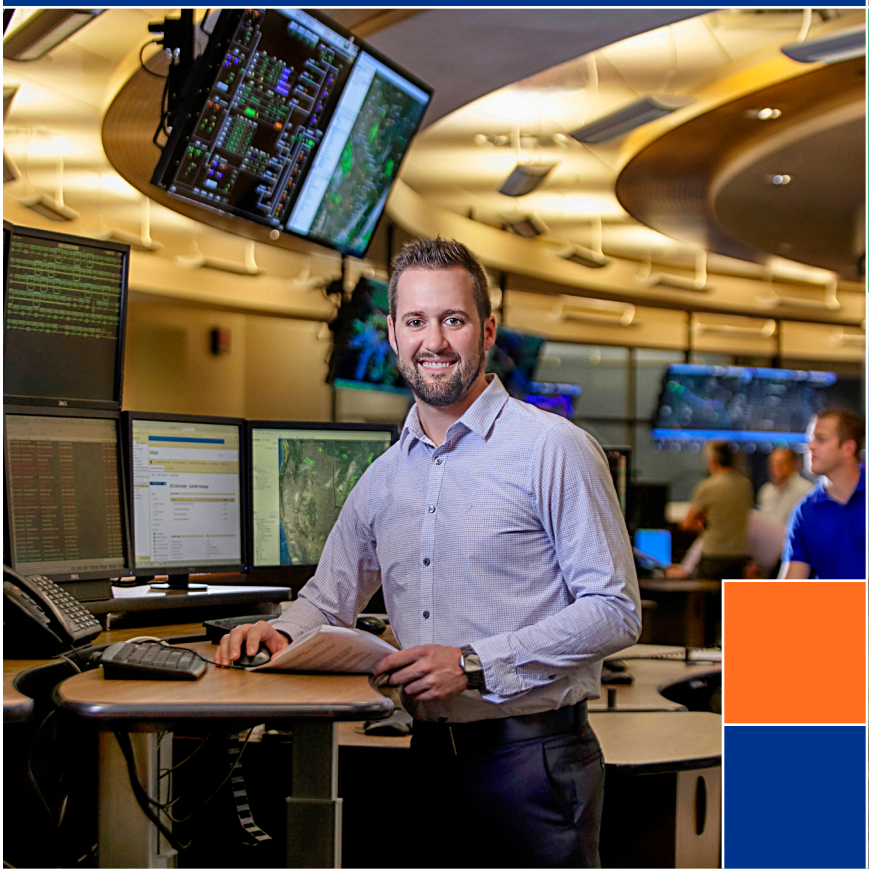
TransCanada Submission to the National Energy Board Modernization Expert Panel



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Introduction

TransCanada is pleased to provide the National Energy Board (NEB) Modernization Panel (the Panel) with this written submission to complement the presentation previously made in Edmonton on March 7, 2017.

TransCanada is one of North America's leading energy infrastructure companies. Our three core areas of business give us broad exposure to all aspects of the energy industry and the different geographies in which we operate including Canada, the United States and Mexico.

Our 90,300-kilometre network of natural gas pipelines supplies 27 per cent of the natural gas consumed daily across North America to heat and cool homes, run industries and generate power. This pipeline network strategically connects growing supply to key markets across our three operating geographies of Canada, the U.S. and Mexico. We also own and operate 664 billion cubic feet of natural gas storage capacity.

TransCanada owns or has interests in 17 power generation facilities with a capacity of 10,700 megawatts (MW) – enough to power more than 10 million homes. Over one-third of the power we provide is generated from emission-less sources including nuclear, hydro, wind and solar.

Our 4,300-kilometre (2,700 mile) Keystone Pipeline System transports approximately 20 per cent of western Canadian crude oil exports to key refineries in the U.S. Midwest and Gulf Coast, where it is converted into fuel and other useful petroleum products. Since it began operation in June 2010, Keystone has safely transported more than 1.3 billion barrels of crude oil from Canada to U.S. markets.

This broad exposure to the energy industry by sector and by geography provides TransCanada with a unique perspective on energy market dynamics as well as multiple regulatory models in varying jurisdictions. The NEB was founded at least partly out of the debates that led to the building of the TransCanada Mainline and TransCanada remains the largest pipeline operator in Canada. In this context TransCanada has more than 60 years of history with the NEB. In the last five years alone, TransCanada has submitted 88 *NEB Act* Section 58 applications and 8 Section 52 applications.

Background/Context

Canada's energy industry is a significant and material contributor to the overall Canadian economy. According to Natural Resources Canada (NRCan), Canada's energy industry was responsible for over 900,000 jobs in Canada in 2015 and energy accounted for 10.8% of Canada's total GDP. Canada's production of crude oil and natural gas was ranked fourth and fifth globally while exports of these same commodities ranked third and fourth respectively. In 2015, energy made up 21% of Canada's domestic merchandise exports and generated $22 billion for governments in Canada.[1] Despite the downturn in oil prices, energy remains a very important

[1] https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/energy/pdf/EnergyFactBook_2016_17_En.pdf

part of Canada's economy and will remain so for some time. Pipelines and transmission lines are a critical link between the production and consumption of energy.

The dramatic growth in gas and liquids production in North America over the past few years, spurred in part by technological advancements, has fundamentally reshaped the energy landscape in Canada and the U.S. New pipelines are needed to provide incremental take away capacity in areas of existing production and also in new production areas that have less established transmission infrastructure. Changes in the electricity sector due to the retirement of older generating plants and replacement by more modern generating capacity, also require investments in new power transmission lines. In other words, new infrastructure is not always about higher production levels. It is often also required as a result of shifting supply and demand dynamics and location.

Major energy transmission infrastructure generally requires significant capital investment and the resulting assets are often long lived. Major pipelines and transmission lines cost billions of dollars and can take years to move through regulatory adjudication and approval processes. The existing NEB regulatory review process, including the environmental assessment (EA) component, is one of the most rigorous and robust regulatory systems in the world. It is transparent, science- and evidence-based, allows for reasonable participation of directly affected parties (including landowners, communities and Indigenous groups), and is grounded in sound administrative law principles that have worked effectively for decades. In addition to the NEB review process, many components of energy projects are subject to comprehensive provincial, and local review and permitting processes. Few industries are under the high level of regulatory, public and political scrutiny faced today by major new pipeline and power transmission projects.

The process to secure regulatory approvals for new infrastructure has, however, become increasingly more complex and subject to uncertainty and ambiguity in substantive requirements, process and timelines than in the past. Increasing environmental expectations and standards, rapidly growing information requirements which are coming earlier and earlier in the process, expanding consultation expectations and the use of the regulatory process as a proxy for filling gaps in federal energy policy, are factors that have had a significant impact on the regulatory processes and timelines for review of proposed new facilities. These processes now take longer than ever before, cost significantly more to meaningfully progress, while resulting in a higher degree of uncertainty relating to expectations and requirements to ultimately secure approvals on reasonable, predicable terms and conditions.

The introduction of "interim measures" (adding more requirements to the review process and taking more time) and the instigation of a wholesale review of regulatory processes for federal pipelines have made the process of getting new pipeline infrastructure approved much less transparent and clear. The reviews themselves, and the manner in which the government has characterized their need, have cast doubt on the legitimacy of the NEB's processes (including Indigenous consultations) creating the opportunity for additional court challenges to the regulatory review process and the decisions rendered through that process. The regulatory process for new energy infrastructure under federal jurisdiction is now taking longer than ever with no obvious offsetting benefits.

This panel has been tasked to "modernize" the NEB and the processes by which it discharges its mandate and conducts its important work. Presumably, the result of any effort to modernize the NEB will improve the efficiency and effectiveness of the regulatory processes, bring greater clarity to the expectations of proponents and participants, and result in well-understood, well-defined and predictable timelines to reach a clear determination on proposed projects. Project proponents must be able to justify their large capital investment decisions and require regulatory process clarity and decision timing certainty to do so. Simply put, if the risks associated with regulatory processes prove to be too uncertain, too unmanageable and too unpredictable, companies may be reluctant to make the critical investments necessary to connect Canadian energy resources to markets.

One task for this panel is to identify ways that the regulatory processes for energy infrastructure under federal jurisdiction can be improved so that project proponents have a very clear understanding of what is required to secure regulatory approvals and subsequently operate those assets efficiently and effectively while other parties with a direct and vested interest - and the Canadian public overall - have reasonable level of trust in the regulator, the process and the end results. If a proposed change to the NEB or its processes does not contribute to these outcomes, it should not be made.

While the NEB and its processes have evolved since it was established in 1959, there are certainly opportunities to improve the manner in which the NEB undertakes its core mandate. Like any organization, the NEB develops its own behavioral norms, culture, and decision-making processes. Over time, these must evolve to meet changing requirements.

Given that the Panel's terms of reference did not include specific criteria under which this review should be conducted, TransCanada recommends the Panel adopt the following guiding principles in drafting its report to the government. Any changes to the NEB, its supporting legislation and regulations or its processes should:

- Contribute to a positive investment climate for energy infrastructure;
- Improve the efficiency and effectiveness of regulatory processes;
- Enhance the transparency of regulatory processes including predictability of timing; and
- Contribute to all parties viewing the result of the processes with confidence and credibility.

TransCanada notes that some parties to this Panel's review have proposed changes that would result in radical shifts from the current regulatory model. TransCanada suggests that the Panel carefully consider the potential impact of these suggestions on the overall work undertaken by the NEB.

For example, some parties have suggested (though admittedly not with much detail) complex, multi-stakeholder decision-making models. While these have the superficial attraction of increasing inclusiveness, the track record for such processes in Canada has not been very positive. Multiple consultation processes (whether in parallel or in sequence) significantly increase the complexity and regulatory risk and invariably add to the time required. For example, Joint Reviews Panels under the Canadian Environmental Assessment Act have a dismal record of protracted reviews and poorly defined mandates. The Mackenzie Gas Project hearing process

was an example of regulatory decision-making that took so long that the project was overtaken by broader market changes and, despite eventual approval, was not completed. There are ways to engage multiple stakeholders without unnecessarily increasing the complexity of the decision-making process, which we discuss at various points throughout this submission.

Other parties have suggested that the complex, technical nature of pipeline reviews makes it challenging for a lay person to understand and critically review the information. Pipeline applications are, however, technically complex; that is their nature. The NEB is a quasi-judicial, independent, expert regulatory tribunal. Much of the information it deals with relates to engineering, the environment, and finance and economics. The NEB was specifically established and resourced to undertake complex and technical reviews. They have the necessary expert staff that support Board Members in decision making. There is no practical manner to change the fundamental nature of the process, recognizing that the review of pipeline applications is complex and technical. There may be opportunities to enhance public participation, but not by altering the core process.

A few presenters to the Panel have suggested that the NEB is unduly influenced by the energy industry, partly because of its proximity to the hub of energy industry activity and partly because it draws staff from that industry. The basis for these comments is the suggestion that NEB staff (and Board Members) can't be trusted to act in the broad public interest. This suggestion is clearly unfounded. Proximity does not equate to bias. Further, given the technical nature of the work undertaken by the NEB, it is inevitable that it will draw on staff with industry experience, there is no other practical option. The Panel should therefore be wary of such bias claims.

The remainder of this submission deals with the issues raised in the Panel's Discussion Papers.

National Energy Board Governance

The NEB is an independent quasi-judicial tribunal charged with making decisions in the public interest about the safe and efficient operation of energy infrastructure in Canada. The NEB is comprised of up to nine permanent Board Members who are appointed by the Governor in Council (GIC) on recommendation of the Minister of Natural Resources. Permanent Board Members serve a fixed term of seven years and are eligible for re-appointment for a term of seven years or less. Board members are supported by nearly 500 expert staff drawn from across a range of functional expertise that supports the Board's core mandates.

It is TransCanada's view that the NEB should remain independent and at arm's length from the Federal Government. This recommendation has important implications for the Board's governance. The closer the NEB is to the government, the higher the risk that the decision-making process will remain politicized. It will be challenging for the NEB to maintain credibility if it does not have decision-making independence from the federal government.

TransCanada recommends that current Board Members should become Hearing Commissioners with no accountabilities for the day to day management of the NEB and a sole focus on adjudicating applications before the NEB. In order to focus the Board members on their adjudicative function and provide a greater role for staff to address operational matters,

TransCanada recommends that the current Board Chair should become Chief Commissioner and the other Board members should become Hearing Commissioners that report to the Chief Commissioner. In this way the Hearing Commissioners can focus on decision making that is suited to their broad areas of expertise and determining the public interest and staff can focus on their areas of specific technical and managerial expertise.

Discussion Questions:

1. *What are appropriate requirements for Board Members (particularly regarding composition, expertise, regional representation, and Indigenous representation)?*

   TransCanada recommends that the skill requirements for Board Members be expressed in a skill "matrix" which identifies those functional skills and experiences that would best support selection of qualified Board Members.

   Hearing Commissioners (HC) must have generalized knowledge of the energy industry in Canada and have one or more of the key skills or areas of expertise needed to effectively adjudicate regulatory applications before the NEB. Core skills would include law, engineering, economics, environmental science and Indigenous historic and cultural knowledge. This skill matrix can be updated periodically to reflect changes in skill requirements as required. In addition, for HCs that have deficiencies in core skills, mandatory training in those areas should be required.

2. *Where should NEB Board Members be located and why?*

   TransCanada recommends that Hearing Commissioners be located anywhere in Canada and not be restricted to the region where the NEB is located (in this case Calgary). This would both increase the pool of potential Hearing Commissioners and assist in getting an appropriate geographic balance.

   Given available communications and collaboration technologies, it is increasingly practical for people to work remotely from their official offices. Given that TransCanada is recommending that many operational matters be delegated to Board Staff (addressed in question 6 below), there is less need for Hearing Commissioners to be co-located with the staff. Major new facility applications are typically adjudicated through oral hearings which are held in the proximity of those new facilities, further decreasing the need for Hearing Commissioners to be located in a specific location.

3. *Where should the NEB be located and why?*

   TransCanada recommends that the NEB remain in Calgary and that the Chief Commissioner and majority of the Board's staff be located in Calgary.

   The NEB is a full lifecycle regulator for the infrastructure under its jurisdiction. The majority of the Board's activities involve this lifecycle oversight (both financial and operational). This

oversight requires frequent interaction between the NEB and the companies it regulates. These interactions between pipeline companies and the NEB allow both companies and the NEB to remain current with respect to technology and the implementation of best practices. To facilitate its independence, the NEB headquarters (including most staff and the Chief Commissioner) should not be in Ottawa. Calgary remains the most sensible location given the concentration of energy industry stakeholders and the myriad of companies that support the energy industry (e.g. legal firms, consulting companies and contractors). This is clearly the most efficient alternative.

In addition, the practical exercise of relocating the NEB from its current location in Calgary would have a massive impact on the ability of the NEB to carry on its mandate. When the NEB relocated to Calgary in the early 1990s, a significant percentage of staff decided to remain in Ottawa. If the NEB left Calgary, the same loss of skills would occur. The result would be devastating to the NEB's ability to deliver on its mandate over a several year period as it rebuilds the needed expertise.

The NEB has recently opened satellite offices in Vancouver and Montreal. Perhaps increasing the number of satellite offices to more fully reflect the geographic spread of the Board's activities would enhance its public presence.

4. *What are your views with respect to the Chair of the Board also being the NEB's CEO?*

TransCanada recommends that good governance practices suggest that the roles of Board Chair and CEO be split. Both are important roles but with a different focus and skill set. TransCanada therefore recommends that the NEB appoint a CEO who would report to the Chief Commissioner and have day-to-day oversight of the NEB staff and organization.

5. *How should the Government of Canada provide the NEB with policy direction? What should be the role of the NEB in implementing Government policies and priorities?*

In order to retain its core mandate as a quasi-judicial independent regulator, the NEB must not be directly involved in the creation of public policy that relates to the national interest – that must remain vested with the federal government.

It is TransCanada's view that the NEB should continue to operate under the umbrella of government policy but should retain authority for decision-making on individual regulatory applications. Policy itself must be imbedded in legislation and regulations so that there is no ambiguity as to the policy intent.

However, it is will be important for the government to clearly articulate its policy goals and long-term vision for the development of national energy infrastructure, Indigenous consultation and environmental assessment so that the NEB can effectively carry out its mandate as an arms-length regulator. Further, if the NEB is to return to being the sole decision-maker on major infrastructure projects under its jurisdiction (see Decision-Making Roles on Projects later in this submission, such policy direction becomes even more important to ensure that policy debates don't re-enter the regulatory forum. It is not appropriate to debate national policy in the context of a single project proposal.

6. *What NEB decisions, recommendations or functions should be delegated to Board Members? To NEB staff?*

   As noted earlier, the Board's activities include adjudication of matters under the *NEB Act* as well as a full slate of activities related to the lifecycle regulation. In many cases, these matters are technically complex (e.g. some operational and highly technical matters, audits, inspections, etc.) and could be more effectively and efficiently handled by the NEB's professional technical staff who are versed in the strict and consistent interpretation of the codes and regulations that govern the industry it oversees.

   TransCanada recommends that the role of Hearing Commissioners described above should be limited to adjudication of regulatory decisions as described in the *NEB Act*. TransCanada further recommends that the role of NEB staff should be expanded to include delegated responsibility for dealing with routine matters which do not require adjudication and are of a highly technical nature.

   A critical element of this delegation would be ensuring that staff decisions were consistent and grounded in established policies and procedures.

Mandate and Regulatory Framework of the NEB

TransCanada recommends the NEB remain the independent, single, full life-cycle regulator for federally regulated pipelines and interprovincial and international electrical transmission lines. TransCanada further recommends that the environmental assessment process for pipelines and transmission lines under federal jurisdiction remain the sole accountability of the NEB albeit under common guidelines established by the federal government. By maintaining a single best placed regulator with the ability to address as much of the permitting needs for a pipeline project as possible, the inefficiencies associated with fractured and duplicative regulatory regimes can hopefully be avoided.[2]

The NEB's primary role is as an independent federal, quasi-judicial regulator of pipelines and electricity transmission lines that cross inter-provincial or international borders. The Board currently also has additional responsibilities related to development of oil and gas and on certain federal lands and also has an informational and advisory role.

The Board has a legislated mandate to regulate in the Canadian public interest. It must factor economic, environmental and social considerations into its decision-making process. The NEB also regulates over the complete lifecycle of a pipeline project (from design through to abandonment) using a wide variety of enforcement tools and activities.

This mandate has several important implications. First, there is no alternative regulatory body for interprovincial or international pipelines and transmission lines – the NEB is uniquely charged

[2] TransCanada has experienced delays on various projects where there are multiple regulatory agencies involved without adequate coordination. Having the various aspects of regulation and permitting consolidated in a single best placed regulator provides a better model for efficiency but also provides greater ability to see across all aspects of a project and monitor for appropriate outcomes in the regulatory process.

with and must be positioned to fulfil this role. Second, the Board and its staff must have, and over the past 60 plus years has developed, the expertise required in all areas to undertake the full life cycle of regulation. Third, there are significant economies of scale in this life cycle regulation as they relate to matters such as Indigenous and stakeholder consultations, adaptive management systems for environmental and engineering requirements, and the ongoing monitoring for the safety and integrity of energy infrastructure. In this case, economies mean having a single agency address all related aspects of required oversight through a single staff that sees the whole picture rather than fracturing responsibility and spreading it across multiple agencies. In addition, a single regulator reduces the risk of potential inconsistencies in regulatory outcomes. Finally, it is essential that the NEB retain its independent status from government to remain credible and to allow for timely and consistent decision making.

What the NEB is not now, and should not become, is a regulator for either the production or consumption of energy, aside from its existing role in regulating oil and gas production on certain federal lands. The production and consumption of energy is generally done under provincial jurisdiction. This point is important in weighing recommendations from some participants in this panel's consultation process who are suggesting that the NEB serve as a vehicle for the federal government's energy and climate policies. The NEB is not well positioned to serve this policy extension function and doing so would erode the ability of the NEB to fulfil its primary mandate.

In this context, the recent NEB processes for some major pipeline projects have been co-opted by parties seeking to use it as a forum to advance agendas on broad energy and climate change policies and perspectives that properly belong in the political or legislative arenas. It has not historically been, and should not in the future, be the NEB's role to consider, or adjudicate debate on and ultimately establish, broad energy or environmental policy. The NEB should follow clearly-established government policy and not be used to independently create or establish policy. To ensure the NEB focusses on its core mandate, these policy debates must be clearly excluded from the regulatory review process. There has been agreement amongst many presenters to this panel that a more appropriate and timely forum for such policy discussion is desired, and that it should be implemented by the appropriate levels of government.

TransCanada notes that several presenters to this panel have recommended taking accountability for environmental assessments away from the NEB. TransCanada disagrees with this approach and suggests this perspective may be based on a misunderstanding of the current state of climate policy in Canada and the NEB's existing mandate. More specifically, TransCanada is of the view that this proposal suggests a misunderstanding of where climate policy can and should be managed.

While not explicitly stated, the rationale offered for stripping the NEB of the EA accountability seems to be related to a suggestion that federal EAs should include a climate change "test" that fundamentally shifts the definition of public interest differently from the existing balance of environmental, social and economic considerations, and that the NEB is not well positioned to perform such a test. TransCanada notes, however, the EAs undertaken by the NEB include consideration of the effects of climate on the project and the effects of the projects on climate, and this has been the case for many years.

Removing EA accountability from the NEB on those grounds is both ill-advised and unwarranted. First, determining the appropriate response to the challenge of climate change should and in fact is being addressed at the policy level, and not through the EA process related to any single proposed project. Canada and several provinces have already introduced specific climate change policy tools (e.g. federal carbon tax, Ontario's cap and trade, Alberta's carbon tax and oil sands emissions cap) in this respect.

Further, stripping the accountability for EAs from the NEB would also have farther-reaching implications for the operations of the NEB. EAs are inextricably linked to many of the NEB's life-cycle oversight activities, from the initial review for new facilities through eventual decommissioning and abandonment. The EAs that are developed for pipelines relate to all aspects of the construction and subsequent operation of a pipeline. The information developed for the EA in the NEB process informs decisions about routing, siting, construction standards and techniques, the assessment of the effects on Indigenous traditional land use and on the general public and, ultimately, development of mitigation strategies. The EA also provides the NEB with guidance for the conditions associated with the order or certificate that may require follow-up oversight of the NEB for years after a project is in service. Often, the mitigation strategies are season-specific and it is crucial to the protection of the environment, the land and even the livelihood of stakeholders and Indigenous peoples that there is timing certainty to the EA process in concert with the public interest decision. If the NEB did not itself conduct the EA, the timing of the EA and pipeline reviews would become disconnected, and it would either have to duplicate the process of gathering this information or become less effective at life cycle regulation – both undesirable outcomes.

It is inevitable that separating the EA process from the NEB review would introduce some level of duplication, make the process more complex than required, more time-consuming and subject to less certainty for proponents and interested stakeholders alike, with no clear and substantive benefits. Prior to the NEB being delegated with the EA process, there was significant overlap between the CEAA and NEB filing requirements requiring duplication of information. Based on TransCanada's experience in the regulatory framework where the EA process was mandated through the NEB filing requirements and through the CEAA requirements, it is TransCanada's opinion that a move away from consolidation of the EA process within the NEB would result in inefficient use of government resources, lack of clarity, ineffective process, misalignment with NEB's life cycle mandate, and degradation of certainty that is so important to economic growth.

Discussion Questions:

1. *What are your views on the NEB's existing mandate?*

   The NEB remains uniquely positioned to undertake the important mandate of providing regulatory oversight of pipeline and transmission line infrastructure under federal jurisdiction. TransCanada recommends that it is essential that the NEB retain this core mandate.

2. *Are there any areas over which the NEB's mandate should be changed?*

TransCanada recommends that other than re-examining the role the NEB has an informational or advisory capacity for energy data (discussed in the next section), the NEB's mandate should remain unchanged.

3. *Are there emerging areas for which the NEB's mandate should be expanded? If so, what are they?*

   TransCanada recommends no expansion to the NEB's mandate. In order for the NEB to stay focused on its important core mandate, it should not take on additional responsibilities. Specifically, any accountabilities related to the development and interpretation of climate change policy or the evolution to greener energy sources should not be added to the NEB's mandate. Such additions would distract the NEB from its core mandate and almost certainly continue to ensure that pipeline and energy transmission line regulation serves as a proxy for public policy debates that are better accomplished in other forums.

Energy Information, Reports, and Advice

The NEB's energy information function is not a core accountability of an independent, quasi-judicial regulator. It is TransCanada's understanding that this function was originally added to the NEB's mandate at a time when no other federal department provided such a function. However, energy information is now also managed by several respective government departments, including Natural Resources Canada (NRCan), Statistics Canada (StatsCan) and Environment and Climate Change Canada (ECCC).

As such, TransCanada recommends that the energy information and advisory function would be better placed with a separate agency similar to the US Energy Information Administration, which provides this service in the United States.

Discussion Questions:

1. *What energy information are you most interested in? Is there additional information that you would like to see collected and/or made publicly available by the NEB? How should the NEB engage the public to help determine priorities related to energy information and dissemination?*

   TransCanada recommends that the NEB's mandate be changed to remove the informational and advisory functions. The information and advisory functions may increase the potential for conflicts of interest given the Board adjudicative role and are better undertaken by a more policy oriented department such as NRCan.

2. *What format would be most useful to you in accessing and using energy information (e.g., raw statistics, graphs and infographics, short and frequent reports, longer detailed reports)?*

   To the extent that the NEB retains an information function, TransCanada would be most interested in accessing the data used for energy forecasts.

3. *What are the other major data sources you rely on to meet your energy information data needs?*

   TransCanada relies on a wide variety of information sources including academic studies, consultants, multi-stakeholder forums, research forums, government agencies and proprietary studies.

4. *Does Canada need energy information to be coordinated by one entity? If so, what entity would best serve in this role?*

   TransCanada's recommends that NRCan is best positioned to coordinate the collection and publication of energy data for Canada. The US Energy Information Administration is a possible model.

5. *Should the NEB have a role in GHG data collection given ECCC's existing mandate to do this? If so, what should the NEB's role be?*

   TransCanada recommends that the NEB should not have a role in GHG data collection as it would be duplicative and inefficient. The information collected by ECCC should be shared across all departments.

6. *What GHG data and analysis should the NEB publish regardless of who collects the data?*

   Although it is TransCanada's position that climate change policy matters should be undertaken within government departments, the NEB should be expected to take the project-specific GHG emission data and compare it against the policy objectives as it considers a project application to ensure that it aligns with the policy.

Decision-Making Roles on Projects

To prepare for Major Pipeline Project reviews, proponents can spend hundreds of millions of dollars to complete complex route-specific environmental and engineering assessments, finalize complicated commercial negotiations, secure shipper commitments, and conduct multi-year engagement with Indigenous groups, private landowners and other potentially directly affected stakeholders and communities. At the end of a lengthy and expensive process, there appears to be a growing and real risk that the application will be denied not on the basis of the technical or economic merits but because of a broader public policy concern or, in some instances, evolving political interest considerations. It is important to note that while the NEB has been criticized for being an "approval" agency, it is inconceivable that pipeline companies would put forward pipeline applications that have a very uncertain chance of being approved. As proponents of projects, it is imperative that we do our due diligence to ensure that the projects being put forward meet legal and regulatory requirements and the objective criteria for approval. The costs are too high to advance projects on the mere hope that they will be approved.

Prior to 2012, the NEB made conclusive determinations with regards to all types of pipeline and transmission line applications before it. The Governor in Council (GIC) could refuse approval for issuance of a Certificate of Public Convenience and Necessity on a Section 52 application

that had been approved by the NEB but could not independently approve an application that had been denied by the NEB. One of the key amendments to the *NEB Act* in 2012 was that final decision-making to approve or deny a project was to reside exclusively with the federal government. The NEB's present role is to carry out the environmental assessment and regulatory review process and provide a recommendation to the federal government.

The current major project regulatory review process involves extensive consultations with Indigenous groups and stakeholders as well as the preparation of very detailed application materials and submissions. This is followed by a hearing process that usually includes an oral component allowing for cross-examination of written submissions. Once the NEB has completed its review it either makes a decision (all matters except *NEB Act* section 52) or provides a Report that makes a recommendation to Governor in Council (GIC) on the project (for section 52 applications). The GIC can either agree or disagree with the findings in the NEB Report in making its decisions. For Section 52 applications, the GIC has its own largely unclear process for determining the adequacy of Crown consultation with Indigenous groups and then deciding whether a project should be approved. It is unclear in the sense that the process used by the GIC is not transparent to those outside the government and the final decision does not include detailed reasons, which creates challenges to informed investment decisions in the future.

Upon making its final decision, the government, through the Governor-in-Council, approves or denies a project and directs the NEB to issue a Certificate as applicable. While legislation suggests that the GIC determination be made within three months, the federal government has the ability to extend that timeframe indefinitely. It has become common practice for the GIC determination process to take six months for routine Section 52s. The result of this change in the final decision-making authority is that the regulatory risks and uncertainty for project proponents has changed from past practice, with the added potential for late political intervention at the very end of a lengthy and rigorous fact-based regulatory process.

Some have suggested that the NEB should no longer independently determine the public interest for major energy infrastructure projects and that this determination is best made by the government. However, this suggestion is premised on the idea that there are broader public policy considerations that will remain unresolved for the foreseeable future and the government must therefore intervene on all future major infrastructure decisions. This is not a reasonable conclusion for several reasons. First, the federal government has already been very active in regards to climate change matters and has begun the process of establishing a national, cross-jurisdictional approach to taking climate action. Second, there will realistically be a relatively small number of future energy projects under federal jurisdiction that would invoke public policy considerations beyond what the NEB normally considers in its public interest determination. In other words, the focus of regulatory reform should be on the more routine scenarios. If the routine scenarios are well managed and maintain public trust, then that platform can be leveraged in larger, more exceptional circumstances.

Note that prior to a handful of recent regulatory processes such as Northern Gateway, the Trans Mountain pipeline expansion and Energy East, there was virtually no debate on public policy matters relating to pipelines since the 1950s. Leaving the final decision to the government rather

than the NEB yields a decision that may be tainted by political expediencies rather than based on science and facts.

The logical conclusion is that the final decision-making approval for all energy infrastructure applications under federal jurisdiction should be returned to the NEB. With a clear policy framework in place, there is no reason why the NEB cannot have the same authority it had for the first 60 plus years of its existence as well as that accorded to analogous regulators in other jurisdictions. TransCanada would also note that the NEB was created, at least in part, because the government of the day did not want to have such decision-making politicized. They therefore created a quasi-judicial, independent expert regulatory tribunal that had the requisite expertise to oversee pipelines and transmission lines under federal jurisdiction. That process worked for more than half a century. It is not clear that the current, and likely temporary, elevated interest in pipelines warrants a change.

TransCanada recommends that final decision-making authority for all Section 52 applications should be returned to the NEB. The previous model of the GIC having the ability to veto an NEB decision could be retained if a final degree of political oversight was determined necessary to ensure projects were substantively consistent with established policy.

If, however, the federal government were to retain the final decision-making authority to approve or deny major infrastructure projects, TransCanada recommends the Panel adopt a two-part review process which separates out those factors that the federal government wishes to consider outside of the well-established public interest determination made by the NEB including a technical review of routing, engineering, detailed environmental and land matters. In a two-part review, the federal government would make its decision on the "national interest" (to differentiate from the public interest assessment made by the NEB itself) ahead of the more detailed technical review undertaken by the NEB and possibly subsume some aspects of the public interest determination made by the NEB. This two-part review essentially reverses the order of the current NEB/GIC determinations for major projects.

The issues that would be addressed in the first phase could include, among other matters:

- the extent to which the project was aligned with a national energy policy;
- overarching climate change considerations;
- the need for new infrastructure;
- regional or cumulative environmental, social and economic impacts;
- intra-jurisdictional matters such as between the federal and provincial governments; and
- Indigenous issues outside of those addressed through project-specific consultations.

It is likely that the array of stakeholders involved in this first phase would be broader than during the second phase given the subject matter being considered. The first step or phase should still follow a quasi-judicial process relying on science, facts and evidence that can be tested. TransCanada is the view that the first phase could be managed by either the Major Projects Management Office (MPMO) or a combination of the MPMO and the NEB (given the NEB's process experience). The outcome of the first step would be a recommendation report to the GIC. The GIC could approve or reject the report but would need to provide detailed reasoning for any rejection.

If the project is found to be in the "national interest", it would then proceed to a more detailed technical assessment in the second part of the review. As proposed, the first phase of the review would reduce uncertainty and investor risk by signaling whether a project should proceed to a detailed technical assessment before proponents invest significant resources, years of time and hundreds of millions of dollars developing technical proposals and participating in multi-year regulatory reviews. Put another way, any major political or policy hurdles would be known, clearly identified and addressed before a proponent went through the more detailed, comprehensive and expensive NEB assessment. TransCanada notes though that these considerations would only be made to the most significant new infrastructure proposals and would not include all Section 52 applications, most of which do not invoke potentially broader policy considerations.

The issues reviewed in the first part would generally not be reconsidered in the more detailed second part (recognizing that some issues, such as environmental impacts, would be explored at a broad level in part one and a more detailed level in part two).

The second part of the two-part process would be a project regulatory review that would be a thorough examination of the technical aspects of a project. This would include a detailed environmental and socio-economic assessment, together with the detailed technical assessment of the engineering and design and detailed routing and siting. The project assessment would also consider project-specific mitigation to address routing considerations raised by landowners, Indigenous groups and other stakeholders directly impacted by the proposed project. Part two would assess *how* a project could proceed and which conditions would need to be applied to mitigate or enhance expected environmental, social and economic impacts from the project. The assessment in this part would be based on well-established scientific and engineering principles that would typically be of interest to a narrower group of stakeholders who are directly affected by the project.

TransCanada suggests that as further clarity is achieved on Canada's energy and climate strategies and initiatives, the first phase of the project is likely to take less time and be less involved. If the policy matters were substantially resolved, there would likely not be a need to hold a first phase at all. The recommendation for a two-part review process simply acknowledges that there are currently policy gaps that are being debated in the context of major energy infrastructure project reviews. The two-part review process itself does not fill these policy gaps but rather, provides a more appropriate forum to discuss where individual projects fit into broader policy considerations while at the same time reducing capital risk for project proponents due to uncertain regulatory processes.

As noted earlier, TransCanada is proposing that the two-part review would only apply to the largest pipeline projects that, due to the nature of their scale, raise public policy issues of national concern. TransCanada is not proposing that this two-part review process be implemented beyond the transmission pipeline context nor is it proposing that all NEB regulated pipeline projects be subject to a two-part review process. Smaller projects, whether under provincial or federal jurisdiction including many Section 52 applications, do not necessarily involve issues of national concern. For those projects, the current review process within the NEB is working effectively. In essence, these projects would default to a version of the second part of the two-part review.

Finally, TransCanada recognizes that the determination of national interest under the first phase of the two-part review may need to be modified or augmented in circumstances where Aboriginal title has been or is about to be established.

Discussion Questions:

1. *What principles should determine who should make the final decisions for the following projects and why:*
    a. *Major international and interprovincial pipeline projects (i.e., greater than 40 km in length)?*

        TransCanada recommends that the principles that should guide final decision-making for major pipelines follow those that had been in place prior to the changes to the NEB Act made in 2012. That is, that the final decision-making should be delegated to a quasi-judicial, independent regulatory tribunal with the necessary processes, experience and knowledge as embodied by the NEB. If GIC is to retain final decision-making authority, TransCanada recommends the adoption of the two-part review process outlined above and that it be limited to only pipeline projects that are subject to review under s.52 of the NEB Act and exceed 200 km in length with more than 75% new right of way. This would effectively create a subcategory of s.52 application for major pipeline projects.

    b. *Smaller international and interprovincial pipeline projects (i.e., 40 km in length or less)?*

        TransCanada recommends that the principles that currently govern the delegation of all smaller pipeline projects (i.e. Section 58s) under federal jurisdiction to the NEB remain valid. Therefore, the NEB should retain complete decision-making authority over Section 58 applications.

    c. *International and designated interprovincial power line projects?*

        See (1a) above.

    d. *Import and export licences?*

        See (1a) above.

2. *What is the role of government policy in guiding NEB oversight and decision making?*
    a. *As the lead Minister of the Crown, is there a role for the Minister of Natural Resources to clarify policy outcomes that are expected?*

        TransCanada recommends that it is the role of government to establish the policy under which the NEB makes decisions and then allow it to make these decisions without any further interference. In practice this requires policy direction to be embedded in legislation and regulations. The Minister of Natural Resources should play a lead role in establishing policies that help guide NEB decision-making but should not be directly involved in any decision-making undertaken by the NEB itself.

b. *How should the NEB incorporate and reflect "whole of government" policy direction, such as the new Federal Sustainable Development Strategy for Canada and Canada's Mid-Century Long-Term Low-Greenhouse Gas Development Strategy, when setting out hearing orders, lists of issues, and ultimately, recommended decisions and conditions?*

   See (2a) above. The government could incorporate into the NEB Act, specific additional factors to be considered in project reviews. In addition, the NEB should act as the lead agency in reviewing new facility applications to ensure that other federal permitting authorities cannot subsequently refuse to grant appropriate and necessary permits.

3. *What are your views with respect to the role(s) of other parties in the final decision-making process, such as Indigenous groups, provinces/territories or municipalities?*
   a. *Do you see an enhanced role for some or all of these parties? If so, please describe what these roles should be for each, with a short rationale for why.*

      TransCanada recommends that no joint-decision approach is appropriate or necessary. The NEB is a quasi-judicial, independent regulatory tribunal. Board Members (or Hearing Commissioners) are vested with the necessary authority and resources to make reasoned decisions based on science, facts and evidence. It is not clear to TransCanada that the decision-making model is flawed, especially given generally clear delineation of federal jurisdiction over infrastructure regulated by the NEB. Joint decision-making processes are inherently more complex and lengthy.

4. *What are your views with respect to the current three options available to the GIC when making its decision for pipelines greater than 40 km in length? What can be improved?*

   See section on "Decision Making Roles on Projects". TransCanada reiterates its recommendation that final decision-making authority be returned to the NEB for all pipeline projects.

5. *What are your views with regard to the legislated timelines for project reviews (i.e., 15 months for NEB recommendation and 3 months for a GIC decision)?*

   The legislated timelines included in the *NEB Act* only reflect the time taken by the NEB and GIC to complete their regulatory assessments. Project proponents can spend several years in advance of submitting an application undertaking consultations with all types of stakeholders and Indigenous peoples as well as complex commercial negotiations and detailed engineering and environmental studies. When making investment decisions, consideration is also given to the timelines and cost to comply with certain regulatory approval conditions prior to construction and to obtain the required ancillary permits.

   It is TransCanada's view that the timelines for regulatory reviews should be more flexible based on the scale and scope of the project. Section 58s should be limited to a maximum of nine months with simpler projects taking even less time. Larger projects could range from 12 to 24 months (assuming NEB was provided with final decision-making authority and GIC

was given an absolute maximum of an additional 3 months to exercise its veto). The timelines should be known at the beginning of the process for any project. In addition, the criteria for completeness determinations and timeouts can extend regulatory processes. The criteria for completeness should be well articulated and the criterial for timeouts should be well understood and kept to narrow and specific informational deficiencies. Information gaps that might lead to timeouts should be identified and discussed with proponents early in the process.

6. *What are your views with respect to NEB's discretion to hold hearings for export licences?*

   TransCanada recommends that the process for export licences remain streamlined and the NEB exercise its discretion as to whether a formal process is required in every instance.

7. *In determining whether an export licence should be issued, what are your views with respect to NEB's obligation to only consider whether the exports would be a surplus to Canadian requirements?*

   TransCanada does not recommend any change to the current process.

8. *What are your views with regard to the land acquisition process and dispute resolution? What are your views with respect to the responsibility of the pipeline company to negotiate with landowners regarding the amount of compensation?*

   See section below on "Land Acquisition and Compensation".

Determining the Canadian Public Interest

In the Panel's Discussion Paper on the public interest, the following is stated:

> "The Canadian public interest is not explicitly defined in the NEB Act. However, the NEB has described the public interest in the following terms: "The public interest is inclusive of all Canadians and refers to a balance of economic, environmental and social interests that change as society's values and preferences evolve over time." The NEB is responsible for estimating the overall public good a project may create and its potential negative aspects, weighing its various impacts, and making a decision or recommendation based on those considerations."

In addition, the NEB Act includes guidance for the NEB as follows:

> 52(2) In making its recommendation, the Board shall have regard to all considerations that appear to it to be directly related to the pipeline and to be relevant, and may have regard to the following:
>
> a) the availability of oil, gas or any other commodity to the pipeline;
> b) the existence of markets, actual or potential;
> c) the economic feasibility of the pipeline;
> d) the financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity to participate in the financing, engineering and construction of the pipeline; and

e) any public interest that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application.

The determination of whether a project is in the Canadian public interest must inherently include a balance of economic, environmental and social factors and that this balance will evolve over time to reflect societal norms and values. Long, linear projects such as pipelines may pose more of a challenge in this regard than a more localized project. This arises both from the much larger area traversed by linear projects, and the larger number of groups potentially affected, and also by the fact that the economic benefits are not necessarily regionally balanced against potential environmental and social impacts.

The unique characteristics of long, linear projects require a flexible approach to the public interest determination. TransCanada therefore suggests that the current approach of using a broad definition of public interest and giving the NEB the discretion to apply this broad definition in the case of infrastructure applications remains the most effective and efficient way of achieving a reasonable outcome. To the extent that the federal government believes that there are common factors that should be considered in determining the public interest for all pipelines, these can be included in Section 52(2) as listed above. However, the more detailed the definition of public interest, the more challenging it becomes to apply the definition across a range of projects of differing scales and issues.

It is TransCanada's view that the NEB's reasons for decision must include a discussion of how the Board considered the information relating to the public interest and how it weighed the different factors. This way people with conflicting views will be able to see how their own interests have been reflected in a decision, even if in the end, it was not the interest that was determinative of the outcome.

Discussion Questions:

1. *What does the 'Canadian public interest' mean to you?*

   A reasoned balance of economic, environmental and social factors. Specifically, the economic benefits for a specific project must be balanced against the potential social and environmental impacts created by the construction and ongoing operations.

2. *What factors should be taken into account when determining whether a pipeline or power line project is in the 'public interest'?*

   See response to (1) above.

3. *For factors that fall within the jurisdiction of provinces and territories, such as land use planning, should the federal government and agencies take these into account in their public interest determination? If so, how?*

   Yes. To the extent that other jurisdictions have regulations, guidelines or planning processes that may influence the route or siting of a project under NEB jurisdiction, these jurisdictions should participate in the NEB process and ensure the NEB is aware of such requirements. However, the fact that there are provincial or municipal requirements should not be

determinative in the NEB's decision making process. To the extent that provincial or municipal requirements are incompatible with a pipeline that would otherwise be considered to be in the Canadian public interest, the federal (NEB) requirement should be found to be paramount.

Safety and Environmental Protection

TransCanada's safety and environmental stewardship starts well before TransCanada commences construction. This stewardship begins with compliance with the NEB's Onshore Pipeline Regulation requirements for management systems and an environmental protection program. TransCanada uses only high-quality materials, the latest proven technology and industry-leading practices to ensure the integrity of its pipelines begins before they go in the ground.

During construction, TransCanada requires every weld to be inspected by qualified independent inspectors and we use radiography and automated ultrasonic testing techniques to check for irregularities before our pipelines go into service. Qualified inspection personnel visually inspect every phase of the construction process to ensure compliance with company and regulatory standards and specifications. TransCanada takes significant steps to prevent and minimize the chances of a pipeline leak and detect irregularities both before beginning transportation service and during operations.

TransCanada uses state-of-the-art leak-detection systems, safety features such as shut-off valves and highly specialized training for people working on our assets from the construction process to operations. During operations, the pipelines are monitored 24 hours per day, seven days per week by a state-of-the-art oil or gas control centre. This dedication to safety is practiced at every level of the organization, making us confident our infrastructure will continue to operate safely and any possible defects will be identified immediately and responded to accordingly.

Along with these safety practices, TransCanada invested more than $1 billion in integrity and preventive maintenance programs in 2015 and 2016 alone to ensure safe and reliable operations of our pipeline systems. TransCanada will continue to invest in new technologies and maintenance to ensure our pipelines operate safely and reliably.

TransCanada has a number of programs to monitor the integrity of the pipeline, including:

- Public and landowner awareness programs – We support numerous programs designed to encourage and facilitate the reporting of suspected leaks and events that may suggest a threat to the integrity of the pipeline. We also work closely with industry associations to educate the public on using www.clickbeforeyoudig.com, 811 "Call Before You Dig" and other one-call systems in the jurisdictions where we operate.
- Aerial patrols – We regularly inspect the pipeline route from low-flying helicopters and airplanes. The pilots look for hazards to the pipeline from outside sources (e.g., unauthorized activity, soil disturbances) that could affect the integrity of our pipeline system.
- Aerial leak surveys – In addition to the visual inspections noted above,

TransCanada pilots perform scheduled aerial leak detection surveys on the natural gas pipelines using sensitive detection equipment mounted on the aircraft.

- Geotechnical monitoring – TransCanada's pipelines cross more than 10,000 bodies of water and significant slopes. All of these are monitored for erosion and movement during aerial patrol.

Particularly active slopes and streams are monitored more thoroughly through a variety of survey techniques.

- Depth-of-cover surveys – TransCanada investigates areas where we suspect wind or water erosion may have reduced the depth of ground cover over our pipelines to ensure pipe integrity.
- In-line inspection – In-line inspection, also referred to as 'pigging,' looks for any locations where corrosion and other anomalies may have occurred. Specialized internal inspection devices called 'smart pigs' travel through the pipeline collecting data. The data is then analyzed to determine if there are areas of concern requiring further investigation.
- Investigative digs – TransCanada conducts investigative digs based on the data analysis from pigging and other information. Sections of pipeline are excavated to investigate their condition and to ensure integrity. Detailed engineering assessments are used to determine if and when repairs are required.

A key component of TransCanada's company-wide strategy to make health, safety and environment a top-of-mind and around-the-clock value is our commitment to fostering a robust and positive safety culture. By continually modelling and reinforcing a strong safety culture, along with effective processes and systems, we strive towards our 'zero is real' goal as we won't be satisfied with anything less than a zero-incident workplace.

As another element of its commitment to safety and environmental protection, TransCanada is fully committed to the Integrity First program introduced by the Canadian Energy Pipelines Association (CEPA), the industry organization for transmission pipelines. This industry-led program is designed to improve CEPA members' performance. The program brings the industry together to collaborate and challenge each other's practices, going beyond regulation and demonstrating a commitment to continuous improvement throughout the life cycle of the pipeline.

Integrity First is a condition of CEPA membership. All 12 member companies are committed to the initiative and to implementing Integrity First into their own operations. Through Integrity First, the industry is working together to define and implement leading practices to continuously improve industry performance in three key areas:

- Pipeline Safety
- Environmental Protection
- Socio-economics

Integrity First is not a response to current regulatory requirements, but a proactive approach by the pipeline industry to demonstrate its accountability and transparency to Canadians.

Discussion Questions:

1. *What are your views with respect to the existing compliance and enforcement tools available to the NEB for safety and environmental protection?*
    a. *What are your views as to adherence to these tools?*

        It is TransCanada's view that the NEB's existing compliance and enforcement tools give it the ability to respond to any issues that may arise in relation to safety and environmental protection

    b. *What are your views as to the current use of these tools to advance risk management and any barriers or remedies that would enhance safety?*

        The advancement of risk management and any barriers or remedies that would enhance safety are most effectively implemented during collaborative discussions between the regulator and industry on best practices and solution development to safety issues and concerns.

    c. *What are your views as to the safety and environmental performance reporting that is currently done and areas for improvement?*

        Reflective and meaningful safety and environmental performance metrics should include both leading and lagging indicators, address the areas of greatest environmental risk and uncertainty for the regulated community and reflect the environmental components that are assessed in environmental assessment processes. Arguably, if aligned in this manner, safety and environmental performance metrics would be those elements of greatest stakeholder and Indigenous concern and reflect the general principles that underpin the public interest.

    d. *Can the process by which the NEB evaluates compliance and adherence to conditions be made more efficient? If so, how?*

        Yes, compliance processes could be made more efficient by ensuring that staff are current with industry standard practices. This would allow for more efficient and effective evaluation of environmental performance.

2. *Are there additional initiatives the NEB could undertake to help promote a positive culture for safety and environmental protection?*

    A positive culture for safety and environmental protection cannot be prescribed by regulation. However, TransCanada suggests that a positive culture could be reinforced through an increased focus on outcomes and clarity on performance expectations. As noted above, TransCanada imbeds safety culture from the very top of our organization through every employee. It is the ongoing commitment from senior leadership, reinforced through internal management systems and processes which fosters a safety culture. TransCanada's Environment Strategy presents a framework of stewardship, protection and performance.

3. *What are your views on monitoring committees?*

   TransCanada does not support monitoring "committees" for pipelines projects. Environmental monitoring should be science-based and data collected or monitored must be relevant to answering specific environmental performance questions (e.g. were predictions accurate and mitigation effective). At the same time, changes in the detection and trending of an ecological response to a disturbance requires consistent methodology and parameters to facilitate comparability. It may be challenging to maintain the appropriate focus of a committee of the purpose and intended outcome.

Emergency Prevention, Preparedness and Response: Tools and Requirements

In the unlikely event that an incident was to occur, TransCanada's pipelines have site-specific Emergency Response Plans (ERPs) in place, developed in collaboration with local emergency responders, to guarantee a quick response. These plans require regulatory approval and are supported by an Incident Command System that outlines procedures to protect the public, emergency responders, property and the environment. These plans are tested in a series of annual emergency response drills and exercises.

Through robust emergency management programs, emergency preparedness and emergency response, TransCanada strives to ensure a quick and appropriate response to emergencies on any of our assets. In the event of any emergency, our goal is to ensure an effective, co-ordinated response to contain and control any incident in order to minimize harm to people, property, company operations, and the environment. Our system is documented and tested regularly through annual exercises involving both our employees and the community. By working with our communities, TransCanada builds relationships with local fire-responders and other community officials, informing each other of emergency response strategies and gaining an understanding of each other's roles and responsibilities.

TransCanada strives to continuously improve our emergency response programs by developing complex exercises to test emergency management procedures and by training staff in effective emergency response. The Emergency Management Program provides a consistent and comprehensive approach to emergency preparedness and response within TransCanada.

The Emergency Management Corporate Program Manual was developed in accordance with the NEB Onshore Pipeline Regulations (SOR/99-294), the CSA Z662-11, and Z731-03 standards, and the Department of Transportation Pipeline and Hazardous Materials Safety Administration 49 CFR Parts 192, 194 and 195 Regulations.

Site specific ERPs are created for all head, regional and facilities offices as well as power facilities, hydro dams, gas storage facilities, compressor stations and metering stations, or any other areas deemed sensitive that our pipelines may cross or be adjacent to. The plans are reviewed annually, and an emergency event analysis is completed and updated if there is a significant change in the business practices or facility. Emergency Preparedness Training Emergency preparedness training provides participants with a clear chain of command: efficient and accurate communications, strategic thinking and informed decision-making. TransCanada conducted more than 125 emergency drills and exercises across our entire network of assets in

2015. These simulations allow company personnel and external agencies to put into practice the skills acquired through training.

Discussion Questions:

1. *In your opinion, are the existing emergency preparedness and response tools and requirements sufficient? If not, what additional tools or requirements are needed?*

   TransCanada believes that the existing emergency preparedness and response tools are sufficient. TransCanada notes that the NEB has recently introduced new requirements, including communication requirements. To better allow for operators to plan for these changing requirements, it would be helpful if the board communicated a multi-year strategy related to these requirement changes including key activities and associated timelines.

2. *What are your views with respect to the absolute liability limits that should apply regardless of whether a pipeline release was the company's fault (particularly $1 billion for major oil pipeline companies)?*

   TransCanada supports the recent implementation of the Pipeline Safety Act (which outlines the liability limits).

3. *In addition to information the NEB currently makes public about compliance and enforcement, is there additional information that should be made available over the lifecycle of a regulated project? If so, what?*

   The current information provided by the NEB about compliance and enforcement is appropriate. However, TransCanada recommends that a higher level of transparency would be achieved if the NEB's online document repository was easier to search and navigate.

Indigenous Engagement and Consultation

TransCanada recognizes and respects the legal and constitutional rights of Canada's Indigenous people, including the right to use land for the pursuit of hunting, fishing and gathering. TransCanada has invested significant time and resources to build and sustain positive relationships with Indigenous groups whose Aboriginal and treaty rights are potentially affected by existing and proposed pipeline operations. These relationships and associated pipeline projects have resulted in significant and tangible benefits to many Indigenous groups through increased training, education, and employment, as well as through procurement, construction, and other business and financial opportunities.

TransCanada is committed to engaging in meaningful consultation with Indigenous groups who may be affected by our pipeline projects. We work to avoid or mitigate any effects to Aboriginal and treaty rights and aim to obtain the support of affected Indigenous groups where possible. This engagement with Indigenous groups is a key part of project reviews at the NEB. However, often issues that are beyond the scope of a project are brought into the discussion for lack of an appropriate alternative forum. The hearing process is not designed or equipped to address these kinds of concerns and as a result both proponents and Indigenous groups become frustrated and delay is often the result. Such delays create significant uncertainty for proponents and investors.

As is more fully described below, an alternative forum should be established for these Nation-to-Nation discussions so that project reviews can focus on the issues associated with the project itself. By having separate processes and more clearly defining the scope of the issues to be addressed in the NEB project review and those to be addressed through Nation-to-Nation discussions, both proponents and Indigenous groups will be better equipped to move through the NEB process without losing sight of the broader, Nation to Nation discussions

Also challenging is that linear projects like pipelines often require consultation with a large number of Indigenous groups. These groups frequently have varying interests and concerns, different levels of capacity and knowledge about pipeline developments and operations, and different expectations regarding the level of consultation.

Any changes to the consultation process will need to consider that the Indigenous interests at issue and the nature of impacts on the exercise of Aboriginal or treaty rights can vary significantly within and between projects. Examples of varying Indigenous interests where pipelines may traverse include: land that has been ceded through historic or modern treaty; reserve land; treaty lands; or private or Crown lands that are subject to outstanding claims, some of which may be overlapping.

In short, a one-size-fits-all approach is not feasible as not all projects are the same, not all impacts are the same, and not all Indigenous interests at issue are the same. Context matters – and a nuanced approach is needed to align and adapt to the very significant legal and practical differences relating to Indigenous interests across the country. All parties need a better process that sufficiently protects and balances the rights and interests at issue. This process needs to ensure meaningful Indigenous consultation and help to avoid or mitigate impacts to Aboriginal or treaty rights. However, it must also ensure transparent criteria on which Indigenous groups should be consulted; timely decision-making with clear roles and responsibilities; consistent approaches; and without unnecessary duplication.

An enhanced approach to Indigenous consultation must first recognize the reasonable limits of project reviews and what Indigenous issues they can and cannot reasonably address. This is because certain Indigenous concerns cannot be effectively addressed in the context of project reviews. This includes issues that are unrelated to the approval at issue, such as historic grievances relating to prior Crown conduct in traditional territories and ongoing disputes over Indigenous rights and title including overlapping claims, treaty implementation, or treaty interpretation. This also includes issues that go beyond individual projects like cumulative effects on Aboriginal and treaty rights and climate change, for which proponents can only reasonably be expected to deal with the additional impacts from their respective projects.

While these issues can be significant for Indigenous groups, they all require broader government action that goes beyond what proponents can do. These issues should be recognized and dealt with as Nation-to-Nation issues rather than proponent issues. In order to do so, the federal and provincial governments need to take concrete action to establish alternative effective processes to discuss and resolve these Nation-to-Nation issues.

For major pipeline projects (for example Section 52 projects), the federal government also needs to engage Indigenous groups much earlier in the process in order to identify whether there are

issues that cannot be addressed within a project review and require a separate Nation-to-Nation process. As with project proponents, the federal government's approach should be to establish broader long-term relationships upon which to build project-specific consultations. These steps would help reduce the conflict, frustration, and delay that currently arise over these issues in the EA process and, in so doing, help advance the government's broader goals of advancing reconciliation and developing a renewed Nation-to-Nation relationship.

The duty to consult is a Crown duty but, in practice, governments can and do rely heavily on proponents for Indigenous consultation and accommodation. TransCanada supports the federal government delegating to or relying upon proponents to fulfill certain aspects of the duty to consult. This makes sense because proponents are best able to explain and answer questions about their projects and put in place measures that avoid and mitigate impacts on Indigenous or treaty rights. That said, there needs to be much greater clarity about the roles and responsibilities in consultation and accommodation as between the federal government, industry, review panels or regulatory tribunals, and Indigenous groups.

With respect to the role of the federal government, its involvement for major pipeline projects requiring deep consultation needs to be earlier (at the outset of the project), sustained, and better coordinated with proponents to ensure that issues are dealt with in a timely and consistent manner and that discussions do not proceed on parallel but disconnected tracts. On this issue, it is TransCanada's view that any steps by the federal government to implement a Nation-to-Nation dialogue on project reviews should be done in a way that does not undermine or devalue relationships between Indigenous groups and industry or create unnecessary duplication or uncertainty. TransCanada wants to continue developing and maintaining direct and positive relationships with Indigenous groups potentially impacted by our projects. These relationships help to advance the goal of reconciliation and it is important given the long operational life of many projects which will go well beyond the Crown's initial involvement.

Finally, federal agencies do not have a consistent approach to identifying which Indigenous groups need to be consulted for a given project. It also frequently adds Indigenous groups to the consultation list once the process is well underway. These decisions often are not triggered by some change in the project nor are they typically accompanied by a rational explanation as to why these groups need to be consulted or how the federal government made this determination. The federal government needs to develop a set of objective, consistent, and transparent criteria to identify Indigenous groups that will need to be consulted for a particular project. These decisions should be made at the outset of the process, with a mechanism to enable proponents to seek early advice from the federal government on Indigenous groups that need to be consulted for the purposes of early engagement.

Discussion Questions:

1. *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? Specifically:*
    a. *Early engagement of Indigenous groups prior to a formal environmental assessment and regulatory review process by the NEB;*

TransCanada is of the view that many government-to-government issues are outside the scope of project development reviews. In this context, the Government of Canada needs to engage sooner than is has in the past with Indigenous groups and separately from the NEB. The government also needs to clarify how it intends to implement United Nations Declaration on Rights of Indigenous Peoples (UNDRIP) and Free, Prior and Informed Consent (FPIC) in the context of the Duty to Consult on resource-based projects.

b. Consultations with Indigenous groups on matters that fall both within and outside the NEB's mandate;

The NEB should not get drawn into issues outside its mandate. It greatly complicates the adjudication process, and many Indigenous groups seem to confuse the differing roles of the NEB with the federal government.

c. Adequacy of participant funding to support Indigenous groups' participation in the overall engagement and consultation process;

TransCanada believes that overall level of participant funding to support Indigenous groups' participation in the overall engagement and consultation processes has been adequate.

d. The roles of the NEB and the Crown in considering and addressing potential impacts to Aboriginal or treaty rights on NEB-regulated projects, and how these respective roles are carried out; and

As noted earlier, the roles of the NEB and the Crown are not clear in considering or addressing potential impacts to Aboriginal or Treaty rights. For example, the project EA assesses potential effects on Traditional Land Use, but does not specifically assess impacts on Treaty Rights.

Currently, direct Crown consultation in advance of a GIC decision (as referenced in the Discussion Paper) occurs after the NEB has closed its record. Further, if Indigenous groups choose not to engage during the NEB process, their claims to potential impacts cannot be tested through the written and oral evidence process of the NEB. It is unclear what weight the later consultation would carry in the GIC decision, where the government would need to consider untested claims.

If the NEB were to be given the final decision-making authority for all projects under its jurisdiction, then it may be possible to have MPMO conduct a review of whether the Duty to Consult has been fulfilled (by the combination of early government engagement, the project proponent's activities and the NEB's hearing process). The MPMO's finding on adequacy could then be factored into the NEB's decision. An analogous process is used by the Government of Alberta for pipelines within its jurisdiction.

e. Ongoing consultation and engagement of Indigenous groups during the construction, operations, and abandonment phases of projects that are approved.

TransCanada cannot comment on whether and how the government consults with Indigenous groups during the construction, lifecycle operations of pipelines or during abandonment activities. However, if the government established Nation-to-Nation protocols, these would presumably include a mechanism for communicating about development construction, operations and abandonment.

2. *How can Indigenous traditional knowledge (including Traditional Ecological Knowledge) and information be further integrated into the NEB application and hearing process? What are the potential benefits and constraints to this integration?*

   Traditional Knowledge (TK) can provide useful and important information to the regulatory decision-making process. However, challenges currently exist with integrating this information into the hearing record. These challenges include limitations in language translation, lack of documentation and that TK is often regarded as proprietary by Indigenous groups and held among Elders. Proponents (or their consultants) are often not granted permission to access TK information necessary for thorough consideration in environmental assessment and mitigation planning particularly during public hearing processes.

   If TK information is to be considered by the NEB it must be available with sufficient time for proponents and the NEB to evaluate and assess. While TK is different from the western science based EA, it must still be communicated in a timely manner and in a form that is understandable to all parties. This is especially important if it is used to establish project conditions for construction or operations.

   TransCanada appreciates that Indigenous people value this information and want to protect it from misuse by other parties. However, to the extent that it is included in the regulatory process, it must at least be transparent to the project proponent and provided in a timely manner in a form that is understandable to the NEB.

3. *How can Canada enhance its approach to Indigenous engagement and consultation to inform decision-making on NEB-regulated projects?*
   a. *What should be the role of the NEB? The Government of Canada? Project proponents? Indigenous peoples (e.g., specific groups or communities?)*

      See the responses to (1a) and (1d) above.

4. *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?*

   As noted above, this is not, in first instance, the NEB's issue. Rather, the Government of Canada must address this issue in a whole of government approach. Once the government has determined the manner in which it will address Nation-to-Nation relationships, it should provide direction to the NEB and proponents on how their roles should be defined. If the NEB attempts to resolve this matter in a unilateral manner, it risks undermining the government's broader efforts and introducing inconsistency and confusion to the process.

5. *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?*

   While the Federal Government has previously stated the intent to adopt UNDRIP, it has not yet provided guidance on how it intends to do so. For example, the government will need to establish whether UNDRIP should be more formally incorporated into legislation or whether the current approach of consultation and accommodation is the most effective path forward. A few parties to this Panel's process have suggested that UNDRIP, combined with Free, Prior and Informed Consent (FPIC) effectively provide Indigenous peoples with a veto on any development activities which might affect Aboriginal and treaty rights. TransCanada notes that the government has indicated that it does not view FPIC as a veto. TransCanada observes that, having indicated its intention to adopt UNDRIP, it is now essential for the government to clarify how this will manifest in the consultation requirements for both the Crown and proponents. Without this clarity, it is likely that the issue will result in more polarization amongst Indigenous groups and between some Indigenous groups and developers.

6. *What could be done to enhance the involvement of Indigenous peoples in the full life cycle of NEB-regulated projects (e.g., ongoing monitoring of the operation of existing projects, economic development opportunities/participation, or other roles)?*

   TransCanada understands that there are two separate and distinct reasons why Indigenous peoples might want to participate more actively in the lifecycle activities of NEB regulated projects. The first is to meaningfully engage and participate in the oversight of the facilities that operate on or near their traditional lands. This would be an extension of their stewardship role. The second would be the opportunity to benefit from education, employment and other commercial economic opportunities. Both are valid reasons to be more involved.

   TransCanada's believes that, provided appropriate training and education standards were met and the activities were part of the normal operations (i.e. not extraneous), increased Indigenous peoples' participation in lifecycle activities could enhance the relationships and potentially lead to more efficient outcomes.

7. *What are your views regarding how federal departments and agencies can and should balance and respect the interests and rights of Indigenous peoples with varied societal interests to inform decision-making on NEB-regulated projects?*

   Departments and agencies including the NEB need to have regard for the rights and interests of Indigenous people but it is one element that must be balanced against the many other interests at play in a pipeline application. While important and constitutionally protected, Indigenous rights should not be unduly preferred over other societal rights.

The National Energy Board's Participant Funding Program

Meaningful stakeholder participation is an important foundation of an effective regulatory process and can facilitate improved project outcomes, enhanced sharing of information and learning, increased perceptions for the legitimacy of decisions and public trust. Providing funding ensures that financial limitations are not a barrier for participation in the process.

Funding programs for eligible interveners are common amongst regulatory tribunals. The tribunals typically establish criteria for participation in the regulatory process (i.e. "standing"). Some of these parties are then typically eligible for some degree of participant funding to support their effective intervention. Governments and commercial organizations are typically excluded.

1. *What are your views on the NEB's Participant Funding Program?*

   TransCanada's views on the NEB's Participant Funding Program (PFP) are consistent with its position on public participation. Stakeholders who qualify for full intervener status in the regulatory process (i.e. who are directly affected by the outcome of the process or who have relevant expertise to offer on the issues) should be eligible for funding under the PFP. Under the current PFP guidelines the following individuals or groups are eligible for participant funding:

   - Indigenous groups (e.g., First Nations, Métis, or Inuit)
   - landowners or individuals living on or near the proposed project area
   - unincorporated non-industry not-for-profit group or association
   - incorporated non-industry not-for-profit organization;
   - other affected groups or individuals (e.g., community organizations that would be affected by the project)

   The following groups are not eligible:

   - for-profit organizations
   - industry organizations
   - groups of people with a direct commercial interest in the project
   - government groups (except Indigenous)

   These eligibility criteria effectively balance the funding needs of those parties with a vested interest in the outcome of the proceeding against the need to allocate limited financial resources. Parties who do not qualify for full intervener status but still participate in the regulatory process (e.g. via a letter of comment or who speak at a community engagement forum) should not be eligible under the PFP as their participation is more limited in scope.

2. *How could the participant funding process, administered by the NEB, be more efficient and effective in enabling public participation and Indigenous engagement in the hearing process?*

   It should be noted that the NEB currently recovers virtually all of its costs from the industries it regulates. The financial resources used to fund the PFP are therefore paid by industry to the NEB who redistribute the money via the PFP program to eligible interveners. Having the

NEB make the allocative decisions for eligible interveners is efficient and ensures a degree of transparency in the process.

Since the current PFP was put in place in 2010, it has materially increased the ability of interveners to participate, including Indigenous Peoples. The PFP process seems to be working as intended. While benchmarking information on the levels of funding provided for different regulatory tribunals in Canada is not readily available, a brief review of funding reports suggests that the levels provided by the NEB are in the same order of magnitude.

The suggestion has been made that funding beyond the current levels to facilitate an even higher degree of participation is required. There may also be suggestions that funding not be limited to eligible interveners. There is no merit to these suggestions as there is no evidence to suggest that the NEB's PFP is unnecessarily restricting meaningful participation. Further, these requests must be considered in the context of other potential changes to the NEB and its regulatory processes. If the NEB were to provide additional methods for broader public participation, increased funding may not be required as such participation would not involve fully participating in the regulatory hearing itself.

Public Participation

TransCanada notes that one issue that has frequently arisen in this Panel's consultation process is the role of the government is establishing policy and using legislation and regulation as tools for communicating this policy. TransCanada supports the removal of substantive policy debates from the NEB's regulatory processes as has been suggested by other participants to the Panel's review process. This principle is important in understanding and delineating how public participation can best be accomplished in the NEB's regulatory processes. More specifically, if the intent of a potential participant is to use the regulatory process to address any perceived policy gaps, then they may better be served by encouraging the government to establish more appropriate forums and then participating in those venues. The remainder of TransCanada's comments in this section deal specifically with public participation in the NEB's core regulatory processes.

As a general rule, public participation and engagement should occur early in the process. This can help incorporate concerns into the design of the project, to better identify environmental consequences and to mitigate potentially adverse effects. Opportunities for public participation should be varied, flexible and provide many levels of opportunities for participation that are scalable and appropriate to the circumstances and the level of impact a project has on the participant.

Procedural fairness and natural justice must be preserved, particularly in formal processes of engagement such as oral and written hearings. It will also require that decisions are based on science, fact and evidence, as opposed to opinions and positions that are not subject to testing through cross examination or response by a project proponent.

More formal opportunities for participation such as Intervenor status (allowing for the submission of evidence and cross-examination of other parties) should be reserved for those that are either directly affected by a proposed project or have relevant expertise. However, all parties, whether they have formal standing or not, should have an opportunity to provide comments through flexible and appropriate processes. Note that comments cannot be tested and the Board would assign appropriate weighting when making its recommendations or decisions.

Major project applications can run to thousands of pages and hundreds of documents. To allow for meaningful public participation, information must be easily accessible and searchable by the public. In addition, capacity support is often required for participants to effectively and meaningfully participate.

The decision-making process must be transparent. For the public to be able to accept decisions, it is important to understand how those decisions were made and how their input was reflected in that decision. Decisions should reflect the factors that are considered in reaching those decisions, including input received from the public to the extent it is relevant to the issues being considered.

All opportunities and forums for meaningful participation must also recognize the project proponent's need for a clearly defined regulatory review process resulting in a timely decision. There must be clearly defined procedural timelines at the outset of the project based on the scope and scale of the proceeding and a clear definition of the roles of all parties, including the government, the proponent, other intervenors and the public.

An inclusive approach to public involvement that allows for timely decisions can be accomplished where scalable and flexible levels of involvement, including written submissions, and live statements are accommodated. It can improve the quality of the decision and ultimately help legitimize the process and build public trust.

Discussion Questions:

1. *What works well regarding public participation:*
    a. *Prior to the hearing process;*

        Public notifications, open houses and meetings with local governments and key community organizations are important and effective ways of engaging the public prior to the hearing process.

        TransCanada notes that piloted community meetings such as those used for TransCanada's Vaughan Mainline Expansion Project (Vaughan) do not provide material benefits to the process. The intent of these meetings for Vaughan was to identify additional issues or stakeholders. However, no additional issues were identified and no new stakeholders emerged. It is TransCanada's view that the existing processes noted above are sufficient and the addition of piloted community meetings is unnecessary.

    b. *In NEB hearings (including the criteria outlined in section 55.2 of the NEB Act);*

TransCanada views the current hearing process as a reasonable approach to balancing stakeholder concerns in the context of a quasi-judicial process. It is common practice for regulatory tribunals and courts to put limits on public participation. Procedural fairness requires a process with reasonable timelines and which does not impose an undue burden on any party including the proponent. Having unlimited public participation which might lead to dozens, if not hundreds, of intervenors with the right to submit evidence (which then must be tested) and cross-examination rights would unreasonably tax the process and adversely affect those parties who have a strong claim to participate. While the Northern Gateway hearing is an extreme example of groups who opposed the project using the intervention process to stall or unreasonably draw out the process, it is the model for what can happen when full public participation is unfettered.

TransCanada also notes that many jurisdictions use a combination of written and oral proceedings for complex technical regulatory reviews. Some information is best tested with oral cross-examination (e.g. policy matters) while other information is best tested through written interrogatories (e.g. complex engineering matters). TransCanada encourages the panel to consider the appropriateness and effectiveness of oral hearings in addressing the best way to allow public participation.

c. In the development of emergency response manuals/ plans and their transparency;

Early engagement of local emergency responders is key to ensuring community-specific best practices and to provide input into emergency response procedures that are captured in Emergency Response Plans. A few parties to this Panel's review have suggested that Emergency Response Plans should be provided in the initial application. However, due to the site-specific detail required for this consultation, these discussions cannot practically be undertaken prior to the establishment of detailed pipeline routing.

TransCanada understands the public interest to ensure that such plans are in place, are available for review and that local emergency responders are fully engaged in lifecycle operations. However, it is not clear what specific expertise the general public can add to the development of emergency response manuals/plans.

d. Outside the hearing process, including opportunities related to:

i. The project life cycle;
ii. Specific issues; and
iii. Development of regulations.

The NEB already provides a great deal of information on its web site relating to the lifecycle regulatory oversight of pipelines. Compliance with permit conditions during construction is already transparent through the public submission of reports to the NEB. Information relating to any incremental projects for an existing asset are posted to the NEB regulatory document repository. Finally, the NEB publishes periodic information relating to routine operations and maintenance activities. Findings related to other regulatory oversight activities such as inspections and audits are also posted.

While the format of the document repository and its searchability can certainly be enhanced (see Other Improvement Opportunities later in this submission), there is already a great deal of information available on the NEB website for anyone to review.

For specific issues, operators will typically hold one-on one meetings with landowners and other interested stakeholders. For more significant issues, operators may undertake public notifications and/or hold open houses in local communities. Finally, operators may hold meetings with local governments to discuss specific issues with decisions makers.

In relation to the development of regulations, TransCanada is of the view that the NEB's processes could be more transparent, consistent and predictable. Our specific recommendation is outlined more fully below in the section regarding rule making and, if implemented, would afford any stakeholder a clearer path for participation. TransCanada caveats this with the requirement that meaningful participation be accorded to those with the requisite expertise.

2. *What could be improved regarding public participation:*
   a. *Prior to the hearing process;*

      Prior to the hearing process, the NEB should allow proponents to use e-mail and electronic means for public notification as that is the primary and preferred method of communication for many, if not most, stakeholders.

      It may also be helpful for the NEB itself to participate in community meetings/open houses to answer questions on process.

      The NEB and project proponents could work on developing summarized versions of project application documents with references to the details of the application (i.e. specific volumes, ESAs, etc.) For example, ESAs usually carry summarized versions of the impact assessment in the interaction table. Another example, could be a summary table for stakeholder participation and issues raised, etc.

   b. *In NEB hearings (including the criteria outlined in section 55.2 of the NEB Act);*

      The NEB already has clear participation guidelines using plain language that outlines the process to be followed, roles and accountabilities and information requirements/format.

   c. *In the development of emergency response manuals/plans.*

      See response to (1c) above.

   d. *Outside the hearing process, including opportunities related to:*
      i. *The project life cycle;*
      ii. *Specific issues;*

TransCanada has well established processes for notifying landowners, local communities, Indigenous groups and other stakeholders when there are issues or upcoming activities on any of its operating pipelines. TransCanada has not seen any material level of interest in the lifecycle operations of pipelines from the general public. It is therefore not clear why additional involvement would be required or what benefit it would offer.

iii. Development of regulations; and

Please see TransCanada's recommendation in this area that is provided below in the section on rule making.

iv. In the development of emergency response manuals/plans;

See response to (1c) above.

3. *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)?*

TransCanada's previous responses provide a comprehensive overview of potential opportunities for additional involvement of the public or Indigenous peoples over the course of lifecycle regulation. However, ongoing engagement by regulators and proponents with the public and Indigenous groups, outside of the project development phase, continue to be an effective mechanism for maintaining relationships with communities during the project's lifecycle and in any subsequent development activities.

The Hearing Process

The NEB is governed by the principles of administrative law. A key principle of administrative law in Canada is procedural fairness which arises from the principles of natural justice. The quasi-judicial nature of the NEB's hearing processes results from the application of administrative law principles and processes. This grounding in administrative law provides a rich history of decision-making precedents as well as a solid foundation for decision-making by the NEB, as well as providing the necessary means of appealing the NEB's decisions. These core principles must be maintained to provide a fair and unbiased model for regulatory action adjudication.

Procedural fairness has implications for the process to be followed. The process must be clearly laid out (i.e. obligations of different stakeholders, information requirements, process steps and timing) and the process itself must be predictable. These requirements flow both from the need to maintain procedural fairness but also from the fact that major infrastructure projects can involve investment in the hundreds of millions of dollars simply to get through the regulatory phase.

The quasi-judicial nature of the hearing process also involves the submission and testing of evidence. This requirement that all evidence be placed into the hearing record which is publicly

available and which is then tested through information requests and cross-examination also contributes to procedural fairness and transparency. The decisions are made on evidence and facts which contributes to the legitimacy of the outcomes.

Discussion Questions:

1. *In your view, what core principles and elements should be reflected in the hearing process?*

   The quasi-judicial nature of the hearing process must conform with the principles of natural justice. In addition, procedural fairness must be maintained.

2. *Which applications do you think should have a public hearing process?*

   The NEB Act currently requires a public hearing (oral or written) for all Section 52 applications and gives the NEB discretion regarding the need for a public hearing on Section 58 projects. The dividing line between these two types of projects is 40 km. It is clearly not practical or necessary to hold public hearing for the vast majority of Section 58 applications and the NEB has used its discretion appropriately in making such decisions. Some Section 52 applications are relatively small in scope (i.e. close to the threshold for a Section 58) and may not require a public hearing. However, the NEB already has the discretion to use a written hearing process which can make the process more efficient. Therefore, the NEB Act's current delineation between Section 58 and Section 52 applications on the basis of pipeline length remains reasonable. However, TransCanada recommends that Section 58 applications apply to pipelines up to 100 kilometers rather than the current limit of 40km.

   TransCanada would observe that oral hearings are considerably more onerous than written hearing for all parties involved. Written hearings should be considered in all but the most complex proceedings.

3. *What are your views with respect to the basic steps of the public hearing process? What are the areas that can be improved?*

   For the most part the process used by the NEB follows standard processes used by other regulatory tribunals. An application is submitted, evidence from intervenors is then submitted, all parties have a chance to review and respond to information that is put onto the record and the process concludes with parties arguing their position and culminates in a decision. These process steps are well established and commonly used because they contribute to procedural fairness and transparency.

   However, as with any complex process, some opportunities for improvement exist. For example, the NEB does always not follow its own schedule for information requests and can issue multiple rounds of such requests to the proponent, often without regard for other impending procedural deadlines facing the proponent or intervenors. It would be helpful if the NEB followed the same schedule for information requests as all other parties were obligated to follow.

   Currently, all Section 52 proceedings follow the same general process and include the same process steps. Some Section 52 applications are not complicated or have little relative impact

and there should be an opportunity to streamline the above process while still ensuring that all parties have an opportunity to test evidence and make their viewpoints known. TransCanada recommends that the NEB exercise discretion in defining the process steps based on the type of issues to be adjudicated and the potential impact of the proposed project. It may be possible to eliminate some process steps for projects with limited impact or few issues to be resolved.

The NEB does not typically consult with stakeholders on the list of issues to be adjudicated. While this is likely the result of a standard and comprehensive issues list that the NEB uses for Section 52 reviews, there may be an opportunity to engage stakeholders earlier in the process and to refine the issues that must be adjudicated. If the NEB initiated a process by which stakeholders could comment on the list of issues prior to the issuance of the hearing order, it may be possible to both focus the hearing process on the most critical issues (recognizing that the *NEB Act* imposes statutory requirements for the NEB to include in its review) and better engage stakeholders. TransCanada recommends that the NEB issue a draft list of issues for comments prior to finalizing the hearing order.

Section 58 applications are also allowed to take up to 15 months (the same theoretically legislated time limit as Section 52s). Since these projects are recognized as having a smaller impact and are often done on a written basis (assuming the NEB requires a public hearing at all) the maximum time should be reduced to 9 months.

4. *How could the NEB enable public participation in hearings in a less formal way?*

As described earlier in the responses relating to public participation, the NEB process can be modified to allow for a higher degree of public participation. However, to preserve the quasi-judicial nature of the actual regulatory proceeding, this participation would best be enabled outside of the actual hearing process and hence in a less formal way. Some specific suggestions TransCanada would offer include:

- Allow for letters of comment from any member of the public. The NEB would need to review the letter for relevancy against the list of issues and determine what weight it should be assigned. A summary of the letters of comment could be added to the record of the proceeding recognizing that any statements made did not count as evidence (since they can't be tested) but would be reviewed and considered by the hearing panel.
- Introduce community meetings where members of the public could make oral statements that would be recorded and transcribed. As with letters of comment, the NEB would decide if the statement was relevant to the list of issues and then determine the appropriate weight to be assigned to the statement. A summary of the transcribed comments could be added to the record of the proceeding recognizing that any statements made did not count as evidence but would be reviewed and considered by the hearing panel.
- Have the NEB issue a draft list of issues and ask for comments. The public could provide comments on the draft list of issues which would be considered by the NEB along with comments from other stakeholders before finalization.

Land Acquisition and Compensation

Pipeline assets are expected to operate for decades. Some parts of TransCanada's Mainline have been in operation since the 1950s. As a result, the relationships that TransCanada has with its landowners are long-lived as well. It is therefore in TransCanada's interest to have positive working relationships with all the landowners along our pipeline rights of way.

For context, TransCanada has almost 100,000 landowners with whom we maintain relationships. It is TransCanada's philosophy to enter into these relationships on a solid footing, with early and thorough project consultation and negotiating in good faith when acquiring land rights. We then strive to maintain positive working relationships for the life of our assets. Recent public awareness surveys we have conducted indicate that a majority of landowners in Canada are satisfied with the relationship they have with TransCanada and in fact we are seeing a growing trend in the positive direction.

Discussion Questions:

1. *How has having a pipeline or powerline on your land affected how you use your land?*

Not applicable.

2. *What are your views with respect to:*
    a. *Land acquisition agreements, its required clauses and the NEB oversight?*

        Part V of the *National Energy Board Act* sets out powers of pipeline companies, including restrictions on those powers and in particular, requirements with respect to how pipeline companies obtain land rights. The required clauses that must be part of land acquisition agreements, as set out in the Act do provide a level of consistency with respect to land acquisition agreements that are used for all NEB regulated assets across Canada. For instance, pipeline companies must provide the same prescribed indemnity provision in land acquisition agreements.

    b. *Compensation and dispute resolution processes and the private nature of agreements?*

        TransCanada strives to provide fair and equitable compensation for all of its land rights. In doing so, it relies on the per acre market value of the lands, any established patterns of dealing in the industry, and other factors enumerated in the Act. Some participants in this Panel's review have suggested annual payments may be more appropriate than a lump-sum, up-front payment. TransCanada presumes this is referring to payments for easements and in that respect, while traditionally this type of property right would be valued and compensated for once (*i.e.* at the time the right was obtained), TransCanada points out that the Act does already mandate an option for landowners to receive compensation either by one lump-sum payment or by annual or periodic payments of equal or different amounts over a period of time. In this way, the Act builds in optionality for landowners in terms of how they want to receive the agreed upon compensation amount. A one-time payment amount (whether the landowner takes this amount lump sum or over time) makes particular sense for

underground pipelines given the compatibility with the ongoing use of the land. This is different from situations involving above-ground facilities where the same land use compatibility does not exist. In these cases, typically there is a lease in place that involves a more traditional annual payment (rental) component.

TransCanada also understands that there are mixed views among its landowner base in regards to the transparency of the various types of land rights agreements. Many landowners prefer that all land acquisition agreements be kept confidential while some landowners and landowner advocacy groups would prefer not to have these agreements private. Moreover, some land rights (easements for instance) constitute an interest in the land and are registered against title at the local land title or registry office. Other agreements do not constitute an interest in land, and may be temporary or more private or site-specific in nature. TransCanada is of the view that overall, the negotiation of land rights and associated agreements is a private matter and while the pipeline industry strives for a degree of consistency, there are circumstances that may require flexibility and unique considerations.

With respect to the current dispute resolution process it is TransCanada's view that having NRCan or another authority continue to provide this function is appropriate. However, TransCanada would note that the current process to get arbitrators appointed can be long, which is not to anyone's advantage.

c. Right of entry process and authority?

TransCanada always prefers to settle land rights on a voluntary basis. The right of entry process is only applied for as a means of last resort and only after there has been significant consultation and negotiation, and in the case of all section 52 applications, (pipelines of more than 40 km) a detailed route process. However, there are situations where the right of entry process is the only remaining alternative and TransCanada views the Board's authority to order right of entry to be critical to the timely construction of an approved pipeline. All levels of government reserve the right to access land necessary for public utilities and pipelines are no different in practice.

3. In your opinion, are the existing processes described in this discussion paper fair and sufficient? If not, what improvements could be made (e.g., additional tools for land acquisition, compensation and dispute resolution)?

TransCanada observes that the discussion paper implies that companies cannot acquire land rights until after obtaining an Order or Certificate/GIC approval and after the Detailed Route Approvals process. TransCanada notes that there is nothing in the NEB Act (with the exception of acquiring some land rights on Crown or Indian lands section 77 and 78 of the Act) preventing a pipeline company from acquiring land rights prior to regulatory approval. In fact, it has become common practice for the NEB to request an update from companies with respect to the percentage of land rights that have been acquired and requests specific updates on any major issues between the parties.

TransCanada is of the view that the existing processes for acquiring land access rights are fair and efficient.

4. *Who should make the final decisions for land compensation disputes?*

   As noted above, land compensation disputes are best addressed through NRCan or another agency. Having the NEB manage compensation disputes would put the NEB in the difficult position of determining not only whether a project is in the public interest but also the specific value of the land required, which is not part of the Boards core area of expertise. By separating the processes, the NEB can focus on its core mandate of determining whether facilities are in the public interest. Currently, the process through NRCan is set up with a view to resolving claims efficiently and expeditiously. The pipeline arbitration committee proceedings are also governed by the rules and procedure set out in the Act, and in TransCanada's view these procedural mechanisms ensure a fair hearing.

5. *What are your views regarding the process of determining whether to authorize right of entry?*

   As noted above, the current process of determining whether to authorize right of entry is appropriate and, in fact, crucial to the efficient and effective processes of routing, siting and acquiring land access rights, where such rights cannot be voluntarily negotiated. Further, given that the NEB's mandate is to balance competing interests in the public interest, it is appropriate that it would also balance the need to grant right of entry for access to land for a pipeline.

6. *What are your views with respect to the company's right of entry without the landowner's consent if a company and a landowner are unable to negotiate an agreement?*

   In the vast majority of cases, TransCanada reaches a negotiated agreement with landowners along a potential right of way. However, for various reasons, there are a few landowners which whom agreement cannot be reached in a timely manner. Removing right of entry would effectively give individual landowners complete authority to hold up the project and create an imbalance in negotiating positions. Based on these considerations, the NEB must retain the authority to grant right of entry in appropriate circumstances.

7. *Should there be a more consistent approach for companies to compensate landowners for access to their land (e.g., defined frequency of payment, opportunities for review)? Would policy or regulatory direction from the Government of Canada be helpful?*

   Land by its very nature is unique and, as set out above, land agreements are often site-specific and tend to be private. In addition, the Act grants certain rights to access both private and Crown land for the purposes of conducting initial surveys and examinations on the lands for fixing the site of the pipeline and ascertaining certain lands as may be necessary and proper for the pipeline. While TransCanada and other pipelines strive for consistency in the level and form of compensation, and how they exercise rights under the Act, there are

circumstances where complete standardization is not practical or feasible. For this reason, TransCanada is of the view that individual landowners should retain the right to negotiate land rights agreements on an individual basis.

Other Improvement Opportunities

While the existing NEB regulatory processes are generally thorough and comprehensive, there is opportunity for improving the transparency, efficiency and credibility. The Panel's discussion documents do not address more generic opportunities for such improvement. TransCanada respectfully offers the following suggestions:

Rule-making

The NEB's life-cycle approach to the regulation of pipelines entails the frequent updating of many regulations, guidelines and processes. The current NEB process for rulemaking does not always provide for adequate consultation and engagement of interested parties in the modification or introduction of changes to these regulatory requirements. In some instances, the NEB imposes changes with little advanced warning and expects companies to be in compliance within unrealistic timelines.

The very nature of the *NEB Act* provides the NEB with a very high degree of discretion regarding the modification or introduction of changes to regulatory requirements. In some instances, new regulatory standards or requirements are introduced through conditions attached to orders or certificates without the supporting rationale. Given the rigorous requirements to seek a review of a Board decision, many proponents do not attempt to challenge these new requirements. As a result, it is especially important that the process by which changes are proposed and ultimately adopted involve a high degree of transparency and openness.

Therefore, TransCanada recommends that the NEB adopt a consistent, more structured, transparent and accountable process for introducing new requirements for operators into its mandate. All material changes should be required to follow a formal rulemaking process which includes sufficient time for stakeholder consultation and ideally involves the consensus of an independent technical body such as the Canadian Standards Association to ensure fair and reasonable policy making.

Improved Transparency and Accountability in Enforcement Activities and Directives

TransCanada believes that the level of transparency in enforcement activities and Board directives could be improved. TransCanada has experienced enforcement orders and directives including a safety order in which detailed reasons including the technical methodology for arriving at the scope of the order were not fully disclosed at the time of issue. With orders that affect the operation of highly technical systems, it would benefit both the Board and pipeline operators to have detailed reasons and an understanding of the rationale for imposing such requirements. In some circumstances the Board may have incomplete information with respect to the operation of the affected systems that could be supplemented with information from the operator in order to avoid safety concerns and operational impacts that may not be in the public

interest. By providing greater transparency, the process for issuing orders would be fairer to pipeline operators and would provide opportunities for greater understanding. To the extent orders are imposed that are either ineffective or may have unintended consequences, it would provide pipeline operators a more complete understanding in the event that variances to orders are contemplated. Ultimately the goal is to ensure that enforcement activities and directives are effective and that pipeline operators have a fair process for fully understanding the basis for them.

Comprehensive Service Standards

TransCanada recommends that the NEB implement timing service standards for all of its regulatory operations. While the NEB currently has service standards for some regulatory decision processes, many processes have no associated maximum timelines. For example, review of engineering assessments and toll/tariff applications have no specified timelines. This makes planning very challenging for companies under the Board's jurisdiction.

Document Management

The NEB's regulatory document repository framework should be updated to modern standards and combined with better and more useful online application tools for managing applications. The existing regulatory document database is outdated, difficult to search and has various limitations, such as requiring larger files to be arbitrarily split when uploading them at the time of filing.

In addition, NEB filing rules and regulations that require the submission of paper copies to the Board and service of paper copies on third parties for materials that have already been filed and/or served electronically are outdated and impractical, especially given the size of many documents that accompany many filings. The use of facsimile transmissions to deliver certain documents should be changed to email delivery. Although fax machines still exist, they are no longer a normal mode of communication.

In this context, TransCanada recommends updating the regulatory document repository to accommodate the size of documents now routinely submitted and to enhance the search function to modern standards. TransCanada also recommends that the NEB review its rules requiring paper copies versus electronic versions and tools.

Conclusion

TransCanada acknowledges the importance of the work of this panel. It is critical that the federal regulatory regime for review and oversight of major energy infrastructure is effective and efficient and that timely decisions are made on credible fact-based assessments, to further the Canadian public interest.

TransCanada observes the only regulator in Canada that has similar scope, scale and mandate as the NEB is the Alberta Energy Regulator (AER). Following a government policy decision to implement a "one-window" approach to regulatory oversight, the AER recently undertook a

comprehensive, multi-year initiative to modernize itself and confirmed that the approach of a single application, a single review and a single decision is the most effective and efficient structure to ensure regulatory excellence.

TransCanada thanks the panel for the opportunity to provide its views.