

Expert Panel on National Energy Board Modernization Public Consultation Montréal, Québec – March 28-29, 2017

The Expert Panel for the Modernization of the National Energy Board met in Montréal March 28-29, 2017, for in-person sessions which included public and Indigenous presentations, a public dialogue session and an Indigenous open dialogue session.

The following summary presents the comments and input received throughout these in-person engagement sessions. It is intended to present the views of participants, and not the views of the Panel itself.

The summary is organized using the Panel's review theme areas, and comment was welcome from all parties on any issue relevant to the renewal of the NEB. Theme areas are as follows:

1. Governance and structure
2. Mandate and future opportunities
3. Decision-making roles, including on major projects
4. Compliance, enforcement, and ongoing monitoring
5. Engagement with Indigenous peoples
6. Public participation

The Panel wishes to thank all those who participated for sharing their expertise and experience at these sessions.

THEME: Governance and Structure

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The Panel heard from many participants that a major overhaul of the NEB's governing legislation and structure is needed, whereas others felt the existing rules and structure are adequate, needing only to be implemented more effectively and consistently.

Several participants urged the Panel to recommend that the Energy East project review be suspended until the laws and regulations governing the NEB have been transformed, as per this modernization process, to handle the review more effectively and with greater integrity.

The Panel heard that the NEB's perceived credibility and impartiality are key to earning citizens' trust. It heard that the public currently views the NEB's integrity as compromised by its proximity to industry, calling it a "captured regulator". Public opinion polls and quotes from within and outside Québec were offered to support this claim.

The Panel also heard that the revelations surrounding former Québec Premier Jean Charest's private meeting with the NEB chairman and NEB's members to discuss the Energy East review process have been especially damaging to the public trust, partly because they have been brought to light by investigatory journalists rather than formal mechanisms. Mr. Charest was

purportedly under contract with Energy East proponent TransCanada. In the opinion of many present, this ethics breach warrants an investigation prior to creating a modernized NEB or its successor.

The Panel heard that the problem seems to lie in the non-application of existing rules on independence and impartiality. It was suggested that mechanisms be put in place to ensure that the NEB is exercising its responsibilities in a neutral, independent and transparent way. One specific suggestion offered was for Canada's Auditor General to conduct random audits on the NEB to catch and rectify potential ethical lapses.

Board and Project panel Composition

The Panel heard concern over industry affiliated appointments to the NEB, and a call for board members representing a broader range of experiences, interests and knowledge.

It was specified that participants wish to see civil society (ordinary citizen), Indigenous and local representation.

The Panel heard that the Metis Nation wants members who understand their rights and priorities. The Panel also heard of the need for members to have an understanding of how agricultural lands and forests are likely to be affected by projects, as most private landowners are agriculture and forestry producers.

Given the NEB's current quasi-judicial nature, one participant questioned whether people without a legal background should be making legally binding decisions.

Participants acknowledged the need to draw on the expertise of those with industry experience, but wondered how to ensure the NEB's independence in light of this. Some participants felt that, when in conflict, the independence of the NEB should be favored over acquiring talent with oil and gas industry knowledge.

Some participants suggested that people with industry expertise and ties should only be technical advisors and consultants rather than permanent or temporary members. One participant suggested setting a policy whereby a minimum number of years must pass before an NEB board member or employee may go work for the industry. Some participants acknowledged that such limits would need to be accompanied by a level of job security and compensation commensurate with the sacrifice they demand.

One participant pointed out the need to specify what is meant by "industry", assuming that most are referring to oil and gas. They noted that moving forward, "industry" should be understood to refer to renewable energy sources as well.

Bilingualism Requirement

The Panel heard that NEB board members and staff must have functional bilingualism, as per

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Board and Staff Composition and Expertise

The Panel heard that to gain the trust of Indigenous Peoples, they must be better represented in the NEB's membership and staff. One participant suggested that Indigenous Peoples form 50% of permanent board members. It was also specified that the board should have representation from Indigenous People who live on the land, rather than only Indigenous People from urban centres.

The Panel heard that the NEB selection and appointment process should be transparent and that it should involve Indigenous Peoples, ensuring that Indigenous women (represented by civil society groups) have a say. It also heard that Indigenous Peoples should have an equal role in appointing individuals to project review boards.

It was also discussed that the NEB should represent Canada's regional diversity and contain members with expertise in community development, sociology, economics, traditional knowledge, renewable energy, energy efficiency, fisheries and aquatic ecology, land ecology, climate change mitigation and adaptation and archeology.

It was stated that all parties involved in the NEB's decision-making and operations should receive comprehensive training on the history of Indigenous Peoples, treaty rights, the issues facing Indigenous women, intercultural communication, human rights and the fight against racism and discrimination.

The Panel was told that the roles of CEO and Chair of the NEB should be held by different people.

NEB Location and Residency Requirements

One participant called for all impediments to Indigenous participation in NEB governance to be removed from the NEB Act. The Panel heard that the residency requirement for board members should be eliminated, and that the NEB should not be located or funded in a way to bias its conclusions. It heard that participants feel it is much too close to the oil and gas industry, calling into question its impartiality. Some participants wished to see the NEB headquarters moved to Ottawa, though they warned against replacing industry influence with political influence.

The Panel heard from some participants that the NEB's current Calgary location is fine as long as there are changes made to its mandate and governing legislation.

Policy and Legislation

The Panel was told that participants wish to see a major overhaul of the NEB Act in order to translate the government of Canada's commitments and goals into action. It heard that the NEB

Act should include requirements for the informed consideration of Treaty rights and the application of Indigenous knowledge.

It heard that the NEB should be tasked with implementing a National Energy Framework, developed jointly by the federal government, provincial and territorial governments, and Indigenous Nations. Such a framework would be responsible for assessing what energy resource potential is available, the national demand for energy, the potential for export opportunities, energy diversification targets (including those needed to meet international climate commitments and societal expectations) and the infrastructure requirements needed to meet current and future needs.

The Panel also heard that, in setting energy policy, political representatives must consider the growing inequality among Canadians and the cost of energy to the end user.

THEME: Mandate and Future Opportunities

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Scope of Mandate

Some participants proposed to divide the NEB's current role among different government agencies. One participant specified that the NEB's role should be reduced as society shifts further away from oil and gas-related energy to focus on decommissioning pipelines.

Some participants expressed their desire to keep the NEB as a single point of contact through which proponents can fulfill all regulatory requirements throughout the project lifecycle. They believe the NEB's mandate is adequate and that dividing the review process between the NEB and another agency would make the process more cumbersome for proponents.

The Panel heard that the NEB's current project by project focus must be expanded to consider the cumulative impacts of various forms of infrastructure, and long-term national strategies based on forecasted needs, risks and opportunities. Such forecasts may span several decades as the ramifications of energy projects and climate change are too long lasting to be credibly assessed over a short time. As such, the NEB's mandate must no longer hinge on the assumption of a continuously increasing demand for fossil fuels.

The Panel heard that the NEB's mandate should fall within the context of Canada's greenhouse gas (GHG) emission targets and global commitment to the Paris Climate Agreement. The NEB should operate on the understanding that such targets were established to remedy an urgent situation. The Panel was offered the example of the United Kingdom's integration of a carbon budget into legislation. One participant expressed their desire to see the NEB mandate include the transition away from fossil fuels.

The Panel heard from one participant that her organization sees no need to expand the NEB's

mandate, but rather prefers to improve its ability to fulfil its existing mandate more effectively. Another participant wishes to see the NEB Act amended to include decision-making and monitoring authority over energy transportation by rail, road and waterways, in addition to pipelines.

The Panel heard suggestions to withdraw the NEB's project assessment mandate and give it to a new national entity akin to Québec's *Bureau d'audiences publiques sur l'environnement* (BAPE). This new office would examine projects and provide recommendations to the Governor in Council (GIC) on the basis of the information it gathers and its consultations with the public, with an emphasis placed on transitioning to greener energy sources.

The Panel heard from other participants who envision reducing the scope of the NEB's mandate in favor of sharing more power with provinces, territories, municipalities and Indigenous governments, in the spirit of cooperative federalism.

The Panel further heard that the NEB must scale and grow its capacity in proportion to any new or expanded mandate. Expanding the overall NEB mandate and increasing compliance and monitoring activities will require that the NEB maintain the organizational capacity commensurate with these expectations.

Government Institutions

The Panel heard from some participants that Canada should create a national institution with the mandate of coordinating the transition away from fossil fuel-based energy. It was noted that the province of Québec is in the process of creating such an institution and that one already exists in France. Some participants stated that the NEB does not appear to have the capacity to fulfill such a function.

It was proposed by one participant that the NEB mandate should be split between two distinct organizations, one studying fossil fuel-based projects and another studying projects based on alternative forms of energy. It was suggested that this could help reduce public cynicism.

Electrical Transmission Lines

The Panel heard that international power lines are a vital component of the Canadian and North American power grid, with net exports to the United States exceeding 50 terawatts a year.

Regarding electricity, the Panel heard a desire for a more efficient, streamlined and predictable process of regulating electricity exports and international powerlines. It was noted that regulatory requirements have not changed for many years despite changes in the electricity industry. Specifically, it heard support for the modernization and streamlining of the export permitting process.

One participant voiced their organization's support for procedural reforms that improve the

efficiency of applying for international power line permits. Procedural form and governance are interrelated, given the NEB's quasi judicial role.

A participant suggested that the NEB play a role in bilateral provincial negotiations over electrical transmission lines. What's more, one participant expressed her concern about the increased risk of corrosion caused by electrical lines crossing pipelines, adding that since there are many more kilometres of pipeline than electrical lines, when these two cross, the rules governing pipelines should take precedence. There is a risk of confusion in such situations and the NEB should be responsible for providing citizens with the appropriate information on which regulatory framework is being applied. One participant said that she had to pay to find out which standard applies to a nearby area where an electrical line and pipeline cross and called for more transparency in sharing information with the public.

Determination of Public Interest

Participants agreed that determining the Public Interest involves considering the various complex intersections of social, economic and environmental factors and that these have evolved since the NEB's creation. The Panel heard that the definition of Public Interest to be applied by the NEB should be made very explicit, so as to limit discretion in its interpretation and application.

Concern was expressed vis-à-vis the perception that so far, economic factors have outweighed all others in the NEB's deliberations. The Panel heard that in considering the Public Interest, decision-makers should consider climate change and protecting water sources higher priorities than economic factors, as life itself depends on a healthy environment. It heard that in considering socioeconomic issues, the social cost of GHG emissions from production to combustion should be included in the analysis.

In light of this, some participants voiced their belief that the approval of any further fossil fuel infrastructure would contravene the Canadian Public Interest.

The Panel heard of a tool called the Social Cost of Carbon which was developed in the United States and has been adopted by Environment and Climate Change Canada. It allows damages to be estimated based on tonnes of carbon emissions in each year.

A participant asked if, given the global shift away from fossil fuels, investing a fifth of the Canada's economy in this industry would be wise from a economic perspective.

One participant provided the following list of minimum criteria to be applied in the determination of Public Interest:

- Ecological integrity;
- Respect for ancestral and acquired rights to the land and resources;
- Respect for existing environmental and public health policies; and
- Relevance to social context and relative return on investment (comparing costs and benefits to alternative projects).

would allow the NEB to consult with Indigenous Peoples but would have the Crown set standards by which it could evaluate and issue a decree as to whether the duty to consult has been adequately carried out.

The Panel heard that consultations are quite onerous for many Indigenous communities and that the timelines associated to them (often 30 days) are unrealistic given their culture and the time and resources available to them.

Some participants proposed the creation of a new permanent commissioner in the Office of the Auditor General responsible for all consultations with Indigenous Peoples, and for the implementation of UNDRIP and of Truth and Reconciliation Commission recommendations. Alberta's Aboriginal Consultation Office was offered as an example.

The Panel heard that it would be helpful if the government could identify which Indigenous political bodies should be consulted by proponents. A participant then reminded the Panel that, as in other societies, Indigenous political leaders do not represent all of their community's ideas or opinions, so Indigenous individuals should also have the chance to be heard.

Indigenous Traditional Knowledge

The Panel heard that project approval and lifecycle management should integrate a wider range of approaches, especially those integrating Indigenous Traditional Knowledge, throughout NEB processes. Additionally, NEB processes could draw inspiration from Indigenous cultural and legal tools to better account for principles such as intergenerational justice and the fight against climate change.

The Panel heard that consultation will sometimes have to take place in native languages to be meaningful and complete and to fully convey the traditional knowledge and Indigenous worldviews.

Early and Continuous Engagement

The expert Panel heard that Indigenous Peoples must be engaged from the earliest stages of a project. They must be represented among those designing and implementing projects, as well as in decision-making bodies. The Panel heard that in instances where a project spans many Indigenous jurisdictions, shared decision-making could be negotiated, though it may take a long time.

The Panel heard that the NEB might include in its project conditions the need to respect local laws, including those of Indigenous Peoples. The Panel heard that everything the NEB does should contribute to relationship building, including with the Métis Nation which has historically been neglected. The Panel was asked to recommend that the NEB's governing legislation advance the protection and fulfillment of Métis rights.

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Legislation and Reconciliation

The Panel was told that currently, a deep distrust reigns over Indigenous Peoples' relations with the Crown and the NEB given their past undermining of constitutional and treaty rights. It heard that the NEB Act and operations should be modified to better support reconciliation. It was noted by one participant that reconciliation is about sharing the land, benefits and power.

The NEB Act should also reflect Canada's signing of the UNDRIP and integrate its key principle of FPIC. The Panel heard that treaty rights should be recognized and respected at every turn.

A specific legislative change requested was to eliminate section 78 of the NEB Act whereby proponents are given the means to expropriate reserve lands.

The Panel heard that the NEB and proponents' dealings with Indigenous Peoples should take place within the context of a nation-to-nation relationship, respecting Indigenous modes of governance, ways of knowing and decision-making schemes.

It was noted that some Indigenous nations have, or are elaborating, formal constitutional documents and that, where these are available, the Crown, the NEB and proponents should be conducting themselves within the norms that they dictate.

Participants said that, rather than requesting that Indigenous Peoples continually identify and justify their rights, they hope that conversely, under a modernized regulatory process, proponents will be tasked with proving how their projects will *not* infringe on Indigenous rights. One participant said that reconciliation cannot take place until Indigenous Peoples are included as equal parties in decision-making circles.

Meaningful Consultation

Participants asserted that Indigenous Peoples have the right, to be consulted in a truthful, honest, open and collaborative way that influences decisions and processes.

The Panel heard that the constitutionally mandated duty to consult cannot be delegated to the NEB, the provinces, the proponent, or any other party. It heard that this has been confirmed by the Supreme Court of Canada, but that parties are acting as though it can be. When delegated to the NEB, the potential scope of consultation and accommodation are greatly reduced, resulting in unsatisfactory outcomes. It was also noted that risk mitigation is not necessarily sufficient accommodation.

The Panel heard that the confusion surrounding the duty to consult prevents it from being carried out adequately. At times, the NEB does some of the consultation or relies on proponents to do so. It heard that this should not be the case and that the Crown itself

should be involved. Conversely, the Panel heard that the NEB Act should be modified to clarify whether the Crown's duty to consult can be delegated or not.

Participants shared that proponent consultations often place them in a difficult position. They fear that the fact that they participate in a consultation may be misused as proof of community assent to a project. On the other hand, if they cannot stop a project from moving forward, they would still like a say in how it is implemented. It was suggested that the NEB provide proponents with clear and specific guidance on each party's responsibility to consult with Indigenous Peoples and accommodate them. The Panel heard that the Indigenous Peoples affected should be the ones to decide on the appropriate accommodation.

The Panel heard that, to build credibility, guidelines should specify the need to consult with the correct representatives, such as chiefs and in some cases, associations. The Panel heard that, as the impacts of a project are different and at times graver for Indigenous women, they should be consulted in particular. It was specified that consultations should be face-to-face, without relying on letter-writing campaigns.

Participants believe that the NEB should be equipped with set criteria to test whether all consultation obligations were adequately carried out before approving a project. To those concerned about the extensiveness of consultation requirements, participants said that early and comprehensive consultation is likely to reduce the scope and length of future consultations.

Consultation Funding

The Panel heard that many Indigenous communities, such as the Metis Nation, lack the significant financial resources and in-house capacity to adequately respond to consultation requests. As such, the current average timeline of 30 days to respond is unrealistic.

Participants stated that such communities should receive funding to enable their meaningful participation. One participant specified that the need to provide funding is supported by case law as forming part of the Crown's duty to consult. Some participants put forward the idea of providing communities with multi-year funding, to build internal capacity to respond to all forthcoming requests for consultations.

The Panel heard that proponents should be prepared to assume the costs associated with the activities needed to meet their consultation threshold and maintain positive relationships with the community. However, one participant said it is not fair to expect the proponent to make up for a lack of consultation by the NEB or the Crown.

Indigenous Worldview and Traditional Knowledge

The Panel heard that the NEB, proponents and the Canadian public must understand that opposition to projects stems from an Indigenous worldview that highly values the protection of Mother Earth and of future generations. This is a uniting belief among various Indigenous Peoples who have lived on their lands for millennia in an ecosystem they have come to know

intimately.

Participants said that the NEB's current decision-making criteria do not mesh well with Indigenous knowledge and priorities, passed on by elders who are viewed by outsiders as less qualified than scientists with formal credentials. However, traditional knowledge is often very detailed and technical and provides key insights on sensitive environments, emergency mitigation and economic opportunities. As such, some participants said that it would be beneficial to integrate it to all facets of the NEB's role and responsibilities.

Others suggested that rather than striving to integrate traditional knowledge to NEB proceedings, it could form the basis of a parallel process which better reflects its particularities. An example was given of how traditional knowledge, in the form of observing black bear behaviors, had alerted Indigenous peoples to climate change before it was broadly recognized in the scientific community.

The Panel heard that, as part of the decision-making process, the Crown should continue to provide Indigenous communities with funding to collect and document traditional knowledge and to conduct research on the issues of greatest concern to them.

The Panel heard that collecting and assessing traditional knowledge cannot be done the same way as conventional knowledge. It was told that traditional knowledge keepers should not be asked to share their knowledge in a quasi-judicial setting in front of an intimidating panel, or to condense it in a short, written answer to a pointed question.

Traditional knowledge sometimes cannot be translated to English or French without losing its meaning, therefore, it is believed to be in the interest of all parties to conduct certain proceedings and meetings in native languages, with interpretation as needed.

Early and Continuous Engagement

Some participants believe that the Crown, the NEB and proponents should be pursuing consent and shared decision making, rather than consultation in a strict sense. Others said that the NEB needs to demonstrate how Indigenous rights, interests and perspectives were taken into account when coming to a decision.

The Panel heard that unless there are truly extenuating circumstances, federal processes should defer to Indigenous processes as per land claim agreements and agreements in principle.

Consultation should take place as soon as development is contemplated on Indigenous territory. Access to NEB processes and government consultations should be facilitated. The example of accessibility issues offered was of an Inuit Nation with fourteen communities accessible only by air, in which Inuktitut is the primary language spoken by all age categories. When processes are only in the official languages, or involve consulting web pages, this forms an entry barrier.

The Panel heard that Indigenous Peoples want to be involved throughout the project lifecycle, not only when a new project on their territory is being considered. Participants proposed that the NEB Act mandate the creation of lifecycle agreements between proponents and Indigenous communities. Such agreements could mandate early engagement, joint decision-making and post-construction monitoring.

A participant proposed that a government sustainability council could be created in Ottawa, with input received from all different regions of the country and consultative neighbourhood councils. Indigenous Peoples could map zones of serious consequence and share them with the council so that it could inform further pipeline routes.

A participant offered the Panel the following six hallmarks of improved Indigenous engagement:

1. Capacity funding provided corresponds to a community's needs
2. Arbitrary timelines are removed
3. Indigenous peoples are involved in scoping impact assessments and determining information sufficiency
4. What matters to Indigenous peoples is assessed: go beyond current use and biophysical impacts
5. Indigenous knowledge is respected and incorporated in project planning and NEB decision-making
6. The decisions and perspectives of Indigenous Peoples are respected

Economic Development

Participants stated that, despite what is shown in the media, Indigenous Peoples are not necessarily against economic development, nor the exploitation of resources. They said that communities are often open to talking to companies, but will simply not negotiate the loss of access to ancestral territory, or the degradation of flora and fauna.

The Panel heard that Indigenous People should receive a fair share of benefits from the projects crossing their territories in the form of shared profits, community improvement projects and procurement partnerships, among others. Participants discussed the possibility that certain Indigenous communities give their assent to a project out of desperation to resolve poor living conditions. It was posited that many would not approve projects, many of which contradict the rules imparted on them by their ancestors, were there other means of subsistence available to them.

THEME: Public Participation

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The Panel heard of the need for fair, transparent and balanced participation. The unfair turn

of events of past consultations was decried, when the loudest or most violent participants seemed to hijack proceedings at the cost of others being heard.

Criticisms were raised as to the inability of the NEB to lead and coordinate effective and meaningful citizen engagement. The expert Panel heard of the need to scale public participation opportunities overall: participants believe that the degree of public participation should be commensurate with the importance of a project. It was noted that a variety of online tools can be leveraged to collect diverse Canadian perspectives.

Concerns were raised over open houses being an insufficient means of public consultation. With no written record, it is easier for proponents to make misleading statements and not be held to account for them.

The Panel was also told that while a hearing likely wouldn't be needed, small replacement and modification projects (i.e. a valve or pump replacement) should still require some form of public consultation.

The Panel heard that there should be public participation in the EA process. In addition, beyond project-specific review processes, there needs to be a forum for public deliberations on larger energy policy issues, as well as strategic and regional environmental assessments.

The Panel heard a call from some participants for the right to obtain a judicial review of NEB decisions at no unnecessary cost to the party seeking it.

Early Engagement

The Panel heard that before submitting a project application to the NEB, companies should already have begun engaging communities and modifying their project accordingly. The Panel also heard that the NEB itself could engage the public in early informal consultations, prior to beginning the project review process, in order to identify what information the public would like to be collected and presented to them. It was put forward that online tools may be particularly helpful in the early and continuing collection of diverse Canadian perspectives.

Project Hearings

The Panel heard that the EA and all official positions on a project, including those of the federal, provincial, territorial, municipal and Indigenous governments, the proponent and civil society groups, should be published on the NEB website, to provide hearing participants the opportunity to familiarize themselves with these views and cross-examine them, as necessary.

A participant further suggested that the Panel consider alternatives to the quasi-judicial hearing format such as "world café", community cartography and round tables. The Panel heard that hearings should also allow for written submissions, as well as audio and video

submissions, which would make the process more inclusive of those with difficulties reading or writing.

Participants voiced a desire to see the in-person hearing process become more welcoming and inclusive, suggesting it be inspired by the BAPE in Quebec. The BAPE implements a two-step consultation process whereby proponents present their project and answer questions from the public as a first step, following which the public can submit comments.

The quality of participation was also stressed, noting that it must be inclusive, transparent, and culturally sensitive. One participant emphasized the importance of letting communities determine which forms of participation are best suited to them –while some may appreciate hearings, others may not. Including communities earlier on in the project review process would result in more meaningful participation.

The Panel heard that the NEB should facilitate the participation of smaller entities in hearings, to encourage more decentralized decision making, including providing more time to register and simplifying the registration form. The Panel also heard that technologies such as video or audio calls can be leveraged to enable remote participation in NEB proceedings.

The Panel heard that the NEB should allow participants interested but not deemed to be “directly affected” to submit a letter without having to pass a standing test. This was allowed prior to the 2012 legislative changes that introduced the standing test. Some participants voiced their position that only those directly affected by a project should have standing. The Panel heard that there should be no standing test and that if thousands of people truly are interested in having standing, as some parties fear, it signals the importance of a project, and that they must be heard. One participant said that all Canadians are affected by energy projects as they ultimately impact the value of our dollar and the stability of our climate.

Participant Funding

Participants told the Panel that citizen groups require sufficient participant funding to offer their variety of opinions and expertise as part of the project review process. They said that unrestricted funding would enable the study of alternative scenarios, to ensure that the NEB and federal government are making informed decisions.

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n/a

ADDITIONAL COMMENTS

- One participant expressed disappointment that there was not a specific working document produced on the issues facing land owners.
- Some participants expressed their hope that the time they invested in this consultation process will have influence over the Panel’s recommendations, and ultimately the government’s actions.