

**NEB MODERNIZATION:
AN EAST COAST PERSPECTIVE**

MARCH, 2017

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Acknowledgements

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This report was produced with funds provided by Natural Resources Canada through the National Energy Board Modernization Expert Panel's public input support program. The opinions and views expressed are not necessarily those of Natural Resources Canada or the Government of Canada.

About the Ecology Action Centre

The Ecology Action Centre is a charitable, non-governmental organization based in Halifax, Nova Scotia, on unceded Mi'kmaq territory, with operations across Nova Scotia, Atlantic Canada, Canada and internationally.

Since 1971, the Ecology Action Centre (EAC) has been working to build a healthier, more sustainable Nova Scotia and Atlantic Canada. Today the EAC is Atlantic Canada's largest environmental advocacy organization, with over 5,000 members, 500 volunteers, 45 staff, and seven action areas, including the Energy Action Team (EAT).



The EAC works closely with social and natural scientists, a diversity of stakeholders, and grassroots people to achieve our shared goals. The EAC uses detailed policy analysis to encourage a society that respects and protects nature and provides environmentally and economically sustainable solutions for its citizens.

The EAC Strives to provide up-to-date environmental information and policy recommendations; pursue researched solutions with citizens and stakeholders; and act as a watch-dog for the Nova Scotia and Atlantic Canadian environment.



The EAC and its Energy Action Team regularly provide detailed policy analysis on energy and climate issues regionally and nationally, and participates as intervenors in project reviews and processes with the NSUARB, NEB and EA Review Panels.

We are grateful to provide input into the NEB Modernization process and trust that the NRCan Panel will consider our recommendations with open minds and a sense of optimism about how our actions today can result in a healthier, more sustainable future for future generations.

Introduction

The Ecology Action Centre (EAC) was approved for funding from Natural Resources Canada (NRCan) to conduct a regionally specific study and produce a report to NRCan to inform the National Energy Board (NEB) Modernization process. The following report attempts to provide insight into the East Coast perspective on three of the six key themes being analyzed by the NEB Modernization Panel. These themes include Mandate, Indigenous Engagement, and Public Participation.

Over the month of March, 2017, the Ecology Action Centre team conducted numerous key stakeholder interviews to gain a better understanding of the views and opinions of citizens and experts on the East Coast regarding the National Energy Board and major projects potentially impacting the maritime region.

We spoke to legal professionals, professors, citizens' groups, environmental groups, oil and gas industry employees, and members of the public. Outside of the legal professionals and professors, there was an overwhelming commonality in the general public's lack of knowledge of the NEB's role and purpose and unfamiliarity with the hearing process.

The initial goal of the EAC submission was to provide an East Coast perspective about who is "directly affected" by a project, how and why. Through conducting the interviews, we determined that defining "directly affected" was near impossible in the context of oil and gas pipelines due to the overwhelming nature of potential downstream impacts.

Rather than narrowing participants to those "directly affected" or having "relevant information and expertise", it is our view that there must be an opportunity in the process for all interested parties to have their voice heard. Therefore, we have provided recommendations in this report about how to create a more open, transparent, and welcoming review process to facilitate greater public involvement, which will then transpire into better policy and decision making.

Please note that some of our main recommendations involve limiting the role of the NEB and placing certain review elements with agencies such as a modernized Canadian Environmental Assessment

Agency (CEAA), who we believe are much better suited to fulfill the environmental assessment duties and provide a more welcoming environment for public participation and broader policy discussions.

EAC was accepted as an Intervenor in the NEB hearing on the Energy East pipeline in 2016. We have been active in the project review and presented at the Energy East Panel Hearing in Saint John, New Brunswick in August, 2016. As an engaged participant in a current NEB proceeding, we understand the opportunities and challenges at the NEB.

From our research, experience, and engagement with citizens in Atlantic Canada, we believe that the NEB should have three roles:

1. National Energy Transition Board

Canada has ratified the Paris Agreement and launched a new national climate plan. As an energy regulator and possessing expertise in the state of energy in Canada, the National Energy Board should begin a transition of its own to focus on the reality of climate change and our national commitments. As the National Energy Transition Board, the EAC recommends that the Board establish a public outreach and learning environment on how Canada will transition to renewables. Features of this transition could include:

1. Fostering research and development on renewable energy alternatives;
2. Facilitating public dialogue on the impact of NEB decision on meeting Canada's national and international climate commitments;
3. Establishing regional offices, including in Nova Scotia to assist residents in understanding the role of the NEB and the projects in which the NEB is engaged;
4. Through those regional offices, conducting town hall meetings to discuss current and future projects, including discussions and debate on how to transition to a carbon-neutral future.

More detail on the role of a National Energy Transition Board is provided below, at pages 10 and 11.

2. Environmental Impact Assessment (EIA)

The NEB is not an appropriate body to conduct EIA and the quasi-judicial approach favoured by the NEB does not engage or meet the needs of public participants. In a modernized EA process the NEB should provide input and expertise only into an independent CEAA process; the NEB should not lead the process, be responsible for the process or have a direct role in the decision-making.

3. The Regulator

As a regulator, the NEB should conduct a quasi-judicial process to address the technical aspects of a proposed project after the project has passed the EA and it has been determined to be in the best interest of Canadians.

An East Coast Perspective

Mandate and Regulatory Framework

Per the NEB Modernization Panel's Terms of Reference, Canada's energy sector has undergone significant changes in recent years due to technological innovations and shifting global dynamics. Therefore, potential outcomes of the Panel's work could include findings and recommendations in the following areas:

- Defining and measuring public interest (e.g., consideration of national, regional, Indigenous, and local interests as well as environmental, economic and social factors);
- Potential to clarify and expand the NEB's mandate with respect to collecting and disseminating energy data, information, and analysis; and
- Potential to expand the NEB's mandate (i.e., in emerging areas such as offshore renewables and to support the transition to a low carbon economy in light of Canada's climate change commitments).

Questions Considered:

- What are your views on the existing NEB Mandate?
- Are there areas over which the NEB's mandate should be changed?
- Are there emerging areas for which the NEB's mandate should be expanded? If so, what are they?
- What does the 'Canadian Public Interest' mean?
- What energy information are you most interested in?
- Should the NEB consider upstream / downstream impacts and climate change?
- Should the NEB conduct Environmental Assessments?

The existing NEB mandate is far too narrow. The main responsibilities of the NEB are established in the NEB Act and include the regulation of:

- The construction, operation, and abandonment of pipelines that cross international borders or provincial/territorial boundaries, as well as setting of the associated tolls and tariffs;
- The construction, operation, and abandonment of international and designated interprovincial power lines; and
- Imports of natural gas and exports of crude oil, natural gas liquids, natural gas, refined petroleum products and electricity.

The EAC believes that there is a great opportunity for the modernized NEB to play a facilitative role in a transition away from fossil fuels and toward a carbon-neutral economy. In order to do so, the following points must be addressed.

NEB Location

For years, the NEB - located in Calgary, Alberta - has been viewed as a captured regulator, highly influenced by industry, and lacking in panel members with environmental science background and Indigenous experience. When the Mulroney government moved the NEB to Calgary in 1991, many NEB staff members quit and the regulator was then re-staffed with employees from the oil and gas industry in Alberta.¹ The NEB's close relationship with the industry it is mandated to regulate has resulted in a loss of public trust. The current board disproportionately represents the interests of the oil and gas industries and does not represent the diversity of interests across the country. We recommend that the NEB headquarters be relocated to Ottawa where it operated prior to 1991.

National Energy Transition Board

The NEB should be renamed as the National Energy Transition Board (NETB) to reflect the steps required to reduce our dependence on fossil fuels and to foster the research and development of renewable energy alternatives. This new National Energy Transition Board could assist in facilitating a transition to renewable energy while recognizing and respecting the important provincial jurisdiction over solar and wind energy. We understand that the provinces play an important role and the NETB

¹ <https://thetyee.ca/News/2017/02/09/Reform-National-Energy-Board/>

would need to be set up in a way that recognizes that important provincial role and responsibility. Please note that we are not suggesting that the NETB assume the responsibility of regulating renewable energy projects currently under provincial jurisdiction.

Currently, there is a major disconnect between discussion on fossil fuel pipelines and climate change. We cannot continue with the current process whereby our National Energy Regulator seems to advocate for the further expansion of fossil fuel networks and indirectly, the expansion of oil and gas development in Canada, including oil sands and fracked gas sites. Government should not be advocating for the continued expansion of the oil sands and locking Canadians into 30, 40 or 50 years of oil pipeline transportation.² We need a bold vision for the future and EAC believes a modernized National Energy Transition Board is a good place to start.

It is clear from our interviews that many citizens on the East Coast expect the NEB to look at all forms of energy, not just fossil fuels. EAC believes there is a legitimate role for the federal government in identifying opportunities for a transition to renewable energy. This responsibility would be an extension of the NEB's current role in engaging Canadians on energy information.

At this point, the NETB would be responsible for researching and providing information about what it would take to transition away from fossil fuels and meet our national and international climate targets. This role could be achieved through a modernized Energy Information Program which produces energy forecasting and energy system scenarios and pathways with an emphasis on supporting and encouraging the development of renewable technologies, toward a carbon-neutral economy in Canada.

We understand that since its inception, the NEB has been largely focused on regulating oil and gas pipelines and that the NEB currently oversees approximately 73,000 kilometers of international or interprovincial pipelines. We foresee that the NETB will continue to play an important role regarding lifecycle regulation of existing pipelines and the coming decommissioning, abandonment, and reclamation of pipeline right-of-way's.

² http://priceofoil.org/content/uploads/2016/09/OCI_the_skys_limit_2016_FINAL_2.pdf

Further, we strongly encourage that the modernized NETB's mandate include emerging areas such as offshore renewables. If the NEB is to become truly modernized, the Board must become a world class regulator of all forms of energy, not just fossil fuel energy. This should include but not be limited to tidal energy, wave energy and offshore wind, as a way to streamline the development of responsible offshore renewable resources.

The NETB's role in producing independent and fact-based energy information for Canadians would be guided by national and international climate commitments. The NETB would work with system operators, utilities and other regulators to regularly hold community meetings to facilitate conversations about climate change and the need to transition from fossil fuels.

EAC believes that a National Energy Transition Board would benefit from hosting discussion sessions and hearing the opinions of Canadians. This would be a positive step in regaining public trust. The public wants to be heard and does not want to be limited in what they are permitted to discuss. Climate change must be included in all narratives around Canada's energy future.

Energy Forecasting

A modernized NETB would produce energy forecasts with national policy in mind, including creating a Canadian energy future where we meet our national and international climate commitments. Currently, the NEB Energy Forecast, if carried out, would put us on a path in excess of these national and international climate targets, and far in excess of a reasonable pathway to a safe, livable planet which achieves less than 2.0°C or 1.5°C of overall warming.

The NETB Energy Forecast must include suggested scenarios and pathways of what is needed in the energy sector to meet these climate commitments. It is unacceptable to continue accepting an energy forecasting model which ensures our failure to meet our national and international climate commitments.

One way to address these existing failures of the NEB Energy Forecast is to address the broader question around the Paris Agreement and its targets. The NEB is forecasting assuming Canada will not meet its Paris Agreement commitments, or future commitments toward more climate mitigation ambition. There is a wide range of energy forecasts available, including those from various members

of the oil and gas and broader industry, those from bodies such as the International Energy Agency and the International Renewable Energy Agency and those from groups who forecast in line with commitments made in Paris. We propose that the NEB borrow from established methodologies to ensure that future energy forecasts ensure Canada meets its commitments for a 2.0°C or 1.5°C world, not just energy industry forecasts.

Under this scenario, analysis would be completed in the environmental assessment phase and the decision on which forecast to use would be a political one. The project level EA would inform decision makers whether greenhouse gas projections the proponent is making, including how long their project will be operational and whether it fits in a 1.5 or 2-degree world, are accurate. Coming out of the project level EA, it would be clear whether a proponent's projections of the economic viability of the project are contingent on Canada not meeting its climate commitments.

Environmental Assessments (EA)

The *Canadian Environmental Assessment Act, 2012* (CEAA, 2012) designated the NEB as a Responsible Authority with the authority to conduct environmental assessments for projects within their regulatory jurisdiction that also trigger CEAA, 2012. Per the NEB Modernization's Discussion Paper #2 – Mandate and Regulatory Framework, the NEB currently conducts a science-based environmental assessment during its review of applications for projects under its jurisdiction. For certain projects, the NEB also conducts environmental assessments as required by other federal legislation including the Mackenzie Valley Resource Management Act, and the Inuvialuit Final Agreement or the Nunavut Land Claims Agreement.

It is EAC's opinion that the current EA approach lacks scientific integrity, in part because of the relationship between the proponent and Responsible Authority, as regulator. The regulator tends to have a close relationship with and deeper understanding of the needs and challenges facing the industry it regulates. Given that, there is value in having the regulator engaged in the EA process for expertise and advice, but not to drive the decision-making at the end of the EA.

After speaking with EA professionals, legal counsel and Canadians living on the East Coast, EAC feels very strongly that the NEB should not conduct environmental assessments. All federal environmental assessments should be conducted by a separate and independent environmental assessment

agency, presumably a modernized Canadian Environmental Assessment Agency. Distancing the proponent and the regulator from the EA analysis piece will result in more independent decision-making, a more scientifically rigorous analysis and a more inviting opportunity for public participation.

For EA to function well, we need a higher-level policy context for making EA decisions. In terms of the NEB, we would need a good national energy policy, environmental policy, climate change policy, endangered species policy, water policy, economic policy, social policy, etc. Unfortunately, this is very idealistic and far from what currently exists in Canada.

Step 1 – Regional Environmental Assessment

Regional Environmental Assessments (REAs) focus on improving our understanding of how existing and potential future human activities in a given region may interact with each other and with the natural environment. With this understanding in mind, we can then make reasonable choices about what combination of human activities achieves economic and social goals while staying within the resilience of the ecosystem. This will allow us to make good decisions about what kind of activities should take priority.

Step 2 – Strategic Environmental Assessment

Strategic Environmental Assessments (SEAs) focus on a particular industry, policy, etc., and may be used to keep a completed REA current or to address new issues as they arise. For example, a new industry may come to town, new information may become available, or we may identify new policy gaps that weren't addressed in the REA.

SEAs enable a deeper analysis of a particular gap, rather than look at all human activities in a region. For example, if you don't have a strategy for how to transition to a greenhouse gas reduced future, you could consider that in an SEA.

All EA is first and foremost a planning tool and needs to start long before a project is at the detailed design stage. Strategic environmental assessments will be required for a modernized regulatory system and should be conducted by an independent agency. Sector specific SEAs could considerably streamline project level EAs. Policy recommendations developed through the SEA would provide a baseline to determine whether there is a need for a particular kind of project. In this

context, the EAC envisions the role of the NEB as providing input into the SEA regarding the need for a particular kind of project.

A completed SEA provides a project proponent with direction on whether their project is likely to meet the strategic goals of the region. Where an SEA has not been completed, an independent project level EA could still move forward, but would need to include the broader policy level discussions. In this context, the EAC envisions the role of the NEB as a participant in the EA process providing valuable technical input and expertise. The NEB would not lead the EA.

Efficiency gains can be realized through SEAs, which can streamline NEB project reviews in terms of the public engagement and environmental effects consideration at the regulatory stage. If we do a good job at the SEA and project EA stages, the NEB's regulatory processes can be quite streamlined compared to what they are today, but that goes along with the broader issues being resolved before the NEB gets involved, and the NEB doing what it does best, that is assessing the technical details of proposed energy infrastructure and ensuring the activity is well-regulated.

Step 3 – Project Level Environmental Assessment

In an ideal world, a project level environmental assessment would take place only after appropriate REAs and SEAs have been undertaken. The reality is that there are very few if any areas of the country where that exists, so our comments below are made in light of this reality.

A modern EA process must incorporate a sustainability assessment approach for each project. Project level EAs begin with a proposal, followed by an open and transparent process to analyze the proposal and conclude with a decision on whether – and under what conditions – the project should be allowed to proceed. At the project EA stage, we cannot assume that the project will get the go ahead or be designed in a certain way. Project level EAs must include alternatives to achieving the project goals or an opportunity to redesign the project.

As described above, the nature of a project assessment depends on the policy context. For example, if an REA has been completed and determined that this is the kind of activity that should be given preference in the region, than the proponent knows that their proposal will likely be received favorably. Alternatively, if the project is likely to take up assimilative capacity and provide limited return, the cards will be stacked against that project. Either way, we should have a good idea

whether the project fits into the broader policy context and the issues that need to be resolved to determine whether the project should go ahead. A project that is proposed in this policy context will likely have a streamlined project level EA.

Regardless of the foundation that exists before the project level EA is conducted, the project level environmental assessment provides direction to the decision-maker on whether the project should be approved. The terms and conditions associated with an EA approval become part of the project regulation. Once the technical details are sorted out, the proponent would move to the regulatory stage.

Step 4 – NETB Regulatory Process

The regulatory process would focus on the technical details of a project and the terms and conditions of construction and operations.

Exceptional Cases

In an ideal world, the above four-step process would be implemented immediately. However, we recognize it will take time for this transition to occur. As such, we feel it is important to identify the likelihood of exceptional cases in the interim and use the Energy East pipeline as an example.

The Energy East pipeline regulatory review is currently underway and happening in the absence of a regional or strategic environmental assessment. As well, the NEB is the Responsible Authority for the project level EA and that raises numerous issues as identified above.

Being a massive trans-Canadian project, it is unrealistic to believe we would ever have a complete, current, regional EA for the entire length of the project. This fact has several implications at a project level. As wonderful as it would be, it is impractical to propose doing a regional assessment at the same time as the Energy East regulatory review.

We urge the NEB Modernization panel and the Honourable Minister Carr to put the Energy East regulatory review on hold until a modernized NETB is created. Given that the government has already approved Kinder Morgan Trans Mountain and Enbridge's Line 3 pipeline, why are we in such a hurry with Energy East? Why can't we wait for a modernized NEB and move forward with Energy East under an improved process?

If the Energy East pipeline review is permitted to continue under an old and broken NEB system, the following interim measures must be implemented.

First, after the recusal of a biased review panel, the regulatory process has been reset to the beginning. At the time of writing this report, the List of Issues and EA scoping document have yet to be released. In their January 27, 2017 decision³, the new panel explained that these documents will be open to public comment.

Historically under CEAA, a review panel would get appointed, then they would release draft Environmental Impact Statement guidelines and hold a scoping hearing. They would then decide what the scope of the assessment should be. We feel very strongly that the scoping for the environmental assessment shouldn't just be a document available for public comment. For a project of this size, there should be scoping hearings. This is the only way to ensure an effective public process with input into the appropriate scope. If you don't have scoping hearings, what happens is that participants will arrive at the hearing only to find out their concerns have been scoped out of the process. People's concerns should not be excluded from an EA unless they've had an opportunity to be heard and the way to do that is through scoping hearings.

Second, the NEB must be open to addressing any broader policy issues at the project level. If the NEB fails to do this, they will be making a recommendation to the Governor in Council without considering the broader implications. If a project level cumulative effects assessment is completed in the context of an existing regional EA, the regional EA would have developed a range of future development scenarios for the region and would have considered the carrying capacity of various key environmental components in the region under the possible future scenarios. However, in the absence of a regional EA, the Energy East project review is faced with a very different case. Therefore, the NEB must broaden the scope of the project level EA.

The starting point for the Energy East project EA should be identifying the impacts it will have on all key environmental components throughout its lifecycle. In the absence of a regional or strategic EA, it is impossible to determine whether the impact is acceptable or not. Therefore, in terms of the

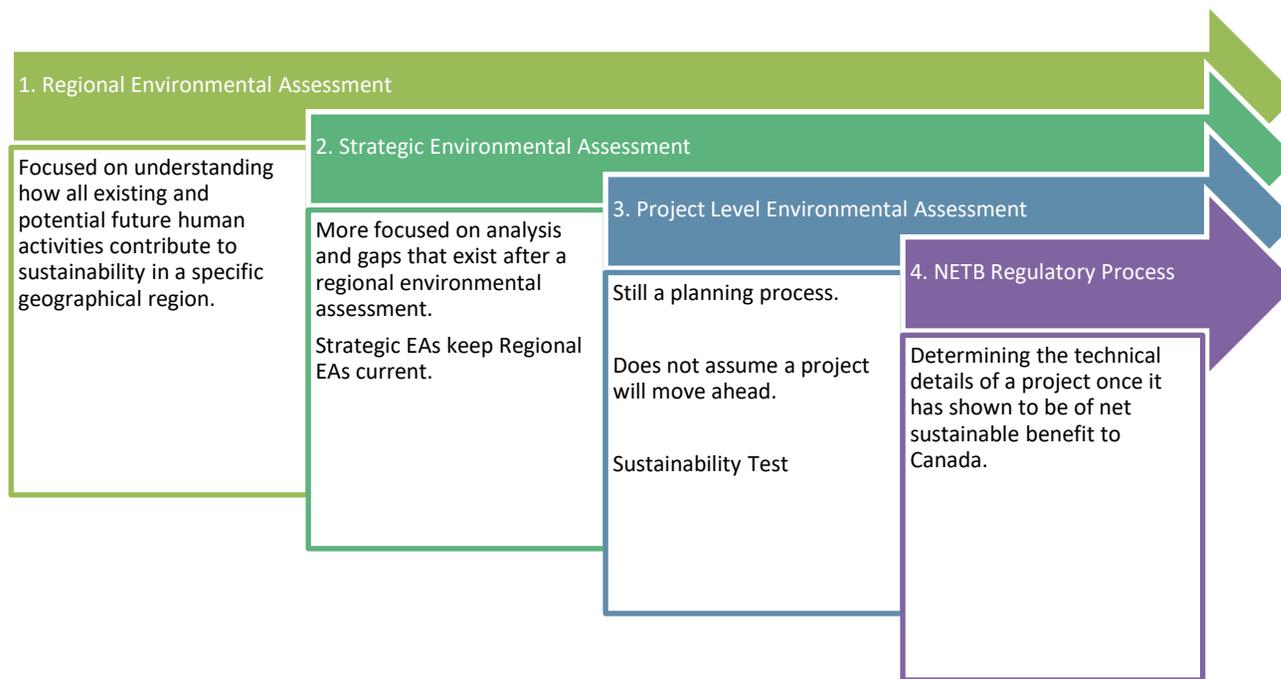
³ Energy East Panel – Ruling No. 1 - <https://apps.neb-one.gc.ca/REGDOCS/Item/View/3179115>

project level cumulative effects assessment, existing activities and potential future activities at the proposed project site and downstream (including the Bay of Fundy) must be discussed during the NEB review.

The NEB must consider what future development activities may be foreclosed by allowing Energy East to take up the carrying capacity of an environmental component. Presumably, we would not allow the entire resilience of an ecosystem to be eroded. If we allow Energy East to take up all the space, we may have to say no to future projects. For example, future aquaculture projects may be foreclosed because the increased Energy East tanker traffic in the Bay of Fundy plus new aquaculture development would put far too much stress on the ecosystem.

Ecology Action Centre's Proposed Process

The environmental assessment must occur prior to the modernized NETB regulatory process.



“Public Interest”

The NEB has never decided whether a project is in the “public interest”. They have decided whether through the lens of energy projects, whether there's a need for these projects. They've never questioned whether the extraction of fossil fuels and expansion of oil pipelines is appropriate.

The NEB has demonstrated that it is highly influenced by the oil and gas industry. As such, we recommend that the needs assessment in the “public interest” be removed from the NEB. As a captured regulator, we do not trust the NEB to decide using the best judgement in the “public interest”.

We believe that we can achieve a National Energy Transition Board, but understand that changing the regulator's culture will take time. Therefore, the determination of whether a project is in the “public interest” must be made independently and not by the NEB.

The decision on whether a proposed project is in the public interest and is in line with the needed transition of our energy systems should come out of the sustainability test in the environmental assessment. The NEB should continue doing what it does best - analyzing the technical details of a project once the project has been identified to be of net sustainable benefit to Canada.

Climate Change

The impact of the project on climate change must be considered through the EA process and NEB regulatory process. This would include upstream, lifecycle and downstream impacts including the development of energy and the use of that energy.

Marine Impacts

The NEB and EA processes must consider the downstream marine impacts of projects. For example, the cumulative effects of increased tanker traffic in the Bay of Fundy must be included in all aspects of the Energy East pipeline review.

Indigenous Engagement

Per the NEB Modernization Panel's Terms of Reference, some Indigenous peoples have raised concerns regarding the nature and process of their participation in different aspects of a federally regulated pipeline's lifecycle. Therefore, potential outcomes could include findings and recommendations in the following areas:

- Enabling early conversations and relationship building between the Government of Canada and Indigenous peoples whose rights and interests could be affected by a specific project under the NEB's mandate;
- Facilitating ongoing dialogue between the Government of Canada and Indigenous peoples on key matters of interest on projects to inform effective decision-making;
- Further integrating Indigenous traditional knowledge and information into NEB application and hearing processes; and
- Developing methods to better assess how the interests and rights of Indigenous peoples are respected and balanced against many and varied societal interests in decision-making; and
- Enhancing the role of Indigenous peoples in monitoring pipeline construction and operations and in developing emergency response plans.⁴

Questions Considered:

- What are your views on the approach the Government of Canada has taken in recent years to engage and consult Indigenous groups on projects regulated by the NEB?
- How can Indigenous traditional knowledge and perspectives (including Traditional Ecological Knowledge) and information be further integrated into the NEB application and hearing process?
- How can Canada enhance its approach to Indigenous engagement and consultation to inform decision-making on NEB-regulated projects?

⁴ <http://www.neb-modernization.ca/terms-of-reference>

- What should be the role of: a) the NEB; b) the Government of Canada; c) Project Proponents; and d) Indigenous peoples (e.g., specific groups or communities)?
- How should the government of Canada's approach to engaging and consulting Indigenous groups on NEB regulated projects support the Government of Canada's goal of renewing the nation-to-nation relationship with Indigenous peoples and moving towards reconciliation?
- How can the Government of Canada best consider and address the principles outlined in the United Nations Declaration on the Rights of Indigenous Peoples when undertaking efforts to modernize the NEB and when making decisions on whether NEB-regulated projects are in the public interest?

UNDRIP

Consultation on NEB-regulated projects creates a difficult situation because consultation cannot be conducted by the proponent, industry, nor the NEB. Indigenous communities have a relationship to the Crown.

The NEB should fully adopt the principles set out in the United Nations Declaration of the Rights of Indigenous Peoples, including the right to Free, Prior and Informed consent. We encourage a reformed National Energy Transition Board to pay special attention to place a special focus on, but certainly not limit their understanding to articles 8, 19, 25, 29 and 32 outlined below. In full respect of UNDRIP, we must move away from a consultation model to a consent model.

Article 8

1. Indigenous peoples and individuals have the right not to be subjected to forced assimilation or destruction of their culture.
2. States shall provide effective mechanisms for prevention of, and redress for:
 - a) Any action which has the aim or effect of depriving them of their integrity as distinct peoples, or of their cultural values or ethnic identities;
 - b) Any action which has the aim or effect of dispossessing them of their lands, territories or resources;
 - c) Any form of forced population transfer which has the aim or effect of violating or undermining any of their rights;

- d) Any form of forced assimilation or integration;
- e) Any form of propaganda designed to promote or incite racial or ethnic discrimination directed against them.

Article 19

States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them

Article 25

Indigenous peoples have the right to maintain and strengthen their distinctive spiritual relationship with their traditionally owned or otherwise occupied and used lands, territories, waters and coastal seas and other resources and to uphold their responsibilities to future generations in this regard.

Article 29

1. Indigenous peoples have the right to the conservation and protection of the environment and the productive capacity of their lands or territories and resources. States shall establish and implement assistance programmes for indigenous peoples for such conservation and protection, without discrimination.
2. States shall take effective measures to ensure that no storage or disposal of hazardous materials shall take place in the lands or territories of indigenous peoples without their free, prior and informed consent.
3. States shall also take effective measures to ensure, as needed, that programmes for monitoring, maintaining and restoring the health of indigenous peoples, as developed and implemented by the peoples affected by such materials, are duly implemented.

Article 32

1. Indigenous peoples have the right to determine and develop priorities and strategies for the development or use of their lands or territories and other resources.
2. States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free and informed consent prior to the approval of any project affecting their lands or territories and other resources, particularly in connection with the development, utilization or exploitation of mineral, water or other resources.

3. States shall provide effective mechanisms for just and fair redress for any such activities, and appropriate measures shall be taken to mitigate adverse environmental, economic, social, cultural or spiritual impact.

Indigenous Education

All NEB staff should be required to participate in education and training sessions on Indigenous cultures and treaty rights. This process would be similar to sensitivity training which is now common in most workplaces.

Impacts on Territory

Indigenous communities do not see the western borders, including provincial or national boundaries. It's about territory. Therefore, a modernized NETB must recognize the impacts on territory, including upstream, lifecycle and downstream impacts of a project.

Treaty Research and Review

The modernized NETB must conduct treaty research work to inform what they can do. There must be careful consideration as to whether the NEB is authorized to do this work. Does the NEB have the right to govern on unceded Indigenous lands?

Role of Energy Transition Board in Reconciliation

For many indigenous communities, there is no place for new pipelines in reconciliation. In order to achieve true reconciliation, the new National Energy Transition Board must facilitate a rapid and thoughtful transition to responsible renewable energy development in full free, prior and informed consent of Indigenous peoples.

Public Participation

Per the NEB Modernization Panel's Terms of Reference, stakeholders have expressed increased interest in the NEB's activities, including hearing processes and in developing emergency response plans. Potential outcomes could include findings and recommendations in the following areas:

- Identifying legislative changes to support greater stakeholder and public participation in NEB activities (e.g., hearings, developing emergency response plans, etc.) that would enhance the outcomes of these activities.

Questions Considered:

- What works well regarding public participation?
- What could be improved?
- What additional opportunities could be provided for the public and Indigenous peoples to provide input over the course of the entire lifecycle of NEB regulated facilities (i.e., from application to abandonment)?

The NEB was established in 1959, in an era when public participation as we understand it today simply did not exist. Communities were not involved in decision-making, and Indigenous peoples (referred to as "Indians" at the time) were not even allowed to vote, much less exert political power. It is therefore reasonable that the current model is outdated and in need of significant overhaul.

Eliminating "Directly Affected"

The Application to Participate process is completely unacceptable. The EA must be removed from the NEB and placed under the authority of a reformed CEAA. A good EA as conducted by CEAA will be open and transparent with numerous opportunities for public participation. This will greatly reduce the number of people wishing to participate in the technical aspects of an NEB regulatory hearing. Currently, the public has no choice but to participate in the NEB process in the absence of a venue to voice their broader policy level concerns.

Prior to 2012, the NEB would consider the concerns of any “interested party”. Post 2012, participation in NEB regulated projects required an Application to Participate and only those who were deemed “Directly Affected” or having “Relevant Information and Expertise” were granted status in the process. There are many issues with this “directly affected” requirement.

First, there is no definition in the NEB Act for “directly affected”. In the absence of a legislated definition, there is far too much objectivity in the Board’s ability to make this determination. We attempted to learn more from interviewing several people on the East Coast about their experience with the Board and thoughts on defining “directly affected”. However, there was strong push back about the term and an overwhelming sense that the NEB should not have the right to decline individuals who wish to participate. This is a fundamental flaw regarding public participation in a quasi-judicial process.

The NEB must remove the requirement for participants to be “directly affected” or have “relevant information and expertise”. A modernized NEB should listen to the concerns of any “interested party”. There ought to be additional, legislatively guaranteed participation avenues for those who wish to have their voice heard, but do not have the time or will to participate fully as an Intervenor. This could occur through a tiered participation system including Intervenors, Letters of Comment, and Public Town Hall Meetings.

Intervenors - Registration Process

Letters of Comment – Open throughout the entire hearing. Deadline for filing would be the closing date of the hearing when the panel stops accepting evidence.

Public Town Hall Meetings – Held as needed throughout the process to focus on project level issues that are deemed to be of significant public interest. These meetings would follow a format like the Ontario Energy Board public consultation process on Energy East. These meetings would be run by a third-party facilitator and the results would be filed as evidence into the NEB regulatory process. The key here is meaningful public participation. It would be unhelpful to have broader public consultation processes that are dismissed by the Board due to the evidence rules in a quasi-judicial process.

If the project level EA is removed from the NEB and completed prior to the NEB regulatory process as outlined in the Environmental Assessment section above, then many of the public's broader policy concerns and comments will have been heard.

Eliminating the Section 58 Loophole

Section 58 of the NEB Act provides the NEB Board with the authority to issue an order that will exempt certain 'smaller' projects (pipelines less than 40 km) from the detailed review process contemplated by section 52 of the Act, including the mandatory hearing process.

58 (1) The Board may make orders exempting (a) pipelines or branches of or extensions to pipelines, not exceeding in any case forty kilometers in length, and (b) any tanks, reservoirs, storage facilities, pumps, racks, compressors, loading facilities, interstation systems of communication by telephone, telegraph or radio, and real and personal property, or immovable and movable, and works connected to them, that the Board considers proper, from any or all of the provisions of sections 29 to 33 and 47.⁵

As section 58 currently stands, after a certificate is issued for the construction of a pipeline, owners of lands that are to be acquired or which are adversely affected by the detailed route of the pipeline are entitled to additional public hearings on the matter. Under section 58, however, the Board may grant an exemption from this process. We are concerned that the section 58 loophole means that landowners and stakeholders who are adversely affected by the proposed project, may nonetheless, be excluded from participating in the subsequent detailed route process if proponents continue to be allowed to request exemption of the right to a hearing. TransCanada, for example, has indicated in their Energy East application that they will seek such a section 58 exemption for the tank terminals in the Red Head neighbourhood of Saint John, New Brunswick.

⁵ National Energy Board Act - <http://laws-lois.justice.gc.ca/eng/acts/N-7/FullText.html>

Regional Inclusion

As mentioned elsewhere in this report, the Ecology Action Centre is located in Halifax, Nova Scotia. As an active participant in the discussion on energy issues, we often feel physically left out of the conversation.

It is extremely unfortunate that the NEB Modernization Panel failed to make a trip to Nova Scotia to hear the views of those in our province. Although we had initially planned on presenting at the Saint John, New Brunswick session, the travel time and application for travel funding proved far too complex and time consuming to participate to present our views in full.

Further, from our interviews, we determined that many of the public in Nova Scotia had no idea what the NEB Modernization process was or where and how it was happening. This is extremely unfortunate because the NRCan Panel will now move forward with recommendations without the insight of an entire province. We recognize that Nova Scotia is not alone in this matter. Several other provinces and territories were also left out of the process.

This issue is quite reflective of the problems we've experienced with the National Energy Board review of the Energy East pipeline. The Energy East review panel has no plans on holding any components of the hearing in Nova Scotia. The furthest east they plan to come is Saint John, even though the entire Bay of Fundy coastline along Nova Scotia's shores would be directly impacted by an increase in tanker traffic and the possibility of an oil spill.

After the list of panel sessions was released, EAC requested a panel session be held in Nova Scotia. The Energy East panel rejected that request, stating their decision was based on the lack of Intervenor status in the process. We are currently caught in a vicious circle. There is a lack of Intervenor status in Nova Scotia due to the minimal public education conducted by the NEB, the lack of trust in the regulator, the difficulty in the application to participate process. The process is then made more difficult for the few of us who achieve Intervenor status and choose to actively participate by physically having to travel to another province in order to be heard.

The new NETB must do a much better job at regional inclusion.

Climate Impact Based Participants

Those concerned about the impact of the project on climate change must not be excluded from the process. The new NETB must facilitate an open and transparent dialogue on the impact its decisions make in meeting Canada's national and international climate commitments. This can occur through more accurate energy forecasting as explained above.

Climate considerations at the project level could occur during the project level EA. Climate considerations must also be included when analyzing the technical details of a project at the regulatory stage.

For EAC, this is the only way to move forward. Climate change and energy projects are inextricably linked. If climate continues to be excluded from the energy conversation, we will have missed a fundamental component in modernizing the environmental assessment and regulatory processes.

EA Location Matters

If the EA is removed from the NEB, and the NEB focuses on the technical issues of detailed pipeline design, then the quasi-judicial NEB regulatory process is probably okay. However, if the EA remains within the NEB, EAC feels very strongly that the quasi-judicial process does not work.

“The quasi-judicial process approach with the NEB as the Responsible Authority to conduct the environmental impact assessment is fundamentally flawed and cannot be repaired.”

– Lisa Mitchell, MES, LL.B, ECELAW

It is important to note that many of the concerns the public wishes to raise may be addressed by a reformed environmental impact assessment process. Such a process would be managed by an independent body such as the CEA Agency and would include open, transparent and effective participation by the public. When the EA is completed with the NEB as a responsible authority, the public is essentially cut out and given no real opportunity to discuss the issues that fall outside of the

NEB's narrow scope. We highly recommend that the panel review the paper, "Environmental assessment process substitution: a participant's view"⁶.

We encourage the NEB Modernization Panel to review the transcript of Mr. Stephen Thomas at the Energy East Saint John panel session where he was denied the opportunity to share the views of the Bay of Fundy Inshore Fishermen's Association (BFIFA) due to the limiting rules of submitting evidence in a quasi-judicial process. The evidence Mr. Thomas was attempting to submit would have been accepted if he had of been participating in a proper environmental assessment process.

Regional Offices

Regional NETB offices should be created, including at minimum two offices on the East Coast. There must be an office in Nova Scotia to improve regional inclusion. These offices would be a floor space to assist residents in understanding NEB regulated projects and offer assistance to those who wish to participate in hearings.

The online nature of NEB-regulated project proceedings can exclude members of the public who may not have access to a computer or online capabilities. These regional offices could be fitted with the technology and personnel needs to assist interested members of the public through the process.

Public Town Hall Meetings

The NEB should conduct bi-annual meetings in each of their regional office areas to inform the public on NEB regulated projects and opportunities to become involved in a hearing. The point of the regional offices is to be more than an office, but to be an active space for public engagement. Meeting topics could vary from project level discussions to thoughts on Canada's energy future and ways to transition to a low carbon economy.

⁶ Gary Schneider, John Sinclair, Lisa Mitchell, "Environmental assessment process substitution: a participant's view," Environmental Planning and Assessment Caucus, Canadian Environmental Network (2007).

The new NETB could look to the Ontario Energy Board public consultation process on Energy East as a model for how to run this type of meeting. In the OEB engagement case, town halls were held. Notes were taken in real time and projected on a screen in the room. All participants were given the opportunity to comment on those notes. The information from public sessions was then drafted into a report which was also available for public comment.

The information gathered during these Public Town Hall Meetings should be considered as background information for project reviews, energy forecasting, and general NETB education.

Participant Funding

Participant funding must be reasonable and timely. For example, the initial funding amount for groups in the Energy East process was \$80,000. Funding was then arbitrarily cut in half to \$40,000 after participants applied to the Participant Funding Program. This makes it extremely difficult for participants to cover all costs associated with full participation in a hearing including legal counsel, hiring experts, meeting rental costs, travel, etc.

Further, funding for Energy East was not made available in time for the beginning of the hearing and panel sessions. Therefore, several groups and individuals were forced to pay for expenses out of pocket or choose not to participate in the process if they couldn't afford to do so on their own account. This makes it almost impossible for small community groups or individuals to participate in the process.

We believe that there should still be an application to request Participant Funding, with justification for why the funding is needed and how it will be spent.

Conclusion

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 considered as a broken promise by the federal government.

Changing the culture at the NEB is not going to be easy. It's going to take time, resources and intention. The risk of trying to reform the NEB to make good decisions and implement good processes on the broader issues is that this is a ship that will take time to turn around, the culture will not change overnight, even if we make fundamental staff and mandate changes. We believe this is the time for deep, foundational change at the National Energy Board.

Summary of Recommendations

Mandate and Regulatory Framework Recommendations

NEB Location – The NEB headquarters must be moved away from Calgary. The NEB headquarters would be best situated in Ottawa.

National Energy Transition Board - The NEB should be renamed as the National Energy Transition Board (NETB) to reflect the steps required to reduce our dependence on fossil fuels and to foster the research and development of renewable energy alternatives.

Renewable Energy Opportunities – The new NETB must become a world class regulator of all forms of energy, not just fossil fuel energy.

Energy Forecasting – The new NETB must write energy forecasts with national policy in mind and assuming we will meet our national and international climate targets.

Regional Environmental Assessments - EA is a planning tool and needs to start long before a project is at the detailed design stage. Regional environmental assessments set the policy context from which project level EAs and regulatory hearings operate within.

Strategic Environmental Assessments - Strategic environmental assessments (SEA) will be required for a modernized regulatory system in order to fill gaps identified after a regional environmental assessment.

Project Level Environmental Assessment - The project level environmental assessment must be removed from the NEB process.

Needs Assessment - The NEB should not be left to decide whether a project should move forward in the public interest. The decision on whether a proposed project is in the public interest and is in line with the needed transition of our energy systems should come out of the sustainability test in the project EA.

Climate Change - The impact of the project on climate change must be considered through the EA process and NEB regulatory process. This would include upstream, lifecycle and downstream impacts including the development of energy and the use of that energy.

Marine Impacts - The NEB and EA processes must consider the downstream marine impacts of projects.

Indigenous Engagement Recommendations

UNDRIP - The NEB should fully adopt the principles set out in the United Nations Declaration of the Rights of Indigenous Peoples.

Indigenous Education - All NEB staff should be required to participate in education and training sessions on Indigenous cultures and treaty rights.

Impacts on Territory – Focus on Indigenous territory, not western borders.

Treaty Research and Review - The modernized NETB must conduct treaty research work to gain a better understanding of their relationship with Indigenous nations.

Role of Energy Transition Board in Reconciliation – To achieve true reconciliation, the new NETB must facilitate a rapid and thoughtful transition to renewable energy and in full consent of Indigenous peoples.

Public Participation Recommendations

Regional Inclusion – Include all regions of Canada in decision making processes.

Eliminating “Directly Affected” - The NEB must remove the requirement for participants to be “directly affected” or have “relevant information and expertise”.

Climate Impact Based Participants - Those concerned about the impact of a project on climate change must not be excluded from the process.

EA Location Matters – If the EA is removed from the NEB, then the quasi-judicial process is okay. However, if the EA remains within the NEB, the quasi-judicial process does not work for that kind of review.

Regional Offices - Regional offices should be created, including at minimum two offices on the East Coast. There must be an office in Nova Scotia.

Town Hall Meetings - The NEB should conduct bi-annual meetings in each of their regional office areas to inform the public on NEB regulated projects and opportunities to become involved in a hearing or broader public consultation.

Section 58 – Close the section 58 loophole and increase opportunities for public involvement.

Participant Funding - Participant funding must be reasonable and timely.

General Recommendations

Transition Time - The NEB must be given the time to implement the above recommendations properly.