



Ecology Ottawa's
Recommendations to the NEB
Modernization Panel

MARCH, 2017

Background:

About Ecology Ottawa

Ecology Ottawa is a not-for-profit, grassroots, and volunteer-driven organization.

We believe that Ottawa residents are concerned about issues such as climate change, pollution, and waste, and that they want sustainable communities where clean energy, air, and water, public transit, recycling, and green space protection take priority. We provide residents with the information and tools they need to understand local environmental issues and promote environmental leadership at city hall.

Ecology Ottawa was accepted as an Intervenor in the NEB's review of the Energy East project.

NEB Modernization

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

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

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

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

Energy East

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

The Energy East project is the largest oil pipeline ever proposed in our nation's history. It is in the public and environmental interest to review Energy East under a new, more modernized regulatory system.

Recommendations:

Governance and Structure

Ongoing Conflicts of Interest

1. The modernization process must address both real and perceived conflicts of interest, particularly around relationships between NEB Board members and the energy sector. This includes not just direct industry relationships or investments on the part of Board members, but also their families. We recommend that there be a waiting period between working in the oil and gas industry and working for the NEB.

NEB Location / Residency Requirements

2. The NEB headquarters should not be in Calgary. This location positions the regulator too close to industry and makes it far too easy for the revolving door between energy and regulator to continue to swing. The NEB headquarters should move back to Ottawa where it was before the Mulroney government moved it to Calgary in 1991.
3. There should be regional offices across the country to ensure the NEB is more accessible and truly representing the diversity of interests across Canada.
4. Residency requirements for Board members must be eliminated. Residency requirements currently state that Board members must live in and around the Calgary area. This requirement furthers the view that the NEB is a partner with industry, not a separate body, and makes it less likely that diverse voices will sit at the NEB table.
5. The regulator must be representative of all Canadians, in terms of regional representation and Indigenous voices.

Skills and Expertise

6. Ensure that temporary Board members are kept to three-year terms to ensure a frequent inflow of new experience into the regulator. Presently, temporary Board members can have their terms renewed, which defeats the purpose of appointing temporary members in the first place.
7. The NEB Board members should bring a diversity of important skills and expertise to the table, such as law, engineering, climate change, environmental science, emerging energy technologies, traditional knowledge, governance, public engagement, accounting, and other competencies.

Climate Change

8. Government direction and international agreements regarding climate change must inform NEB decisions.
9. The NEB should be mindful of taking a long-term view in its decision making, as many issues under its consideration have far reaching ramifications and life cycles that go beyond the short-term considerations of the day.

Energy Forecasting and Education

10. The NEB Act should be modified to explicitly recognize a link between energy regulation and climate objectives.
11. The NEB's Energy Forecasting must envision scenarios where we meet our national and international climate commitments and explain how we achieve reduced greenhouse gas emissions in the energy sector. The NEB of today appears to operate as if the policy context around climate change does not exist.
12. The NEB must become more active as a public educator on all forms of energy. The NEB is an energy regulator, not just a fossil fuels regulator. The NEB Act does not currently outline a specific mandate for public education on energy.
13. There must be an emphasis on learning. The NEB should operate in an environment that fosters opportunities for learning, to ensure more informed and better decisions now and into the future.

Review Timelines

14. Timelines should be revised for project reviews per the size of the project and have the flexibility to be modified as needed. The current system is inflexible and not responsive to needs on the ground. For complex projects the 15-month timeline is not feasible, especially given the massive volumes of information involved, which might take months to read, let alone adequately respond to.

Environmental Assessments

15. The responsibility for conducting environmental assessments must be moved away from the NEB and occur through a modernized CEAA. The EAs must be conducted per the next generation principles proposed by West Coast Environmental Law in their report "Twelve Pillars of a Next-Generation Environmental Assessment Regime". This must occur for two reasons: 1) CEAA is a centre of federal expertise for this type of work; and 2) Performing the project level EA creates a conflict for the NEB as a technical licensing body conducting environmental planning and analysis that then leans either for or against the requested license.

Mandate and Future Opportunities

NEB Role

16. The NEB exercises too much discretionary authority throughout a project review, and not just at the final decision-making step. The NEB can choose who can or cannot participate and how, what the scope of a project is, whether processes will be oral or written, and whether to allow cross-examination. These decisions influence the eventual outcome of a project review and must be revisited.
17. The NEB should not be given the job of deciding whether a proposed project is in the “public interest”. Processes such as Regional Environmental Assessments or Strategic Environmental Assessments are much better suited to determine the “public interest”.
18. The NEB should be renamed to reflect the need to transition to a low carbon economy and should greatly enhance its role as a centre for energy information to inform debate and discussion with a more robust view of the energy sector, trends, and new factors such as renewable energy sources.

Climate Change

19. Discussion on climate change, upstream, lifecycle and downstream greenhouse gas impacts must be included in the discussion.
20. The NEB should openly support the Paris Climate Accord.
21. Project-specific market evaluation and needs assessments should draw on data and forecasting that examines the implications of domestic and international climate action on the economic viability of proposed projects.
22. Energy forecasting must be aligned with the 2-degree scenario. The NEB could develop multiple scenarios for projected resource demand to inform consideration of proposals. For example, imagining a future where efforts to reduce fossil fuel demand are successful, thereby lessening future production needs.
23. Modify the NEB Act and Canadian Environmental Assessment Act (CEAA) to recognize the link between energy development and climate objectives.
24. Reframe the NEB’s mandate to that of managing the decarbonisation of the energy industry. The future we need is one with declining fossil fuel use, and greater electrification. The NEB could play a role in coordinating more efficient electricity transmission networks and energy sharing between provinces.

Environmental Assessments

25. CEAA should conduct sector-level strategic environmental assessments to establish objectives and principles for given energy sectors before individual energy projects arrive at the regulator for consideration. This will ensure a solid baseline of information for regions or ecosystems.
26. NEB decision-making should be made within a broader context of overall energy policy, carbon budgets, and strategic environmental assessment. Strategic environmental assessment is important in providing a lens through which to consider the cumulative effects of many projects. The current focus of assessing projects individually is problematic. At this level, no individual project can be properly analyzed for its impact on the bigger picture. In the absence of a strategic environmental assessment, project level decisions cannot be held to account for their larger environmental and economic costs which are the sum of many projects.

Energy Forecasting, Strategy, and Education

27. Coordinate and harmonize data currently produced by the NEB with those produced by NRCan, StatsCan, ECCC, Transport Canada and the Transportation Safety Board. Further, provincial, and even international data is essential for a complete picture of the energy sector, and the NEB should work to find ways to integrate additional information. There should be one government centre for energy information and the NEB seems best positioned to fill that role, which would carry with it a requirement for increased resources.
28. Energy forecasts should take a longer-term view, looking ahead 30+ years in terms of the need for the project and considering the lifecycle impact of the project rather than just analyzing the immediate future.
29. The NEB must develop a broader range of forecasts that include scenarios where Canada and the global community are successful in reducing fossil fuel use, and where renewable energy sources – whose growth may not be linear as barriers to adoption are overcome – are factored into future scenarios. These forecasts must factor in decarbonisation efforts and goals.
30. The lack of a comprehensive national energy strategy or plan is a major roadblock for ensuring that the NEB approve projects aligned to national objectives. In any event, the NEB's decisions do contribute to Canada's *de facto* energy strategy, which today may contain inconsistencies and diverging goals. Canada needs an overarching energy policy to guide NEB decision making.
31. The government should establish a national, public forum on energy policy. Such a forum would allow for public input around energy policy, and would help build consensus about energy goals and coordination with environmental objectives.

Financial Resources

32. The NEB must be provided with adequate financial resources and new expertise necessary to adopt new responsibilities.

Application Completeness

33. In a proponent's application, raw data files must be made available, not summaries or formats that cannot be downloaded and used.
34. The NEB must not be allowed to limit the scope of what is considered in projects, without input from the public. This includes upstream, lifecycle, and downstream effects as well as transmission lines required to power pipeline infrastructure. NEB reviews should consider all impacts of a project including the facilities required for the project (e.g. transmission lines, power generation, etc.) and the impact at the end of the pipe (e.g. tanker traffic, impact on fisheries, emissions from refineries, human health, potential impact on tourism, etc.)

Decision Making Roles, Including on Major Projects

Project Impacts

35. The effects of spills should be broadened to include effects on sectors like tourism. These potential effects should be included in risk assessments.

Decision Making

36. Energy regulation should result in project decisions that are transparently documented and defensible. The final decision making body – be it the Governor in Council (GIC) or NEB or other – must be required to provide detailed and direct responses to questions and recommendations presented through the hearing process. The NEB should make a practice - as courts do - of providing a rationale for its decisions and showing all factors considered. This could include a decision-making matrix that clearly defines the criteria to consider in making project approval decisions. Greater explanation in reasons for decision will help to demonstrate to intervenors that their views have been considered and will provide broader public education on issues before the Board.
37. The NEB should also make clear how decisions align to government policy and climate objectives.
38. The three-person hearing panels may be too small to adequately incorporate the wealth and breadth of knowledge and expertise necessary for some projects.

Environmental Assessments

39. Energy regulation should be recognized as being distinct from, although closely linked to, planning tools such as environmental assessment (EA). EA can be conducted for individual projects, for geographic regions, or for sectors of natural resource development. Functionally, an EA is a planning tool – making it distinct from the more narrowly-focused scope of energy regulation. Ideally, EAs and energy regulation should have open and transparent communication back and forth to inform each other at appropriate moments in the process.
40. Regional and Strategic EAs must come first (CEAA), then a project level EA (CEAA), then a regulatory review of the technical aspects of a project (NEB).
41. When assessing a project, consider the best option from among a range of alternatives. Reviews should consider alternative scenarios, including the “no” alternative.

Review Timeline

42. The size of major applications and limited review time can be a burden to participants and a factor as to whether they choose to participate in the review. Predictable timelines for a process are reasonable and helpful to all involved, but they should scale to the nature of the project in question.

Public Participation

43. In written proceedings, participants have felt that they had no ability to examine evidence presented by industry, or challenge the assumptions underlying projects. Consequently, NEB hearings may be viewed as tilted toward the proponent viewpoint.
44. The NEB must not move forward with a hearing until the proponent has truly satisfied the need for a complete application. Failure by the proponent to provide a complete application leads to Information Requests being used just to get the basic information and not to challenge the evidence being presented.
45. The NEB hearings should always allow cross-examination of the proponents’ evidence.

Municipal Governments

46. Beyond the natural interest of municipalities in goings-on within their jurisdiction, there are important considerations of cost for pipelines which run through cities, that these costs are borne entirely by municipalities, and are not included in the total cost calculation of pipelines. Costs incurred by municipalities that can be related to pipelines may include road work, sewage maintenance, water main repair, etc.

Legislative Tools (Compliance, Enforcement, and Ongoing Monitoring)

Learning from Past Experiences

47. The NEB must do its utmost to ensure adequate safeguards are in place, and furthermore, in the event of spills or other incidents, should be transparent about lessons learned and revised practices after an incident response. Showing how practices have adapted is important. Public confidence in the regulatory system can be eroded when regulators are opaque about follow-up after an event.

Compliance

48. Public engagement on new projects is the NEB's priority, but compliance issues and incident risk may in fact be greater for existing projects, where it is much more difficult for groups or communities to become involved in understanding and influencing oversight activities. Too much focus is placed on initial project reviews and approvals, while existing projects – which are in place for decades – are subject to much less scrutiny. There should be more opportunities for public participation in the ongoing compliance and monitoring of existing pipeline projects and throughout their lifecycle.
49. When conditions are imposed on a project, the NEB should more clearly show whether those conditions are met, and the results of any follow up monitoring.

Enforcement

50. Ensuring sustainability after the assessment: After projects are approved, the law requires robust follow-up, monitoring, adaptive management, compliance, and enforcement. Energy regulators should employ a precautionary approach to this oversight and should enforce and ensure industry compliance with its full suite of regulations.
51. Monetary penalties are not sufficiently high to represent a real deterrent for non-compliance. They should be increased.
52. Companies may violate conditions and then have those conditions reviewed and scaled back, outside of active public scrutiny. This should not be allowed to happen. If a company requests a scale back of conditions on a project, it should be open to public comment.
53. Often projects are approved with many and varied conditions imposed by the NEB. However, those conditions may be worded in very general terms that allow proponents to interpret them as they choose. The NEB could create annotated guides to impose conditions, so that their provisions are more clearly stated and understood by all parties.

Monitoring

54. Energy regulation should be conducted based on independent information of the highest quality. Presently, industry conducts far too much of their own ongoing monitoring and notification to the NEB is largely self reporting. There should be a greater presence of third party monitors. Further, information about ongoing monitoring activities, results and compliance outcomes must be made publicly available.
55. The reliability of monitoring technologies may be overstated, and overvalued in project approvals. In practice, it is often a passerby or local community members who first observe a spill. NEB recommendations must not place an overreliance on technology. Further, we must more closely assess the likelihood of human error in operating pipeline technology.
56. Transboundary waters issue - Many watersheds, lakes, and river systems are connected to the United States, and are affected by regulatory policy and action there. Perhaps a member of the International Joint Commission (IJC) could sit on the NEB Board, or at the very least coordination between the IJC and the NEB be strengthened.

Education

57. Many local first responders – such as fire departments – may not even be aware they have pipelines located in their communities, much less processes for responding to incidents. In this sense, monitoring is about more than just the NEB role, and includes ensuring that industry works with first responders to have clear plans in place to deal with issues and clear lines of communication in managing responses.
58. There is limited information on existing pipelines and many people may be surprised to know that they already live on or near a pipeline. When pipelines are collocated in hydro corridors, they often go unnoticed. For example, Line 9 through high consequence areas in Toronto.
59. The NEB should adopt a protocol whereby all landowners must be informed of their rights before being contacted by a project proponent. Land acquisition without landowner consent should not be permitted. Landowners should be able to decline access and use of their lands for pipelines or transmission lines which they do not consent to.

Product Type

60. Some substances (e.g. dilbit / tarsands) introduce a greater amount of risk into projects than is currently accounted for. We cannot treat these unconventional forms of oil the same as light, conventional oil. Despite good faith plans for responses to major spills, for example, it may not be possible to fully clean up and remediate after a catastrophic heavy oil spill, especially when there is no proven method of fully remediating a site after this kind of spill.

61. New bitumen products may be significantly different than the original substances for which pipelines were intended, necessitating a review of whether original permits and approvals apply to new activities.

Emergency Response

62. Industry players should be required to pool resources to create a standing body capable of responding to incidents, to mitigate the risk that a company responding to its own spill, for example, might attempt to cover up the impact.
63. Many pipelines and emergency response storage facilities are in the heart of population centres and near high consequence areas. This poses a challenge regarding speed of response due to traffic and city congestion.
64. Specific science around spill remediation techniques and the limits to those techniques should be included in project decisions.
65. NEB conditions require only that emergency response plans be created by companies, but that the NEB exercises little qualitative oversight over those plans. Emergency preparedness plans and evacuation plans in the event of catastrophic failures should be prepared as part of project applications, not after projects are approved.
66. Emergency Planning must be realistic. For example, drinking water contamination for a city like Ottawa or Winnipeg would require the emergency import of water for hundreds of thousands of people for weeks, and this is not something for which any party is seriously prepared.
67. There must be minimum safety setbacks from pipeline right of ways.
68. The NEB should develop a list of high consequence sites along Canadian pipelines, like what the Pipeline and Hazardous Materials Safety Administration does in the United States.

Integrity Digs

69. Companies may use “operations and maintenance” of existing projects improperly, when in fact those maintenance projects have major impacts akin to new projects. For example, large numbers of integrity digs on a pipeline – which are considered normal operations and maintenance – should require greater oversight. An integrity dig is when a company is made aware of a potential problem on their pipeline (including cracks, corrosion, dents, etc.). Pipeline companies regularly send monitoring tools through their pipelines to detect these issues. In some cases, thousands of integrity digs are required to maintain a pipe. At that point, the NEB should be considering whether the pipe is fit to continue operating.

Engagement with Indigenous Peoples

Indigenous Rights

70. The NEB must conduct reviews in the spirit of reconciliation with Indigenous peoples including upholding the principles and obligations as outlined in the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). This commitment should include fulfilling the obligation to obtain the free, prior, and informed consent (FPIC) of each Indigenous community for proposed projects that may affect the lands they customarily own, occupy or otherwise use.
71. The NEB should formally endorse UNDRIP and include a statement of this endorsement in their modernized mandate.
72. Project reviews and environmental assessments should operate in an environment of co-governance with Indigenous Nations. Collaborative assessment and decision-making processes are based on nation-to-nation relationships, reconciliation, and the obligation to secure the free, prior, and informed consent of Indigenous peoples.
73. Indigenous peoples do not and should not have to spend time proving that their rights exist. This is often the case today, and represents a distraction from nations actively exercising those rights.
74. Indigenous law, governance models, and decision-making rights must be formally recognized and incorporated into the NEB process. Consultation, as it is commonly understood, is much different than the stronger standard of free, prior, and informed consent. The current consultation model often creates conflict that results in litigation. The NEB and project proponents must move toward an engagement model based on consent, not consultation.
75. The NEB should participate in discussions with Indigenous peoples in sacred spaces with traditional ceremony and protocols. In this setting, everyone can be heard, knowledge can be gathered from elders and the goal would be to achieve a consensus. Indigenous perspectives cannot possibly be summarized into bullet points in a report.
76. The NEB should submit its recommendation on a proposed project to the Governor in Council and affected Indigenous Nations simultaneously.
77. Indigenous rights are constitutionally protected rights that cannot be equally weighted against social or economic concerns.
78. There is no single “Indigenous viewpoint” or practice. The NEB cannot be guided in its relationship by a one size fits all model.

Barriers to Participation

79. Limited financial resources to participate present a significant challenge. Non-participation in a process may be viewed as consent or support. On the other hand, meaningful participation is resource and time intensive.
80. Current funding is inadequate. Particularly large and complex projects cannot be properly reviewed with \$40,000 funding. Many participants must choose between legal, scientific, community meetings and other costs. The funding cannot cover all expenses.
81. Many Indigenous communities feel an informal pressure to “play nice” with industry during consultation and engagement in exchange for participating in any future economic activity.
82. Subjecting elders to adversarial cross-examination, insisting that all traditional knowledge be validated by western science, and requiring that traditional knowledge be codified or written down, are all major barriers to inclusion, and are symptomatic of a misunderstanding of the role and nature of traditional knowledge.
83. Hearings are often scheduled during traditional hunting and fishing times, when Indigenous peoples would be unable to participate. The NEB should work with communities to schedule hearings at times that accommodate traditional practices.

Public Participation

Barriers to Participation

84. Public trust in the NEB is at an all time low because of its perceived (and/or real) state of industry capture. Many individuals and groups choose not to participate in NEB hearings because they feel that project approval is almost certain when a panel is stacked with oil and gas professionals.
85. The limitation to those “directly affected” by a project is problematic. This is too restrictive, and scopes out large classes of intervenors unnecessarily. The application to participate process, requiring participants to be “directly affected” or have “relevant information and expertise”, should be eliminated. The NEB should focus on evaluating the information it gathers from as many sources as possible.
86. The NEB process should be more accessible to the public. Letters of comment should be permitted to be filed at any point in the hearing process and by any interested party. The deadline for letters of comment should be the day that the panel closes the hearing.
87. Meaningful public participation is early, ongoing, accessible, and dynamic. It occurs at all levels of assessment and can be seen to influence outcomes.

88. Transparent and accessible information flows: All relevant information should be easily accessible to the public, shared between different levels of assessment (energy regulation, EAs, provincial permitting, etc.) and remain available for future use.
89. Require that information provided by proponents and the regulator be searchable and well-organized to facilitate access by the public. Ensure that the data system is not modified mid-review, such as the roll out of “RegDocs” during the Energy East hearing.
90. Accessibility – Proponent’s application information is difficult to search on the NEB RegDocs database. In addition, the application process for funding and intervenor status are difficult to navigate and there are little resources or assistance.

Expanding Opportunities for Participation

91. Currently, public participation is focused on the consideration of new projects. However, the NEB is a life cycle regulator and can do more to engage the public on the other dimensions of its mandate, such as emergency response, operations and maintenance, and others. This could go some distance toward the regulator earning public confidence.
92. The NEB should look to the OEB’s public engagement process for the Energy East project as a good model for expanding opportunities for participation.