

A vision for a modernized National Energy Board

Comments to the Expert Panel on NEB Modernization
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Toronto, Ontario
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Introduction

- Good morning, members of the Expert Panel and fellow participants and observers.
- Bon matin aux membres du comité d'experts et à tous mes collègues et observateurs. C'est un grand plaisir de pouvoir échanger avec vous ce matin.
- It's a pleasure to be able to discuss with you at this second engagement session of the NEB Modernization review.
- My name is Lindsay Wiginton, and I am a member of the team at the Pembina Institute.
- We are a national non-profit think tank that has over 30 years of experience providing research and recommendations to inform energy policies in Canada.
- We recognize the historic importance of this NEB Modernization process. We believe that it has the potential to restore public trust in our decision-making processes, while building on current strengths to create a forward-thinking energy regulator that is equipped to serve the public interest in a world transitioning away from fossil fuels.
- Last week, we published a discussion paper that shares our current state of thinking on pathways for NEB modernization. It is available on our website and I have a couple of copies with me today.
- I understand that you spoke at length with my colleague Erin Flanagan last week in Saskatoon about the nine tenets that we laid out in our paper.
- Among them is the tenet that energy regulation must be conducted in partnership with First Nations, Métis and Inuit Nations, and we would underline that the legitimacy of this NEB Modernization process hinges on the full participation of diverse Indigenous groups in this process.
- Since my time will be more limited today, I'd like to zoom in on three of these tenets and provide some clarifications based on the questions that arose last week.

- My comments should last about 8-9 minutes and I'd be happy to elaborate more in the question period.

The relationship of energy regulation to environmental assessment

- **Tenet 9** of our discussion paper says that **energy regulation** should be recognized as being distinct from **environmental assessment**, which is a planning tool.
- Last week we spoke to you about our recommendation to shift the responsibility for conducting the environmental assessment component of energy reviews to a reformed environmental assessment body in Canada. I wanted to provide a bit more thinking on this.
- Caveat: structural change isn't a means in and of itself. What we've heard is that cultural and expertise change is as important as structural change, and the two need to work together.
- As you know, **the NEB currently applies two tests to pipeline projects under its purview.** (The tests for international power lines are a bit different, but we believe we shouldn't forget about them in the modernization review process, because they'll become even more important in a decarbonized economy.)
- First, there's the **test of public convenience and necessity**, or "needs assessment," as outlined in Section 52 (2) of the NEB Act.¹
- This needs assessment already considers market conditions for energy projects, and it's where we think it's imperative to build in considerations for supply and demand in a decarbonising country and world. This is where improved data and scenarios come in, which my colleagues from Environmental Defense and Oil Change International will speak to today. I'm also happy to speak further about this in the question period.
- The second test is a **project environmental assessment**. Although the test is outlined in the CEA Act, the NEB is the Responsible Authority for conducting the EA for federal energy projects.²
- Currently, the two tests are included in the recommendation report that the NEB submits to cabinet.
- Now, I'd like to provide some context here. **Under current Canadian legislation, there are only two bodies other than the Canadian Environmental Assessment Agency that carry out federal EAs: one is the NEB, and the other is the Canadian Nuclear Safety Commission (CNSC).**

¹ In applying this test, the NEB must have regard to the following factors: the availability of commodities, economic feasibility, financial responsibility of the applicant, and "the public interest" (no definition of this provided in the Act). The NEB then provides recommendations to cabinet regarding the issuance of a certificate of public convenience and necessity.

² Dr. Martin Olszynski's submission to the EA Modernization panel provides thinking on this topic: <http://eareview-examenee.ca/view-submission/?id=1479235841.4223>

- Prior to reforms in 2010, there were in fact many Ministries and bodies that were the Responsible Authorities. **So, shifting this responsibility from the NEB to CEAA, as we are proposing, would in fact represent continuation of efforts to make the EA process consistent – and predictable – across sectors.** It would allow for us to focus on building the required expertise and process into one body.
- This includes expertise on the subject of Indigenous and public engagement, often overlooked in the selection of commissioners.
- We are not saying that the current federal EA process is satisfactory. There is much to be done to improve this process. In our proposal we are assuming that the EA process will be modernized according to next-generation sustainability principles as have been laid out by other thinkers such as West Coast Environmental Law.
- This suggestion, of course, raises important questions around how the two tests would be linked. **Like many stakeholders, we are not interested in creating a more complicated or redundant process.** There are many ways these two tests could talk to each other:
 - they could be nested, such that the NEB would provide a technical recommendation report on the need for the energy project to the EA body;
 - we could use a joint review panel model as we use commonly in other situations;
 - things would look different again if CEA shifted to a new model, for example if we have an independent, expert tribunal for conducting EAs, a some stakeholders have suggested.³

Strategic and regional EAs

- Now, it's important to differentiate the project EA process I just described from **strategic and regional EAs.**
- These are planning tools that are already available but virtually unused.
- Strategic EAs can be used to plan policies, plans and programs and regional EAs can be used to collect baseline information and set impact thresholds for specific geographical regions.⁴ Both would involve significant Indigenous and public participation.
- **These two tools must be used to set policy in advance of project reviews.** Project decisions must then be required to comply with and support these policies.

³ Please see Canadian Environmental Law Association (CELA) preliminary submission to the Expert Panel on EA Modernization: <http://www.cela.ca/preliminary-submissions-federal-ea-act>

⁴ Our colleagues at West Coast Environmental Law have done extensive thinking about how strategic and regional EAs can be a key part of the overall sustainable development process: http://wcel.org/sites/default/files/publications/WCEL_FedEnviroAssess_ExecSum%2Bapp_fnldigital.pdf (see page 4). Please also refer to Dr. Martin Olszynski's submission to the EA Modernization panel: <http://eareview-examenee.ca/view-submission/?id=1479235841.4223>

- Note that these processes would provide a forum for the big-picture societal discussions we need to be having, which may reduce the extent to which project-specific hearings become a proxy for these discussions

Tenet 8: Energy regulators should ensure frequent and credible life cycle monitoring and oversight of projects within its purview.

- We have not focused on lifecycle monitoring and oversight in our research on this project to date.
- However, I understand that the Expert Panel is interested in having more information on this subject, so I'd like to provide you with a few considerations.
- I presume the Expert Panel is aware of the 2015 Fall Report from the federal Commissioner of the Environment and Sustainable Development (CESD) on the oversight of federally regulated pipelines, which found that there is a great deal of room for improvement in monitoring.
- Experts on this issue have made the following suggestions to improve monitoring:
 - Indigenous and local participation in environmental monitoring committees, an approach that has been effective in other sectors;
 - All follow-up information needs to be publicly available and searchable;
 - The current use of the principle of “adaptive management” for mitigating impacts is inadequate.
- I would like to refer the Expert Panel to the work of Dr. Martin Olszynski, Assistant Professor at the University of Calgary School of Law, in particular, his submission to the EA modernization panel which touches on many of the topics we're speaking about today.⁵

Tenet 5: Energy regulators should proactively and predictably support involvement of all interested parties and the public as a fundamental component of evidence gathering, decision-making and monitoring.

- Finally, I would like to highlight a few of our recommendations pertaining to participation, since my colleague did not have a chance to touch on them last week.

⁵ Please refer to Dr. Martin Olszynski's submission to the EA Modernization panel: <http://eareview-examenee.ca/view-submission/?id=1479235841.4223>

- To begin, a new regulatory regime should remove provisions in the Acts limiting interested parties to those “directly affected.” A process with such limitations will not be able to inspire public trust.
- Establish a robust funding program for participation. We would refer the Panel to the former *Intervenor Funding Project Act* under the Environmental Review Tribunal in Ontario.⁶
- This approach was based on the “proponent pays” model and provided incentives for groups with similar interests to group together. It expired in 1996 and was not renewed.
- Provide financial resources for universities and research centres in Canada to develop pools of independent experts who can be called upon to provide independent third-party information.

Conclusions

- I’d like to conclude by reminding the Panel and participants that the NEB was established in 1959, and Canada’s EA law in 1992. It’s normal and desirable that societies would adjust their collective decision-making processes in light of new information and new challenges, and we are certainly living in such a time.
- Through the research we’ve conducted over the last few months, we’ve been reminded of the complexity of regulatory regimes and the difficulty – as much cultural as technical – of reforming them. I commend you in stepping up to this challenge and look forward to working with you moving forward.

Merci beaucoup et au plaisir de continuer le dialogue.

Thank you!

⁶ See CELA’s preliminary submission to the EA modernization panel for more information.