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By email

NRCan's National Energy Board Modernization Secretariat
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March 31, 2017

To NRCan's National Energy Board Modernization Secretariat,

Re: Lake Ontario Waterkeeper's submissions to the Expert Panel of the National Energy Board modernization review process

Please find below the submissions on behalf of Lake Ontario Waterkeeper to assist with the National Energy Board modernization review process.

Should you have any follow-up questions concerning this proposal, please feel free to contact me directly at 647 923 4927 or pippa.d.feinstein@gmail.com or the Lake Ontario Waterkeeper office at 416 861 1237 or admin@waterkeeper.ca.

Sincerely,

A handwritten signature in black ink, appearing to read 'Pippa Feinstein', is written over a light blue circular stamp.

Pippa Feinstein, JD



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EXECUTIVE SUMMARY

For many years now, members of the Canadian public have perceived the National Energy Board (NEB) to be a ‘captured regulator’ – more responsive to self-identified needs of the oil and gas industry than to broader conceptions of the public interest. These public perceptions were cemented for many by a series of changes made to the *NEB Act* and other Canadian environmental legislation in 2012. These changes (and the Board’s implementation of them) marginalized the public’s concerns over the impacts of the oil and gas industry to the environment, and made the NEB processes more opaque and exclusionary.

The federal government is currently in the process of initiating a review of the NEB to better ensure its accountability and transparency, and restore public faith in the regulator’s neutrality and ability to promote the public interest (including the need for a healthy environment).

Lake Ontario Waterkeeper/Swim Drink Fish Canada (Waterkeeper) is participating in the current NEB Modernization review process to help ensure that amendments resulting from this review process will serve to support the health and wellbeing of watersheds across the country.

Waterkeeper has provided submissions for the concurrent federal reviews of the *Canadian Environmental Assessment Act*, *Navigation Protection Act*, and the *Fisheries Act*. All submissions have been shared with the public and are posted on Waterkeeper’s website, where they

contribute to informed public debate and discussions about effective environmental regulation in Canada. These NEB modernization submissions will also be shared with the public via its website for the same purpose.

Waterkeeper has retained Pippa Feinstein, JD to prepare this paper.¹ Ms. Feinstein has experience appearing on behalf of Waterkeeper before several energy boards and commissions including the Ontario Energy Board, Canadian Nuclear Safety Commission, and National Energy Board. She attended the day-long meeting held by the NEB Modernization Expert Panel (the Expert Panel) in Toronto on February 1st and participated in the afternoon's discussions.

Waterkeeper provides the following research, analysis, and recommendations to assist the Expert Panel in its review of the NEB. A list of the organization's recommendations are as follows:

Public Engagement

1. *The 2012 changes to the NEB Act requiring individuals to be "directly affected" in order to participate in decision-making processes for pipeline projects should be repealed. All members of the public, and public interest organizations, should be able to submit letters of comment on any issue involving NEB regulation, including all project applications.*
2. *Public comments opportunities should be provided concerning changes in NEB legislation, regulations, and policies, as well as the consideration of export and import licences, pipelines of under 40km, and the NEB's provision of long-term forecasts of energy demand and supply.*
3. *Interested members of the public should be able to submit comments on both procedural and substantive aspects of NEB hearings.*
4. *Hearing processes must provide opportunities for public comment before the project is approved, once the design of a project has been finalized, and also once conditions on approval have been met.*

Participant Funding

5. *The participant funding limit of \$80,000.00 for organizations, and \$12,000.00 may still be reasonable, and should not be decreased in instances in which significant public interest is expressed in a project.*

Defining the Public Interest

6. *Statutory definitions of the public interest in the NEB Act should include the public's right to safely swim, drink, and fish in Canada's watersheds.*
7. *Climate change and sustainability considerations should also be included in the NEB Act's definitions of the public interest.*
8. *While navigation, water quality, fish and fish habitat protection, and greenhouse gas (GHG) emissions from specific projects may be considered by the NEB, primary assessment of these issues must be conducted by other properly funded federal agencies that have the expertise to do so:*
 - a. *Transport Canada must assess impacts to navigation and navigation safety posed by NEB-regulated projects;*

¹ This was made possible by funding from the NEB Modernization process, provided by Natural Resources Canada. This submission is © Her Majesty the Queen in right of Canada (2017). The opinion and views expressed are not necessarily those of Natural Resources Canada or the Government of Canada.

- b. *The Department of Fisheries and Oceans Canada must assess impacts to fish and fish habitat by NEB-regulated projects; and*
- c. *Overall, environmental assessments of all potential projects' environmental impacts, including those above, as well as those concerning species at risk and GHGs emissions, must be conducted under a revised and improved Canadian Environmental Assessment Act, with the Canadian Environmental Assessment Agency as Responsible Authority.*

Energy Information, Reports and Advice

- 9. *Datasets, units, and assumptions should be aligned across federal agencies responsible for collecting and sharing information about federally-regulated energy so that their collective data is compatible for analysis.*
- 10. *Hearings should be established to test and augment the information and assumptions on which NEB energy forecasts are based. The branch of the NEB responsible for these forecasts should be independent from decision-making and other branches of the board.*
- 11. *The NEB should collect more comprehensive information on pipeline failures in Canada, in line with that collected in the US. This information should also be made publicly available via an accessible and searchable online database.*

Hearings

- 12. *All hearings for pipelines of 40 km or longer must include opportunities for oral cross-examination under oath. Waterkeeper encourages the NEB make oral cross-examination available to intervenors in other types of hearing as well.*
- 13. *The NEB Act should be amended to provide more specific criteria that need to be met in order for an application to be found complete. These criteria should include a public accessibility requirement and require the provision of actual data used to support assertions made in applications.*
- 14. *NEB staff should be required by the Act to make their reviews of the project application publicly available, especially concerning their completeness determination, but also throughout hearing processes.*
- 15. *Both the NEB decision-making panels' and GIC final determinations on projects must be subject to statutory judicial review, and a standard 30-day limitation period.*

Decision-making roles

- 16. *Currently specified timelines for decisions should be repealed.*
- 17. *The GIC should not have the authority to approve any project in which the appropriate NEB decision-making panel has recommended that the application be denied.*
- 18. *If the GIC is still granted authority to make final determinations in the revised NEB Act, the Act should require that its reasons be fulsome.*
- 19. *The NEB's project and policy decisions should be made in keeping with regional plans and strategic EAs.*

Governance

- 20. *The appointment process for permanent and temporary Board members should be transparent, and involve an open (and publicly explained) process for accepting applications from members of the public.*
- 21. *All Board members should be diverse in gender, ethnicity, regional representation, and professional expertise.*
- 22. *The Calgary residency requirement for board members should be repealed.*

BACKGROUND

The National Energy Board (NEB) was created by the *National Energy Board Act (NEB Act)* in 1959² pursuant to the recommendations of two Royal Commissions: the 1957 Royal Commission on Energy, and the 1955 Royal Commission on Canada's Economic Prospects. Both commissions advocated for more centralized and developed processes for expanding the country's oil and gas infrastructure. The *NEB Act* created a new regulatory scheme for the oil and gas industry that put the NEB in charge of regulating pipeline projects, imports and exports of natural gas, crude oil, and other petroleum products, and oil and gas exploration and extraction activities. The NEB was established as an independent expert regulating body. It was meant to make evidence-based decisions that would ensure the oil and gas sector would develop in a way that would protect the public interest.

At that time, the public interest was effectively conflated with a need for the industry to expand - there was no understanding of the dangers of fossil fuel's contribution to climate change, nor was there much knowledge about the fragility of local ecosystems in need of conservation. Economic policies of persistent and exponential growth were still largely unquestioned. In "modernizing" the NEB through this current process, the federal government implicitly recognizes the need to revisit these former assumptions about the public interest.

In 2012, the federal government introduced Bill C-38 which contained a series of far-reaching changes to Canada's environmental legislation, in many instances erasing decades worth of environmental legislation and case law precedent. The bill effectively cancelled almost 3,000 environmental project assessments, 700 of which concerned fossil-fuel related projects.³ Bill C-38 also contained several significant changes to the *NEB Act* that effectively eroded the authority of the Board, and politicized its decision-making functions. These changes have led to a decline in public confidence with the NEB's regulatory activity and its decision-making processes.⁴

This was a significant step backwards for the regulator, which had already by that time been thought of by many as having been captured by industry. For instance, since its establishment, the regulator had only denied one major pipeline project application, and that was in 1966.⁵

The federal government is currently reviewing the *NEB Act* to restore public faith in the regulator's neutrality and ability to promote the public interest.

About Lake Ontario Waterkeeper/Swim Drink Fish Canada

Lake Ontario Waterkeeper/Swim Drink Fish Canada (Waterkeeper) is a Canadian charity working for a day when every person in the Lake Ontario watershed can safely touch the water, when the water is pure enough to drink, and when the lake is clean and wild enough that you can could

² *National Energy Board Act*, RSC 1985, c N-7.

³ Mike De Souza, "Harper government scraps 3,000 environmental reviews on pipelines and other projects", August 23, 2012, online: <http://o.canada.com/news/harper-government-kills-3000-environmental-reviews-on-pipelines-and-other-projects>

⁴ Voices-Voix Canada, National Energy Board case study, online: <http://voices-voix.ca/en/facts/profile/national-energy-board>.

⁵ See: WCEL submissions to the NEB Modernization Expert Panel. See also: Barry D Fisher, "The Role of the National Energy Board in Controlling the Export of Natural Gas from Canada" *Osgoode Hall Law Journal* Volume 9, Number 3 (1971) 553-599.

toss in a line anywhere and pull out a fish. Its work connects and empowers people in order to stop pollution, protect human health, and restore habitat. Waterkeeper's programs bring together law, science, culture, digital media, and public education to achieve its goals. The organization also regularly assists in environmental decision-making processes as members of stakeholder advisory committees and through legal interventions before regulatory boards and tribunals.

Waterkeeper has provided submissions for the concurrent federal environmental assessments review panel. It has also provided submissions concerning the federal government's review of the *Navigation Protection Act* and the *Fisheries Act*. All submissions have been shared with the public and are posted on Waterkeeper's website, where they contribute to informed public debate and discussions about effective environmental regulation in Canada. Should Waterkeeper receive funding to participate in this NEB modernization review process, it will ensure its submissions are also shared with the public via its website.

Waterkeeper has prepared the following submissions to assist the Expert Panel as it examines and provides recommendations for the reform of the NEB.

Public Engagement

It is important for members of the public to have a say in NEB-regulated projects and policies that can impact the health of their communities and local watersheds. The widespread and increasing public engagement with in NEB regulatory processes to date is a testament to Canadians' interest and concern about these issues.

While the literature concerning meaningful public participation is very diverse, several scholars and professionals have identified two ways in which we can measure whether or not a public participation process is 'meaningful'. This first concerns whether members of the public can contribute to decision-making *processes* (i.e. *how* decisions will be informed and discussed). The second concerns whether members of the public can be shown to have an impact on the substantive *outcomes* of decision-making processes (i.e. the extent to which they see their concerns reflected in final decisions on a matter). Ultimately, both are equally important in assessing the meaningfulness of public engagement.

In a groundbreaking paper Shelly Arnstein created a 'ladder of citizen participation' in which she identified eight types of public participation and ordered them according to the degree to which they meaningfully included the public. Overall, she noted that the most meaningful avenues for public participation are those in which the public has the ability to: 1) help determine how information is shared; and 2) influence significant changes and decisions.⁶ Similarly, Caron Chess and Kristen Purcell have underscored the importance of both process and outcome, and explained that public participation processes are the most meaningful when they involve procedures that allow for meaningful exchanges between participants, and mutually beneficial outcomes.⁷

⁶ S Arnstein, "A Ladder of Citizen Participation" (1969) *Journal of the American Institute of Planners* 35:4, at 219.

⁷ Caron Chess and Kristen Purcell, "Public Participation and the Environment: Do We Know What Works?", *Science & Technology* 33:16 1999.

It is also important to note that public engagement programs are not only for the benefit of members of the public who want to feel meaningfully included in decisions that will impact their communities. Designing inclusive public participation opportunities helps to better inform subsequent decisions. The National Academies in the United States organized a panel in 2008 to examine public participation in environmental assessments and decision making.⁸ The panel's report confirmed that meaningful public participation can increase the legitimacy and quality of environmental decisions.⁹

Members of the Canadian public, including not-for-profit public interest organizations, have diverse expertise in a variety of areas that can assist NEB decision-makers to arrive at holistic and nuanced decisions. The active engagement of these individuals and organizations should be viewed as a valuable resource, rather than an inconvenient cost of doing business.

No person should be turned away from expressing their views on projects that can directly or indirectly impact the swimmability, drinkability, and fishability of their watersheds. Before the 2012 changes to the *NEB Act* that limited public involvement, there was no indication that letters from concerned members of the public were unreasonably slowing project approval processes. The vast majority of federal and provincial environmental and energy tribunals across the country accept and consider letters of comment from the public in performing their regulatory duties. The NEB should rejoin them in this practice, and dispense with the long applications forms that have been required to request leave to write to the board about certain project applications.

The NEB should not be able to prevent members of the public or public interest organizations from expressing their views on projects, policies, or reports that can directly or indirectly impact the swimmability, drinkability, and fishability of their watersheds.

Recommendation 1: *The 2012 changes to the NEB Act requiring individuals to be “directly affected” in order to participate in decision-making processes for pipeline projects should be repealed. All members of the public, and public interest organizations, should be able to submit letters of comment on any issue involving NEB regulation, including all project applications.*

At the same time, Waterkeeper is not opposed to a ‘genuine interest’ standing test to determine who may intervene in decision-making matters before the NEB, or a ‘value added’ test to determine which intervenors may receive public participation funding.

Waterkeeper also submits that members of the public and public interest organizations should be engaged by the NEB not just during decision-making processes for larger pipeline projects,

⁸ Which include the National Academy of Sciences, National Academy of Engineering, Institute of Medicine, and the National Research Council.

⁹ Thomas Dietz and Paul C Stern, eds, “Public Participation in Environmental Assessment and Decision Making”, National Research Council of the National Academies, Committee on the Human Dimensions of Global Change Division of Behavioral and Social Sciences and Education, 2008.

but also during decision-making processes for smaller pipeline projects and licence decisions concerning imports and exports and powerlines. Public engagement should also be undertaken for proposed changes to in NEB regulations and policies, as well as the NEB's biannual energy forecast reports. While some public engagement has taken place in these circumstances in the past, Waterkeeper submits that these requirements should be included in a revised *NEB Act*, making them obligatory.

These other opportunities for public input could involve the option to provide letters of comment, or intervene in written or oral hearing processes. The degree of procedural complexity for each matter can also be determined by the appropriate NEB panel members and involve opportunities for public comments on that procedural issue. This is a method employed by the Ontario Energy Board at the start of its decision-making processes where members of the public provide arguments in favour of whether a particular decision-making processes should proceed via written or oral hearing. This can be an important way to ensure the public has a say about both the procedural aspects and substantive outcome of a decision-making process: the two necessary aspects of meaningful public engagement.

Recommendation 2: *Public comments opportunities should be provided concerning changes in NEB legislation, regulations, and policies, as well as the consideration of export and import licences, pipelines of under 40km, and the NEB's provision of long-term forecasts of energy demand and supply.*

Recommendation 3: *Interested members of the public should be able to submit comments on both procedural and substantive aspects of NEB hearings.*

Waterkeeper also submits that opportunities for public comments concerning project approvals should occur throughout the lifespan of a project. Currently, the NEB hearing process for pipeline projects does not include mechanisms for meaningful public engagement in a project after Governor in Council (GIC) approval – this approval is given before the 'design phase' of a project at which point many outstanding issues remain including the finalized pipeline route.

Waterkeeper recommends multiple stages of public engagement opportunities involving NEB-regulated projects, and there is precedent for this kind of process. When the Ontario Energy Board held consultations for the Energy East and Eastern Mainline projects in 2014, they were conducted in two stages. The first stage concerned the initial introduction of the project which involved high-level discussions of its potential impacts to consumers, and the environment in Ontario. Then, once the project application was filed with the NEB a second phase of the consultation took place in which more specific concerns could be discussed. This consultation underscored an important point: while early consultation on a project is key, the opportunity to provide continued input as more project information becomes available is just as important. Federal and provincial environmental assessments also adhere to this principle: comments opportunities have traditionally been provided at the initial scoping of the assessment, then again upon the completion of the assessment, and a third time for environmental assessment follow-up plans.

Waterkeeper recommends that more opportunities be provided for public engagement over the course of project lifespans – especially after the design phase of pipeline projects. Waterkeeper also supports Ecojustice's request for proponents and regulated companies to provide reports on the status and results of follow-up programs as well as reports on compliance with conditions

of approval. These reports should be made publicly available via a searchable registry so that members of the public can follow the operational performance of projects, and potentially submit comments should any concerns arise.¹⁰

Recommendation 4: *Hearing processes must provide opportunities for public comment before the project is approved, once the design of a project has been finalized, and also once conditions on approval have been met.*

Participant Funding

Participant funding is a crucial way to assist public engagement. Most energy regulators in Canada, other than the NEB, have the authority to award costs to cover intervenors' professional fees for retained experts and lawyers which are paid for by the regulated utilities.¹¹ According to Gordon Kaiser and Bob Higgie, "the purpose of cost regimes is to encourage effective interventions so that all public interest aspects of a matter are considered, thereby promoting informed decisions by regulators".¹²

While limits for participant funding have been set for individuals and non-profit organizations, there have been cases in which these limits were restricted when public expressions of interest in these processes proved more than was expected. The current Energy East and Eastern Mainline hearings provide an example of this. The initial list of participants in these hearings was subsequently expanded later in the process and as a result, the granted funding limits for each intervenor was effectively halved. The Energy East and Eastern Mainline projects are unprecedented in size and scope. As such, it would make sense that the hearing scope would also be unprecedentedly large. Members of the public should not have their participant funding lowered depending on the proposed scope of the project.

Facilitating public engagement must be considered a reasonable and necessary cost of applying for a project and potentially obtaining a regulatory and social licence for the proposed project.

Recommendation 5: *The participant funding limit of \$80,000.00 for organizations, and \$12,000.00 may still be reasonable, and should not be decreased in instances in which significant public interest is expressed in a project.*

Defining the Public Interest

When an NEB decision-making panel makes recommendations for the GIC to approve or deny a pipeline application, it may have regard to "any public interest that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application".¹³ However, the Act does not currently provide a definition of what the public interest is or includes.

¹⁰ See Ecojustice submissions to the NEB Modernization Expert Panel.

¹¹ Gordon Kaiser and Bob Higgie, "Developments in Public Utility Law" in Gordon Kaiser and Bob Higgie, eds, *On Energy Law and Policy* (Toronto: Carswell, 2011) at 183.

¹² *Ibid.*

¹³ *Supra* note 2 at s 52(2)(e).

In interpreting its duty to regulate in the public interest, the Board has explained:

*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. As a regulator, the Board must estimate the overall public good a project may create and its potential negative aspects, weigh its various impacts, and make a decision.*¹⁴

There is no universally accepted understanding in Canadian common law of the public interest. Rather, it will change depending on the particular circumstances in which it is being considered. Previous NEB Chair Kenneth Vollman has noted that the “public interest is not a question of law or fact but is an opinion that necessarily involves accommodation of conflicting interests.”¹⁵ He continued, “there is no precise definition of the public interest, it is clear that the public interest embodies the concept of “the greatest good for the greatest number.”¹⁶

More guidance can be given in the *NEB Act* concerning definitions of public interest by including an expanded definition of the public interest in section 52(2). Guidance on this issue can also be provided in a preamble to the *NEB Act*.

There are several examples of preambles to legislation that provide holistic context for these Acts' subsequent provisions. One example Waterkeeper would like to draw the Panel's attention to is that of the *Great Lakes Protection Act* which recognizes the importance of ensuring Ontarians' access to swimmable, drinkable, fishable water in the face of several environmental stressors including climate change and urban development.

*The Great Lakes-St. Lawrence River Basin is particularly vulnerable to the effects of climate change and in the face of additional cumulative pressures such as development, population growth, loss and degradation of natural features, pollution and invasive species, three of Ontario's four Great Lakes are in decline. Co-ordinated action in and monitoring and reporting with respect to the watersheds, lakes, rivers and coastal areas of the Great Lakes-St. Lawrence River Basin are needed to respond to the impacts of and improve resilience to those pressures. While many partners are working together to protect and restore the ecological health of the Great Lakes-St. Lawrence River Basin to ensure that it provides Ontarians with a source of water that is drinkable, swimmable and fishable, more needs to be done.*¹⁷

In addition to providing context for the Act's provisions, this preamble recognizes the importance of swimmable, drinkable, fishable water and its threats, and thus provides important reference points for the interpretation of the Act.

¹⁴ National Energy Board Reasons for Decision OH-1-2009, TransCanada Keystone Pipeline GP Ltd. (Keystone XL Pipeline) at 78.

¹⁵ Application for Energy East, Asset Transfer and Eastern Mainline (OH-002-2016) quoting Mr. Kenneth Vollman, Chairman, National Energy Board “The Regulator's Role—Promoting the Public Interest, Notes for a Presentation by Mr. Kenneth Vollman, Chairman, National Energy Board”, World Forum on Energy Regulation, May 24, 2000, Montréal, QC. at 2-7.

¹⁶ *Ibid* at 2-8.

¹⁷ *Great Lakes Protection Act*, SO 2015, c 24, preamble.

The NEB's definition of the public interest should recognize the importance of public access to swimmable, drinkable, fishable water and ensure that the impacts of NEB-regulated projects must not impair this right to healthy watersheds

Recommendation 6: *Statutory definitions of the public interest in the NEB Act should include the public's right to safely swim, drink, and fish in Canada's watersheds.*

Recommendation 7: *Climate change and sustainability considerations should also be included in the NEB Act's definitions of the public interest.*

The NEB Modernization briefing paper concerning the public interest noted that the NEB has the discretion to consider several factors not explicitly listed in the Act in their determination of whether a project would be in the public interest. These considerations included navigation and navigation safety, water and air quality, fish and fish habitat, species at risk, and the GHG implications of specific projects. While these issues may still inform the modernized NEB's determination of whether a project may be in the public interest, Waterkeeper submits that each of these concerns must be assessed thoroughly by the agencies that had been responsible for these assessments prior to the 2012 changes to the *NEB Act*.

A series of changes to Canada's environmental legislation in 2012 were coordinated to make the NEB a "one window" regulator for all the approvals a pipeline project would legally require. This change was made despite the fact that the NEB did not necessarily have sufficient expertise to adequately take on this centralized regulatory role. In submissions Waterkeeper has made pursuant to recent and ongoing federal review processes of the *Fisheries Act*, *Navigation Protection Act*, and *Environmental Assessment Act*, the organization has consistently recommended a return to the pre-2012 environmental legislative scheme in which Canada's distinct environmental laws relied on the expertise and authority of distinct agencies working in concert. Waterkeeper also stresses the importance of ensuring that these agencies are adequately funded to perform their mandates and enforce their laws.

First, Waterkeeper supports the recommendations by Pembina, WCEL, Ecojustice, and others for all NEB-regulated projects to be subject to environmental assessments conducted by the Canadian Environmental Assessment Agency. More information about how this would be organized and the rationales for this recommendation can be found in those organizations' submissions.

Second, the protection of navigable waters was decimated with the 2009 and 2012 changes transforming the *Navigable Water Protection Act* into the *Navigation Protection Act*. These changes removed navigation oversight entirely from the majority of navigable waterways.¹⁸ The NEB review must be informed by an understanding of these changes and how they have

¹⁸ Submission from Lake Ontario Waterkeeper/Swim Drink Fish Canada to the Standing Committee on Transport, Infrastructure and Communities, November 30, 2016, online: <http://www.waterkeeper.ca/blog/2016/11/30/waterkeepers-submission-on-the-navigation-protection-act-review>.

adversely impacted the public's right to navigate and connect with Canada's waterways. Any amendment to the *NEB Act* undertaken as part of this modernization review should be pursued in coordination with reform to the *Navigation Protection Act* that ensures a sufficiently funded Transport Canada will perform reviews of proposed projects' impacts to the navigation of Canada's waterways.¹⁹

Third, in the same 2012 sweep, Canada's legislative scheme to protect fish and fish habitat was made exceedingly precarious. Amendments to the *Fisheries Act* made an arbitrary distinction between fish of commercial value and all other fish, dispensing with the ecosystem approach that had previously informed the Act. It also weakened fish habitat protection, and placed an onus on members of the public to prove harm, reversing the precautionary principle, an enshrined principle of environmental law. Especially important to note in the context of the NEB review, is that 2012 legislative changes permitted the federal government to decimate the federal Department of Fisheries and Oceans (DFO), spreading its responsibilities over less-informed agencies.

A Memorandum of Understanding (MOU) was subsequently made between the federal DFO and NEB essentially transferring authority from the DFO to the NEB to assess impacts of proposed projects and policies to fish and fish habitat.²⁰ Waterkeeper submits that the current NEB modernization review must be understood in the context of these broader legislative changes. Any amendment to the *NEB Act* undertaken as part of this review should be pursued along with reform to the *Fisheries Act* that ensures an adequately funded DFO can use its expertise to properly assess impacts of NEB-regulated projects to the health and wellbeing of Canada's aquatic ecosystems.²¹

Assessments of potential impacts of projects to species at risk and potential GHG emissions implications of projects should also be assessed during EAs with relevant ministries' and agencies' expertise.

2012 changes to Canada's environmental legislation conspired to make the NEB a "one window" regulator, despite the fact that the Board did not have sufficient expertise or the capacity to adequately take on this centralized role. Environmental assessments, including navigation, fisheries, species at risk, and GHG assessments, must be undertaken by properly-funded expert agencies rather than the NEB.

¹⁹ Note: Transport Canada used to perform these assessments for the Neb prior to 2012 legislative changes.

²⁰ Memorandum of Understanding between the National Energy Board and Fisheries and Oceans Canada for Cooperation and Administration of the Fisheries Act and the Species at Risk Act Related to Regulating Energy Infrastructure, December 16, 2013, online: <https://www.neb-one.gc.ca/bts/ctr/mmmrdm/2013fshrcnscnd-eng.html>.

²¹ Submission from Lake Ontario Waterkeeper/Swim Drink Fish Canada to the Standing Committee on Fisheries and Oceans, November 30, 2016, online: <http://www.waterkeeper.ca/blog/2016/11/30/waterkeepers-comments-on-review-of-changes-to-the-fisheries-act>.

Recommendation 8: *While navigation, water quality, fish and fish habitat protection, and greenhouse gas (GHG) emissions from specific projects may be considered by the NEB, primary assessment of these issues must be conducted by other properly funded federal agencies that have the expertise to do so:*

- a. *Transport Canada must assess impacts to navigation and navigation safety posed by NEB-regulated projects;*
- b. *The Department of Fisheries and Oceans Canada must assess impacts to fish and fish habitat by NEB-regulated projects; and*
- c. *Overall, environmental assessments of all potential projects' environmental impacts, including those above, as well as those concerning species at risk and GHGs emissions, must be conducted under a revised and improved Canadian Environmental Assessment Act, with the Canadian Environmental Assessment Agency as Responsible Authority*

Energy Information, Reports, and Advice

Currently, the NEB, Statistics Canada, Natural Resources Canada, Environment and Climate Change Canada, Transport Canada, and the Transportation Safety Board all collect information concerning energy supply and demand, GHG emissions, and energy infrastructure safety in Canada. While it may not be realistic to expect the NEB to be the centralized source or focus of all this information, Waterkeeper supports Pembina's recommendation that datasets, units, and assumptions be aligned between these agencies so that their collective data output is compatible for further independent analysis.

Recommendation 9: *Datasets, units, and assumptions should be aligned across federal agencies responsible for collecting and sharing information about federally-regulated energy so that their collective data is compatible for analysis.*

The NEB has an important role to play in informing the federal government about energy policy and the safety of NEB-regulated infrastructure. This information must be more comprehensive and include public input.

That being said, the NEB has a unique and important role in informing the federal government about Canada's energy needs and supply.

The Integrated Power System Plan (IPSP) process in Ontario provides a helpful potential template for the Expert Panel to examine when considering possible improvements to the NEB's activities in this area.²² While the IPSP process was meant to determine how Ontario would approach its energy planning, the NEB will not have the same responsibilities in terms of setting Canadian energy policy and determining Canadian energy supply mixes. However, the IPSP's

²² The Plan was required under the *Electricity Act, 1998* and while the IPSP process was initiated in 2006, it was subsequently and abruptly closed without notice. For archived reports prepared pursuant to this process, see: <http://www.ontarioenergyboard.ca/OEB/Industry/Regulatory+Proceedings/Policy+Initiatives+and+Consultations/Archived+OEB+Key+Initiatives/Proposed+Approach+to+Review+the+IPSP+Plan>.

process for compiling the information on which policy would subsequently be made is relevant to this NEB modernization process.

In determining which sources of energy the province would produce and purchase over time, the IPSP involved a thorough and robust information-gathering process including in-person stakeholder workshops, written interrogatories, the provision of additional evidence by intervenors, and oral hearings with cross examination of expert witnesses. This process helped to ensure that important decisions concerning the province's energy supply and demand were made with the benefit of diverse sources of information, and in the best interests of engaged members of the public and stakeholders.

If NEB forecasts of energy supply and demand are used to inform federal energy policy, and used by NEB decision-making panels to assist with their economic and technical determinations when considering new energy infrastructure in Canada, this information should be tested and supplemented by members of the public and public-interest organizations with expertise in these areas. It would also be important for this information-gathering arm of the NEB to be independent from the other functions of the Board.

Recommendation 10: *Hearings should be established to test and augment the information and assumptions on which NEB energy forecasts are based. The branch of the NEB responsible for these forecasts should be independent from decision-making and other branches of the board.*

The NEB is also responsible for collecting information concerning the safety of its regulated facilities.²³ However, the breadth of NEB information pales in comparison to that of its counterpart in the US: the Pipeline and Hazardous Materials Safety Administration (PHMSA). The PHMSA maintains and populates 4 databases that include incidents since the 1980s for 'gathering, transmission, and distribution' pipelines, and since 2011 has collected data concerning natural gas facilities as well. Whereas, the NEB database only contains accidents going back to 2008 and primarily concerns transmission pipelines.²⁴ Further, while PHMSA databases report 21 descriptive fields with regard to the environmental consequences of incidents, the NEB only has two database fields describing environmental outcomes.

The data collection limitations of the NEB prevent any quantitative analysis of the environmental consequences of pipeline failures in Canada. As a result, pipeline failure rates are also almost impossible to determine in Canada.²⁵

In their forthcoming article, Belvedersi *et al* make the following recommendations for incident reporting improvements by NEB:

- "Include inter and intra-provincial pipeline failure data in a publicly available database;
- Change reporting criteria in order to consistent across jurisdictions and with the US database (PHMSA) with the aim of including a higher number of comparable accident cases for review and analysis;

²³ Chiara Belvederesi, Megan Tohmppson, Petr E. Komers, MSES (Management and Solutions in Environmental Science, Inc), "Canada's federal database is inadequate for the assessment of environmental consequences of oil and gas pipeline failures. Under review in *Environmental Reviews*; manuscript available upon request.

²⁴ *Ibid* at 2.

²⁵ *Ibid*.

- Include information about impact on wildlife, soil, water and vegetation in the database, as well as whether remediation was required;
- Ensure and enforce completeness in reporting information for descriptive data fields, avoiding blank cells; and
- Provide publicly-available comprehensive documentation for users, especially providing definitions with clear explanations for every field in the dataset”.²⁶

Recommendation 11: *the NEB should collect more comprehensive information on pipeline failures in Canada, in line with that collected in the US. This information should also be made publicly available via an accessible and searchable online database.*

Hearing Process

An inclusive and rigorous hearing process can help to ensure public confidence in the NEB as an independent regulator, and help to secure social licences for projects in addition to any regulatory licences that may be granted by the board. However, in order to ensure that public hearings fulfill this potential, certain procedural safeguards in hearings must be provided.

The NEB briefing notes available on the NEB modernization website assert oral cross-examination is not required in NEB hearings because issues of credibility and liberty are not usually at play. However, Waterkeeper submits that the *NEB Act* is subject to the *Canadian Bill of Rights* which guarantees full due process of law – not just for instances in which “life, liberty, and security of the person” is engaged, but also when “enjoyment of property” is engaged. As such, the legal necessity of procedural safeguards to ensure due process before the NEB is broader than the board recognizes in its materials. More generally, “[t]he opportunity to cross-examine in order to test or challenge a witnesses’ evidence is a vital part of adversary process”²⁷ And as such, it should be incorporated into NEB hearing processes.

Ecojustice has explained that cross-examination is necessary as it: 1) contributes to the evaluation of evidence; 2) gets more answers than written interrogatories; 3) only a fraction of the intervenors in any hearing will use this opportunity; and 4) preventing oral cross-examination will not necessarily save time as intervenors will bring more motions if they feel they do not have adequate responses to their questions – this is what happened during the Trans Mountain Expansion project’s hearings in the absence of cross-examination.²⁸

Waterkeeper submits that in all applications for pipelines of 40 km or longer, oral cross-examination must be mandatory. For other types of hearing, Waterkeeper recommends that the NEB establish a process whereby intervenors and members of the public can make submissions concerning the need for oral cross-examination, as discussed in these submissions above.

Recommendation 12: *All hearings for pipelines of 40 km or longer must include opportunities for oral cross-examination under oath. Waterkeeper encourages the NEB make oral cross-examination available to intervenors in other types of hearing as well.*

²⁶ *Ibid* at 17-18.

²⁷ David M Paciocco and Lee Stuesser, *The Law of Evidence*, 7 ed (Toronto: Irwin Law Inc, 2015) at 466.

²⁸ *Supra* note 10 at 5.

The *NEB Act* as currently drafted provides the board with the discretion to determine what level of detail must be included in project applications,²⁹ however, not much more guidance is provided concerning specific criteria used to determine an application's completeness.

Completeness findings for project applications have been a contentious issue in past applications for pipeline projects during NEB panel hearings. Under the current Act, NEB staff review a project once it has been submitted by the proponent for any information gaps or other preliminary issues. Once satisfied that the application contains adequate information to be assessed by the NEB decision-making panel and intervenors, staff deem the application complete. The moment an application is deemed complete, the clock starts ticking for the 15-month review period in which the NEB panel must render their final recommendations for whether the GIC should approve or deny the application.

Completeness has been an issue in the Energy East and Eastern Mainline hearings. Last year, NEB staff sent TransCanada's application back to the company when it was found to consist of hundreds of separate files that NEB staff were unable to understand or properly order. NEB staff found the application unmanageable and directed TransCanada to provide a more cohesive submission. TransCanada returned with a loose table of contents for its application, however many intervenors have still found the quantity of separate files, and lack of cohesion, to obscure the contents of that application.³⁰

TransCanada's application has since been subject to motions from intervenors requesting that it be made more user friendly, (including requests that it be presented in searchable formats – a standard requirement before other Canadian energy boards). Many intervenors in this matter are also concerned that since the completeness finding, thousands of pages of modified application documents, including those concerning pipeline routes and water crossings, continue to be added to the application. Such behaviour makes a mockery of any previous completeness findings by NEB staff, frustrate efforts by intervenors to understand and evaluate the application, and fail to hold the proponent accountable to a proper review.

Further, despite these thousands of pages of TransCanada's application, there is virtually no data provided that supports the company's assertions that the project will not pose any significant risks to the local ecosystems the proposed pipeline route will cross. Waterkeeper submits that projects should not be deemed complete unless they provide the data they rely on to assert application's claims and arguments.

²⁹ *Supra* note 2 at s 32(1).

³⁰ Geoffrey Morgan, "TransCanada Corp delivers easier to read 38,885-page Energy East application to National Energy Board", *Financial Post* (May 18, 2016) online: <http://business.financialpost.com/news/energy/transcanada-corp-delivers-easier-to-read-38885-page-energy-east-application-to-national-energy-board>.

All applications brought to the NEB need to be front-ended with proponents providing clear, defensible proposals before the board that will assist rather than frustrate subsequent review during hearings. NEB staff should review proponent applications in a way that better ensures this happens.

More rigorous completeness assessments for projects would save time and money during subsequent hearings. They would help narrow the scope of written interrogatories and help to focus subsequent oral cross-examination, ensuring that these procedural steps concern the actual content of the application, rather than merely trying to fill information gaps permitted by NEB staff. As such more specific criteria should be developed in the *NEB Act* by which applications can be better tested for their completeness.

Recommendation 13: *The NEB Act should be amended to provide more specific criteria that need to be met in order for an application to be found complete. These criteria should include a public accessibility requirement and require the provision of actual data used to support assertions made in applications.*

Staff can provide assistance to both intervenors and the NEB decision-making panel in hearings, however, at the moment, after determining the completeness of a proponent's application, staff are not actively involved in the subsequent review proceedings.

Many energy boards and tribunals include reports prepared by board staff throughout the hearing process which assists decision-makers and intervenors to understand and engage with the available materials. In the case of the OEB, board staff submit information requests before other parties during written hearings and perform cross-examination of proponent's expert witnesses before intervenors during oral hearings.

Recommendation 14: *NEB staff should be required by the NEB Act to make their reviews of the project application publicly available, especially concerning their completeness determination, but also throughout hearing processes.*

In order to ensure accountability in the hearing process, Waterkeeper also supports the submissions of WCEL and Ecojustice requesting that both final decision-making panel recommendations and the GIC's final determinations in applications be subject to statutory judicial review provisions consistent with standard limitation periods for the Federal Courts.

Recommendation 15: *Both the NEB decision-making panels' and GIC final determinations on projects must be subject to statutory judicial review, and the standard 30-day federal limitation period.*

Mandate and Decision-making roles

Amendments to current decision-making roles must protect and support board independence and accountability. The timelines imposed on the NEB in 2012 changes to the Act were not in response to any real threat of longer-than-reasonable hearing times, and have the unfortunate effect of curbing NEB decision-making panels' ability to design hearing processes that are commensurate to the scale and complexity of each project it must adjudicate.

Recommendation 16: *Currently specified timelines for decisions should be repealed.*

The 2012 changes providing the GIC with the discretion and authority to overturn decisions by NEB panels to deny the approval of an application should be repealed. The GIC should not be empowered to authorize an application when it was not present at the fact-finding stages of the hearing, and would not be able to benefit from the full evidentiary record to make its findings.

Recommendation 17: *The GIC should not have the authority to approve any project in which the appropriate NEB decision-making panel has recommended that the application be denied.*

Recommendation 18: *If the GIC is still granted authority to make final determinations in the revised NEB Act, the Act should require that its reasons be fulsome.*

The NEB must remain responsible for helping to inform and implement the federal government's established energy policy rather than setting federal energy policy itself. Waterkeeper supports the recommendations by Pembina encouraging the NEB to make decisions on project applications in a way that is consistent with regional and strategic EAs undertaken for areas in which proposed NEB-regulated facilities would be situated.

Recommendation 19: *The NEB's project and policy decisions should be made in keeping with regional plans and strategic EAs.*

Governance

Amendments to current decision-making roles must protect and support board independence, diversity, and accountability.

Recommendation 20: *The appointment process for permanent and temporary Board members should be transparent, and involve an open (and publicly explained) process for accepting applications from members of the public.*

The NEB panel should also represent diverse regions and watersheds and have professional expertise with not-for profit and public-interest organizations in addition to economic, social, and environmental expertise.

Recommendation 21: *All board members should be diverse in gender, ethnicity, regional representation, and professional expertise.*

Recommendation 22: *The Calgary residency requirement for board members should be repealed.*