

Draft Ecology Ottawa Comments to the NEB Modernization Panel National Capital Region, February 22, 2017

The National Energy Board is broken and no project should move forward through review until it is fixed. The Energy East pipeline review must be delayed until a modern regulatory system is developed. This is the only path for the NEB to become an efficient and effective energy regulator and regain public trust. Canada is unlikely to see any other major pipelines after Energy East. In a sense, the NEB Modernization is useless without delaying Energy East and re-evaluating Kinder Morgan, Line 3, and Keystone XL under the new rules.

Ongoing Conflicts of Interest - Revelations of secret lobby meetings forced the resignation of the NEB's Energy East pipeline review panel last year. The NEB Modernization process is shaping up to be very similar. Three of the five panel members have close ties to the oil and gas industry, including past work for the Canadian Energy Pipeline Association, a pro-pipeline industry lobby group.

Governance and Structure - The NEB headquarters should not be in Calgary. This location positions the regulator too close to industry and makes it far too easy for the revolving door between energy and regulator to continue to swing.

Mandate and Future Opportunities - The NEB must support Canada's commitment to the Paris Agreement on climate change by including the impact of upstream and downstream emissions related to projects and the development of the tar sands. The National Energy Board Act and Canadian Environmental Assessment Act must be revised to recognize the link between energy regulation and climate objectives. This should include making predictions on Canada's energy future (energy forecasting) that assume Canada will reduce oil extraction and meet national and international climate targets.

Engagement with Indigenous Peoples - Collaborative assessment and decision-making processes must be based on nation-to-nation relationships, reconciliation and the obligation to secure the free, prior and informed consent of Indigenous peoples as outlined in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP)

Public Participation - The NEB process should be made more accessible to the public, including no requirement to be "approved" and "directly affected" to submit a letter of comment.

Decision-making Roles, Including on Major Projects - When assessing a project, the NEB must consider the best option from among a range of alternatives. Reviews should consider alternative scenarios, including the "no" alternative.

Compliance, Enforcement and Ongoing Monitoring - After projects are approved, the law requires robust follow-up, monitoring, adaptive management, compliance and enforcement. Energy regulators should employ a precautionary approach to this oversight and should enforce and ensure industry compliance with its full suite of regulations.

Please join the discussion in Gatineau on February 22nd from 7-9pm

<https://www.eventbrite.ca/e/open-house-with-the-neb-modernization-expert-panel-ottawa-gatineau-national-capital-region-registration-31114448152?ref=ebtn>

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National Capital Region

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Background:

The National Energy Board (NEB) is an independent federal, quasi-judicial regulator of pipelines, energy development and trade, with three key roles:

1. Adjudicating energy projects
2. Supporting the safety of Canadians and the environment through oversight
3. Engaging Canadians on energy information.

For years, the NEB - located in Calgary - has been viewed as a captured regulator, highly influenced by industry and lacking in panel members with environmental science background and Indigenous experience. Their cozy relationship with industry has resulted in a loss of public trust. The current board disproportionately represents the energy interests of Alberta and does not represent the diversity of interests across the country.

The Liberal government has committed to modernize the NEB to ensure that its composition reflects regional views and has sufficient expertise in fields such as environmental science, community development, and Indigenous traditional knowledge.

By conducting the NEB Modernization process, the government has recognized that the NEB is broken and ineffective as a regulator. As such, the review of the Energy East pipeline must be delayed until a modern regulatory system is developed. This is the only path for the NEB to become an efficient and effective energy regulator and regain public trust.

The Energy East project is the largest oil pipeline ever proposed in our nation's history. It is in the public and environmental interest to review Energy East under a new, more modernized regulatory system. Anything short of this will be viewed as a broken promise by the federal government. Further, any pipeline that has recently been approved under this broken system (e.g., Kinder Morgan, Line 3, Keystone XL) should be re-evaluated once the new system is in place.

Discussion Themes:

Governance and Structure

- Revelations of secret lobby meetings forced the resignation of the NEB's Energy East pipeline review panel last year. The NEB Modernization process is shaping up to be very similar. Three of the Five

panel members have close ties to the oil and gas industry, including past work for the Canadian Energy Pipeline Association (CEPA), a pro-pipeline industry lobby group.

- The NEB has long been accused of being biased in favour of industry, and leading pipeline reviews that don't take transparency, public input and consultations with Indigenous peoples seriously.
- In November, Natural Resources Minister Jim Carr announced the government would “modernize” the NEB. But three of the five people he appointed to lead the review have **close ties to the pipeline industry**. That's no way to inspire public confidence.
 - Brenda Kenny worked until 2016 as the **president of Canada's top pipeline lobbyist** association, the Canadian Energy Pipelines Association (CEPA). She worked for 10 years as the Business Leader of Planning, Policy and Coordination at the NEB before joining CEPA. Ms. Kenny provides a true example of the revolving door between government and industry. Even worse, she went from working for an industry regulator to being a notable industry lobbyist.
 - Gary Merasty is a former Liberal MP and current board member of the Canada West Foundation, a **right-wing think tank known for its staunch pro-pipeline stance**, including public support for Kinder Morgan's Trans Mountain pipeline. Enbridge, a major pipeline company, is one of the Canada West Foundation's “Champion” level sponsors.
 - Hélène Lauzon, who co-chairs the expert panel, is the chair of the Quebec Business Council on the Environment, a **pro-pipeline business association** that represents major pipeline companies like Enbridge and TransCanada, as well as other oil and gas companies.
- The NEB headquarters should not be in Calgary. This location positions the regulator too close to industry and makes it far too easy for the revolving door between energy and regulator to continue to swing. The NEB headquarters should move back to Ottawa where it was before the Mulroney government moved it to Calgary in 1991. Further, there should be regional offices across the country which make the NEB more accessible and could represent the diversity of interests across Canada.
- The regulator must be representative of Canadians, in terms of regional representation and Indigenous communities.
- The NEB must be independent of bias and interferences from government and non-government stakeholders.
- The NEB Board Members should bring to bear a diversity of important skills and expertise, such as law, engineering, environmental science, traditional knowledge, accounting and other competencies.
- Government direction and international agreements regarding climate change in particular must inform NEB decisions.
- The NEB should be mindful of taking a long term view in its decision making, as many issues under its consideration have far reaching ramifications and life cycles that go beyond the short-term considerations of the day.
- The NEB's role should be expanded to include energy forecasting using their own independent data (rather than industry data).
- The NEB must be more active as a public educator on all forms of energy. They are an energy regulator, not just a fossil fuels regulator. The NEB Act does not currently outline a specific mandate for public education on energy.
- Put an emphasis on learning. The NEB should operate in an environment that fosters opportunities for learning, to ensure more informed and better decisions now and into the future.
- Revise timelines for project reviews per the size of the project and have the flexibility to modify the deadlines as needed.
- Modify the NEB Act to explicitly recognize a link between energy regulation and climate objectives.

- Shift the responsibility for conducting environmental assessments away from the NEB and regulate according to the next generation principles proposed by West Coast Environmental Law in their report “Twelve Pillars of a Next-Generation Environmental Assessment Regime”. Some of these recommendations include:
 - **Sustainability as a core objective:** All assessments ensure the long-term health of the environment and social values. Equitable distribution of risks, impacts and benefits.
 - **Integrated, tiered assessments starting at the strategic and regional level:** Participatory and sustainability-based assessments at the regional, strategic and project levels, and each of those levels inform the other.
 - **Cumulative effects assessments done regionally:** Cumulative effects assessment is regional, focuses on environmental health, and looks to the past, present and future.
 - **Collaboration and harmonization:** Jurisdictions harmonize their assessments to the highest standard, collaborating on processes and decisions wherever possible.
 - **Climate assessments to achieve Canada’s climate goals:** A climate test ensures that projects keep Canada on track to meeting its climate change commitments and targets.
 - **Credibility, transparency and accountability throughout:** Legislation sets out criteria, rules and factors to guide assessments and discourage politicized decisions. An independent body conducts assessments and the public has the right to appeal decisions.

Mandate and Future Opportunities

- Currently, NEB reviews do not consider the upstream development of oil, the downstream greenhouse gases facilitated by that oil, or the impact of the project on climate change.
- The NEB should support Canada’s commitment to the Paris Agreement on climate change by including the impact of upstream and downstream emissions related to projects and the development of the tar sands
- Project-specific market evaluation and needs assessments should draw on data and forecasting that examines the implications of domestic and international climate action on the economic viability of proposed projects.
- Energy forecasting must be aligned with the 2 degree scenario. The NEB could develop multiple scenarios for projected resource demand to inform consideration of proposals. For example, imagining a future where efforts to reduce fossil fuel demand are successful, thereby lessening future production needs.
- Modify the NEB Act and Canadian Environmental Assessment Act (CEAA) to recognize the link between energy regulation and climate objectives. This must include:
 - Modifying section 52(2) of the NEB Act (or its future equivalent) to require that market scenarios include action on climate.
 - Defining the “public interest” to include the contribution of a project to national sustainability goals and protection of Indigenous rights.
- Conduct sector-level strategic environmental assessments in order to establish objectives and principles for given energy sectors before individual energy projects arrive at the regulator for consideration.
- Coordinate and harmonize data currently produced by the NEB with those produced by NRCan, StatsCan, ECCC, Transport Canada and the Transportation Safety Board.
- Provide the adequate financial resources and new expertise necessary for an agency to adopt these new and expanded responsibilities.
- The NEB should formally adopt the principles of the UN Declaration on the Rights of Indigenous Peoples into its mandate.

- The NEB must define the “public interest” to include the contribution of a project to national sustainability goals and protection of Indigenous rights.

Decision Making Roles, Including on Major Projects

- Energy regulation should result in project decisions that are transparently documented and defensible. The final decision making body – be it the Governor in Council (GIC) or NEB or other – must be required to provide detailed and direct responses to questions and recommendations presented through the decision-making process.
- Energy regulation should be recognized as being distinct from, although closely linked to, planning tools such as environmental assessment (EA). EA can be conducted for individual projects, for geographic regions, or for sectors of natural resource development. Functionally, an EA is a planning tool – making it distinct from the more narrowly-focused scope of energy regulation. Ideally, EAs and energy regulation should be linked so that each fully informs the other.
- When assessing a project, consider the best option from among a range of alternatives. Reviews should consider alternative scenarios, including the “no” alternative.
- The NEB should make a practice - as courts do - of providing a rationale for its decisions, showing the factors considered, and perhaps including minority decisions.

Compliance, Enforcement, and Ongoing Monitoring

- The NEB must do its utmost to ensure adequate safeguards are in place, and furthermore, in the event of spills or other incidents, should be transparent about lessons learned and revised practices as a result of incident response. Showing how practices have adapted is important. Where regulators are opaque about the history of follow-up it can erode public confidence in the regulatory system.
- Energy regulation should be conducted based on independent information of the highest quality. Presently, industry conducts far too much of their own ongoing monitoring and notification to the NEB is largely self reporting.
- Ensuring sustainability after the assessment: After projects are approved, the law requires robust follow-up, monitoring, adaptive management, compliance and enforcement. Energy regulators should employ a precautionary approach to this oversight and should enforce and ensure industry compliance with its full suite of regulations.

Engagement with Indigenous Peoples

- Conduct reviews in the spirit of reconciliation with Indigenous peoples including upholding the principles and obligations as outlined in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). This commitment should include fulfilling the obligation to obtain the free, prior and informed consent of each first nation for proposed projects that may affect the lands they customarily own, occupy or otherwise use.
- Project reviews and environmental assessments should operate in an environment of co-governance with Indigenous Nations. Collaborative assessment and decision-making processes are based on nation-to-nation relationships, reconciliation and the obligation to secure the free, prior and informed consent of Indigenous peoples.

Public Participation

- Public trust in the NEB is at an all time low because of its perceived (and/or real) state of industry capture. Many individuals and groups choose not to participate in NEB hearings because they feel that project approval is almost certain when a panel is stacked with oil and gas professionals.
- The NEB process should be more accessible to the public, including no requirement to be “approved” to submit a letter of comment.
- Meaningful public participation is early, ongoing, accessible and dynamic. It occurs at all levels of assessment and has the ability to influence outcomes.
- Transparent and accessible information flows: All relevant information should be easily accessible to the public, shared between different levels of assessment (energy regulation, EAs, provincial permitting, etc) and remain available for future use.
- Require that information provided by proponents and the regulator be searchable and well-organized so as to facilitate access by the public. Ensure that the data system is not modified mid-review.