicting messages regarding this issue.

In the Decision, the Panel states:

“…we do not consider that there is 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 environmental effects of such activities as part of our assessment of the Project under the CEA Act or the NEB Act. Subject to consideration of cumulative effects, as referred to in section 2.1.3, we will not consider the environmental effects of upstream hydrocarbon production projects or activities in our review.”

However, the Project Application (the “Application”) submitted by Northern Gateway Pipelines Limited Partnership (“Northern Gateway”) makes several references to and relies on the benefits that will accrue to or are related to the development of the Alberta oil sands as a result of the Northern Gateway pipeline project:
“Historically, shortages of condensate supply have created risks and additional costs for Canadian oil sands producers. NEB forecasts for condensate requirements suggest that there might be future shortages of condensate import capacity. The Project’s condensate line is capable of meeting this forecast need.” (Application, Vol. 1, p. 1-3)

“Over the 10 years after project start-up, Muse Stancil estimates that:

• Athabasca dilbit prices will similarly increase, on average, by $3.00/bbl”

(Application, Vol.1, p. 1-3)

“As early as 2002, Enbridge recognized the need for additional pipeline capacity to access new markets to meet the needs for the long-term growth of new oil sands production and provide Canadian producers with access to alternative markets.” (Application, Vol. 1, p. 7-1)

“There is a clear opportunity to link, by new pipelines and marine transportation, regions of rapid demand growth with new, secure supplies of oil, such as those that are increasingly available from Canada’s oil sands. The Enbridge Northern Gateway Project (the Project) will create that link by connecting to suppliers of oil delivered at the Edmonton hub.” (Application, Vol. 2, p. 1-1)

“As nations continue to develop and grow, oil sands supply will continue to respond by increasing production. It is critical, however, that oil sands producers can access new global markets to support their development so that Canada obtains full value for its secure oil production.” (Application, Vol. 2, p. 1-3 – 1-4)

“Figure 1-3 shows large oil sands supply volumes through 2018 because of significant global demand for oil and steadily rising oil prices. New markets and pipeline capacity to supply them will be needed to support this growth. The Project will create access for a large volume of oil sands products to very large, rapidly increasing, offshore markets that can readily absorb the expanding Canadian supply.” (Application, Vol. 2, p. 1-5)

“Canada currently depends on a single market for exports of its crude oil. Demand for crude oil in the United States appears to have peaked and is expected to steadily decline. There is a further risk of future measures being implemented at the federal and state levels in the United States, which could adversely affect Canadian oil sands products accessing that market.
The Project is needed to diversify markets for Canadian crude oil providing increased competition and additional transportation options for producers by connecting Canadian supply to strategic markets in northeast Asia and elsewhere, which are driving increasing global demand for crude oil. The Project allows Canada to increase the security of its markets and significantly add to the benefits that Canadian’s derive from crude oil exports.

Likewise, the Project creates the opportunity to diversify and significantly expand sources of condensate supply and availability. Historically, shortages of condensate supply have created risks and additional costs for Canadian oil sands producers. NEB forecasts for future condensate requirements suggest that there may be future shortages of condensate import capacity. The Project’s condensate line is capable of meeting this forecast need.” (Application, Vol. 2, p. 1-14)

“Enbridge’s Gateway Project is an important part of Canada’s energy future and will help ensure there is enough capacity to transport new oil from Canada’s oil sands in the years to come.” (2005-06 Open House Documentation, Display Boards, Application, Vol. 4, App. D-2)

“The proposed Enbridge Gateway Project is an important part of Canada’s energy future and will help ensure there’s enough capacity to transport the 900,000 barrels of new oil per day expected from the country’s oil sands by 2010.” (2005 ESA Workshop Documentation, Project Brochure, Application, Vol. 4, App. F2.1)

Further, the Application states:

“Wright Mansell Research was retained to provide an independent assessment of the benefits of the Project from a Canadian public interest perspective. Over a 30-year operating period, Canadian gross domestic product (GDP) would increase by $270 billion. Additional labour income would be $48 billion, as a result of an additional 558,000 person years of employment. Federal and provincial governments could collect an additional $81 billion in revenue.”

The Wright Mansell Research Ltd. (“Wright Mansell”) report Public Interest Benefits of the Enbridge Northern Gateway Pipeline Project forms the basis of the Proponent’s calculation of the economic benefits of the Project. The Wright Mansell report bases much of its calculation of the economic benefits of the Project on the reinvestment and increased energy production that will result from the increased oil producer netbacks.

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1 Application, Vol. 1, at 1-3.
The Wright Mansell report states:

“…within a reasonably favourable price and policy environment there is considerable potential for substantial increases in oil sands production.”

“Initially, a detailed modelling of the project components is used to estimate the annual requirements and sourcing for all goods and services associated with the construction and operation of the Northern Gateway facilities. This step also includes estimation of reinvestment expenditures and associated energy production resulting from the increased producer revenues arising from the oil price benefits generated by Northern Gateway.”

“Based on historical reinvestment patterns it is expected that a significant portion of the net cash flow derived from these incremental revenues will be reinvested in some combination of energy projects across the country… Specifically, it is assumed that the geographical distribution across Canadian regions and the types of investments in the future will be similar to those observed in 2008.”

Based on this approach, the Wright Mansell report calculates the economic benefits of the Project within Alberta resulting from the reinvestment of net income in the energy sector and from increased energy production over the 30 year life of the Project to be over $92 billion in investment, over $22 billion in labour income and over $75 billion in increased Gross Domestic Product, resulting in an additional 264,165 person years of employment in Alberta. In 2008, 75 percent of oil industry expenditures in Alberta were in the oil sands. Therefore, a significant portion of the reinvestment and increased energy production is expected to occur in the Alberta oil sands.

Northern Gateway therefore clearly ties the need for the Project to the ability to transport oil sands oil to new markets and to transport condensate to support expanded oil sands development. Further, a significant portion of the economic benefits accruing to the “Canadian public interest” as identified in the Wright Mansell report, and as claimed by the Proponent, arise from the reinvestment and increased energy production in the Alberta oil sands.

It is curious then that Northern Gateway also claims that “[p]otential increased development of Alberta’s oil sands” and “[p]otential increased production of Alberta’s oil sands” are “[b]eyond the scope of the Project for the purpose of the [environmental and socio-economic assessment].” However, Northern Gateway includes the economic

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3 Ibid., at 15.
4 Ibid., at 20.
5 Ibid., at 29-30.
6 Ibid., Table A-5.
7 Canadian Association of Petroleum Producers, Statistical Handbook for Canada’s Upstream Petroleum Industry, (Calgary: January 2011) at Tables 4.3(b), 4.16(b).
8 Application, Vol. 6C, Table 4-2, p. 4-3 – 4-4.
benefits of reinvestment and increased production from the oil sands in its statement of the public interest benefits of the Project.

Even more forcefully, the following comment from Northern Gateway is recorded in the notes of a meeting of the Quantitative Risk Assessment Group:

“NGP Comment: The question of the project’s relationship to the oil sands is one of public policy debate. The expansion of the oil sands is not tied to the project. **This project has nothing to do with the future of the oil sands.**”

(Emphasis added.)

Therefore, Northern Gateway appears to include the oil sands when considering the need for and economic benefits of the Project, but to exclude the oil sands when considering the potential environmental impacts.

This is precisely the problem identified by Wenig and Sutherland with respect to the Mackenzie Gas Project:

“In short, considerations of the benefits of upstream and downstream activities are inherent in public interest-type approval decisions for pipelines and other energy transmission facilities and exports. As the NEB itself stated in a pipeline approval proceeding, in response to an argument that upstream/downstream activities were beyond federal jurisdiction, if the Board “did not consider the benefits related to matters within provincial jurisdiction [including the benefits to downstream users and upstream resource suppliers] … very few pipelines would ever be constructed.

The case for consideration of upstream/downstream costs flows directly from the above logic. If the Board must consider the public benefits of upstream and downstream activities in deciding whether to approve a pipeline, the cost/benefit nature of the “public interest” test requires consideration of the public costs of those upstream and downstream activities, as well.”

In *Sumas Energy 2 Inc. v. Canada (National Energy Board)* 2005 FCA 377 [Sumas], the Federal Court of Appeal considered whether the benefits and costs of the upstream Power Plant were to be considered in considering the public convenience and necessity of an international power line (“IPL”). The Federal Court of Appeal stated:

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What the Board is doing is simply determining under subsection 58.16(2) of the NEB Act the considerations that are relevant in determining whether a certificate [of public convenience and necessity] should be issued and, as required under the NEB Act, it is assigning weight to these considerations. The Board is engaged in a balancing of the benefits and burdens resulting from the IPL and the Power Plant with a view to determining whether the public convenience and necessity test is met.\textsuperscript{11}

(Emphasis added.)

Further, the Court in \textit{Sumas} concurred with a broad approach to determining the public interest, quoting in agreement from \textit{Canadian National Railways v. Nakina (Township)} [1986] F.C.J. No. 426 (Fed. C.A.):

\begin{quote}
The Court noted that the Committee acknowledged that it was required to have regard for the public interest and stated (page 2):

I find this conclusion startling. The Committee concedes that it must have regard to the public interest. I would have thought that, by definition, the term "public interest" includes the interests of all the affected members of the public. The determination of what is in the public interest involves the weighing and balancing of competing considerations. Some may be given little or no weight; others much. But surely a body charged with deciding in the public interest is "entitled" to consider the effects of what is proposed on all members of the public. To exclude from consideration any class or category of interests which form part of the totality of the general public interest is accordingly, in my view, an error of law justifying the intervention of this Court.\textsuperscript{12}
\end{quote}

Therefore, to include consideration of the economic benefits derived from increased oil sands development in considering the public interest, but to exclude the environmental impacts resulting from that increased development would appear to be an error in law.

The National Energy Board ("NEB") has also sent conflicting messages with respect to the consideration of the impacts of the induced oil sands development. While the Decision states that there is insufficient direct connection to consider oil sands impacts, an NEB spokesperson provided the following response to a question raised at a Community Advisory Board meeting in Kitimat in December 2009:

\begin{quote}
"Q: The tar sands are not independent of the pipelines. It’s a concern that it isn’t part of the process as it is in the public interest.
\end{quote}

\textsuperscript{11} \textit{Sumas Energy 2 Inc. v. Canada (National Energy Board)} 2005 FCA 377 at para. 33.

\textsuperscript{12} \textit{Ibid.} at para. 23.
A: The JRP can hear and consider all kinds of information, including information on tar sands expansion.\textsuperscript{13}

In the Decision, the Panel rejects the consideration of the environmental effects of oil sands projects on the basis that the Northern Gateway Project is not sufficiently connected to the oil sands to warrant such consideration. This is incongruous when the Panel accepts for consideration the economic benefits of increased oil sands investment and production. It would seem incumbent on the Panel to accept the consideration of the environmental effects of induced oil sands activities as within the scope of the Panel process and not to exclude this from the totality of its consideration of the general public interest.

Alternatively, if, as the Panel asserts, there is an insufficient connection of the Project to the oil sands, the Panel must require that Northern Gateway remove any reference to the economic benefits accruing to or derived from the oil sands from its discussion of need for the Project and from its analysis of the benefits of the Project. In that case, the Panel also should confirm that they will not consider any references to the oil sands in determining the need for the Project or in determining if the Project is in the public interest.

The Coalition respectfully requests that the Panel reconsider its position and include the consideration of the environmental effects of induced upstream oil sands development within the scope of the issues. The Coalition looks forward to the Panel’s response.

Sincerely,

<original signed by>

Barry Robinson
Staff Lawyer

Cc: Chris Genovali, Raincoast Conservation Foundation
    Jennifer Lash, Living Oceans Society
    Nikki Skuce, ForestEthics

\textsuperscript{13} Application, Vol. 4, App. J.4.4.1, Community Advisory Board (CAB) Meeting #3, Kitimat, British Columbia, December 8, 2009, Draft Meeting Summary, Margaret McQuiston, NEB, responding.