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National Environmental Law Group Cross Country Seminar – Fall 2017

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Environmental and Social Risk

Contractual and Project Financing Issues

Charles Bois
Partner, Vancouver
604.643.1224
cbois@millerthomson.com

What is Environmental Risk?

- Environmental laws and regulations impose liabilities and constraints on a project
- Pre-existing contamination and contamination during the construction and operation of a project
- Environmental permitting requirements of governmental authorities which will be involved with the project

What is Social Risk?

- Adverse local interest groups can delay project implementation, increase the cost of implementation and undermine project viability (*NIMBY*)
- Impact on local communities (e.g. noise, pollution, quality of life)
- Protesters



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Navigating Permitting Issues

Concurrent Jurisdiction

- Environmental law is an area of jurisdiction shared between the federal government, the various provincial and territorial governments, and municipalities.
- Federal: jurisdiction over federally owned land and undertakings, fisheries waters, shipping, aviation (including airports), railroads, manufacturing, import and export of toxic substances, interprovincial and international transportation, as well as certain areas designated as being of national importance, such as ports, security and nuclear power.
- Provinces regulate everything else.
- Municipalities: delegated power to pass bylaws with respect to storm and sanitary sewer discharges, pesticide use, noxious weeds, noise and certain other nuisances.

Proponents failing to consider the jurisdiction of all levels of government

- As an area of concurrent jurisdiction, both orders of government have valid environmental powers
- Having met one order of government's rules, does not excuse the need to meet the other order's rules
- Several examples:
 - Energy East – the need to have both a Federal environmental assessment as well as an assessment under Quebec law
 - Trans Mountain Expansion – BC is required to conduct its own assessment as well as a Federal one

Environmental Assessments

- Some projects may trigger the need for an “Environmental Assessment” before a permit can be obtained.
- Due to their complexity, Environmental Assessments have the potential to significantly delay planned projects.
- Certain aspects of a project may trigger both federal (CEAA 2012) and provincial environmental assessment legislation.

The addition of more process if there are difficult political/social considerations

- The imposition of additional process by the Federal government in particular to assess aboriginal engagement and climate change issues
- No uniformity of process
 - Pacific North West LNG gas export terminal in Prince Rupert – additional assessment by a new aboriginal panel

The need for senior leadership and engagement on major projects

- Simply creating a team and hiring engagement help may not work
- If there is to be proper engagement and real understanding, very senior staff (CEOs) may need to participate

Major projects becoming highly publicized political footballs

- There are no “straight forward” or simple projects
- There is likely a local population waiting to be engaged, some local or regional group with an interest and possibly even an international group
- Businesses need to be properly prepared to engage

How does E&S Risk Impact Projects

- Cost
- Delays
- Financeability
- Ability to construct and operate
- Reputation

Assessing E&S Risk

Procurement Open Period

- Disclosure of existing environmental reports to bidders during a procurement or tendering process is often done
- Procuring authority will not warrant the information provided as being accurate or representative of the current environmental state of a project site
- Bidders should expect to conduct additional environmental and contractual due diligence during a procurement period or following contract award

Pre-Construction *(including during procurement open period, if applicable)*

- Define environmental site conditions: pre-existing conditions and their effect on construction resources, schedule and successful project delivery
- Understand social/political risk surrounding the project (NIMBY; Non-acceptance)
- Understanding all permitting requirements
- Assess and understand contractual risk allocation and project insurability

Assessing E&S Risk (cont'd)

Construction

- Often, risks are encountered only once site activities commence and after contract award.
- Previously unknown pre-existing contamination may be encountered or exacerbated during construction.
- Hazardous Materials during construction post risk.
- Assess experience of contractors/subcontractors and consultants and choose wisely.

Post-Construction

- Environmental risks can arise from completed operations, construction defects, or installed products.
- New environmental/pollution conditions can be created as the result of operations and maintenance activities.

Contractual Risk Allocation to Minimize Risk

Does the contract clearly identify who is responsible for E&S risks if they materialize?

- Risk Sharing Mechanisms
- Representations and warranties
- Indemnification
- Limitation of Liability
- Termination Rights

Project Financing Issues and the Equator Principles

- Lenders want to minimize risk of a default and their exposure to credit and regulatory risk
- With respect to E&S, they also are concerned about reputational risk
- Credit risk assessment process will take into account E&S issues and risks
- Due diligence and appropriate contractual risk allocation are critical to ensuring project financeability
- Potential importance of the Equator Principles

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