

# Lyackson First Nation recommendations for NEB modernization

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## **Governance and Decision Making**

### *Process*

The National Energy Board (NEB) today is closely affiliated with Industry, based on its' structure and partisan representation. NEB was developed for industry and regulator to work together. NEB's existence today depends on funding from the petroleum industry, therefor the Board today is making decisions based on vested interests. The process today is not designed to fairly assess environmental concerns. Important evidence is dismissed and economic benefits are weighted higher than environmental concerns.

In order to restore trust in the process, the Regulator must be arm's length and independent from industry. Technical studies and data should be provided by experts that are independent of Government and industry. All studies and all information considered in the NEB review should be available for the public to review, including public submissions and scoping, emergency response plans etc.

One suggestion for how the flawed process that currently drives NEB can be improved is that NEB conducts the socio economic assessment, while an independent federal agency (such as CEAA) conduct the environmental review for NEB projects. There is a need for consistency, where one capable federal agency (such as CEAA) conducts all environmental assessments.

### *Board representation*

The interests of board members today are weighted too heavily towards industry. The Panel members today disproportionately represent energy interests in Alberta. This bias is crowding out the broader public interest. It is not possible for a one sided Board to conduct a non-biased assessment. It is also not acceptable that industry affiliated members are assessing environmental impacts. There is a need for the Board to include members of equal representation from all sectors. Today there is a lack of understanding of aboriginal rights and interests amongst Board representatives. Board members should be able to act on the best interest on the public, based on an independent and informed reviews.

The NEB review panel must be transparent, diverse and include indigenous representation. There is a need for a Federal joint panel that is comprised of independent, unbiased members that are capable of conducting an independent review.

## **Public participation**

Today the NEB does not include a fair, impartial process that allows cross examination. In a fair and independent process, Proponent's "expert evidence" must be available for scrutiny and cross examination by interveners. Participation exclusion is not conducive for building trust. Intervenors today must be provided with the opportunity and means to adequate and meaningfully participate in hearings. Hearings with municipal governments should further be integrated with NEB hearings.

## **Scope**

The fact that climate effects are not currently assessed by the NEB constitute a flaw in the process. The impacts of the project are further reaching than the actual project foot print. The project effects must be assessed in its entirety, by looking at climate effects and both upstream and downstream effects. Projects reviewed by the NEB must be subject to a rigorous cumulative effects assessment, assessed against a national energy strategy including set thresholds that may or may not already have been surpassed. This energy policy should determine what and how much natural resources that can and should be extracted to meet energy goals and targets. The national energy policy should further identify what and how much natural resources that can and should be extracted without extinguishing Aboriginal rights and interests.

The NEB does not currently have the expertise to assess all the evidence that is brought forward to them. The NEB falls short in assessment of environmental evidence. Therefore, it should not be within NEB's mandate to conduct environmental assessments. An independent and adequate assessment of environmental effects require high level expertise by members that are non-partisan to industry's interests.

Pipelines that are less than 40 km have the potential to impact Aboriginal interests and environmental values immensely. Aboriginal interests should determine if a project should be heard by the NEB, not the length of the pipeline. The scope of the project should be assessed in consultation with First Nations, based on significance screening.

NEB is today not capable of assessing impacts to Aboriginal lands, resources and title. There is also a strong need for a separate review of Aboriginal interests and impacts to rights and title.

## **Indigenous Engagement**

Indigenous people must be given the opportunity and means to actively participate in the NEB decision making process. The Government of Canada has committed to the United Nations Declaration on the Rights of Indigenous People (UNDRIP), as well as the Truth and Reconciliation. These agreements must be upheld and meaningful indigenous decision must be honored. UNDRIP Article 32 of Free and Prior informed consent emphasizes the Nation to Nation relationship between State and Indigenous Governments based on respect and recognition of indigenous rights. According to UNDRIP, the Government of Canada should honour the Principle of Prior and Informed Consent. There is a need to work towards collaboration, where Indigenous People are involved in a consent based decision making process. The NEB process must be flexible enough to allow for Government to Government decision making, between the Crown and the Aboriginal Governing bodies. First Nations should have joint decision making power, where the First Nation assessment is based on Indigenous Law. A Federal and Indigenous approval must be treated equally and require a meaningful, accountable and transparent reconciliation by a joint committee. The determination of First Nation's inclusion in the decision making process should be based on upstream and downstream effects.

First Nations should be involved in all aspects of the decision making, from scoping and assessment to monitoring. Indigenous reviews should inform the Project application, rather than being an afterthought that is being consulted on after all the project designs are in place. Procedural aspects of the consultation should be delegated to industry, who should be providing necessary capacity funding for First Nation consultation. Industry should be required to meet with Indigenous groups early in the scoping and planning stages, prior to determining if the project should be applied for. Aboriginal interests, including rights and title must be included and assessed in the project application.

There is a need for a robust and adequate process that assesses impacts to Aboriginal land and title. First Nation's value components must be adequately assessed and addressed, as well as environmental thresholds. Projects

reduce the land and resources available for First Nations to practice their rights. There is a further a need for a holistic effects assessment of First Nation's rights and interests, including an economic, social and environmental project effects associated with First Nations rights and interests. This includes an assessment of cumulative social and economic losses associated with less opportunities to access the land. There is a need for Government and industry to recognize that each First Nation is unique and the approach taken to consultation with each Nation must be flexible.

NEB is not currently designed to assess Aboriginal interests and rights. There is a need for a guidance document for the Board which guides the Crown's duty to consult with First Nations. Such a First Nation engagement protocol must be developed in collaboration with and approved by Aboriginal groups. There must further be guidelines in place for how TEK and TLU is being considered and meaningfully considered in conjunction with western science.

Cumulative impact assessment must meaningfully consider and include an assessment in relation to First Nations baseline data, based on their past, present and future uses. Such a cumulative impact study must be conducted in collaboration with First Nations and adequate capacity must be allocated to insure that the necessary information can be provided.

#### *Time*

It is crucial that Indigenous communities are provided with adequate timelines to meaningfully engage in the review process. The current NEB review process is rushed process with insufficient time for stakeholders and intervenors to provide meaningful and comprehensive feedback. There should be First Nation driven time lines, based on the timing necessary to review and assess project information as well as for providing sufficient traditional land use and traditional knowledge information. The timeline for consultation should not start until First Nations have been meaningfully engaged.

#### *Costs*

Funding must be timely and sufficient. There is today no adequate capacity provided to intervenor to review the evidence presented by the Board. The NEB must provide intervenors with sufficient funding to provide credible evidence to support their claims. First Nations must be adequately compensated for costs to meaningfully participate. Furthermore, stakeholders should be able to determine independently how the funding provided is spent. Budgets should be driven by First Nations capacity requirements for providing sufficient traditional land use and traditional knowledge information and for reviewing and assessing project information. Adequate funding for full and meaningful participation is a requirement. Otherwise, traditional use information and First Nation's assessment will be lacking and the assessment will not be complete.

#### **Public interest assessment**

The Board today has lost touch with what it means to represent public interests. The public interest is not fairly determined by the NEB. The review process today is not balanced. A fair process requires that environmental, social and economic factors are assessed in a balanced manner. Today, NEB makes decisions based on a flawed process, since it does not consider science on climate change. It is extremely irresponsible of NEB to not consider the targets of climate change in their assessment. An independent body comprised of equal interest groups must collect the data to be assessed and conduct the public interest assessment. This assessment must include an unbiased review of the risks versus the benefits of the project to all sectors and always act on behalf of the broader public interest. There is a need to assess the broader energy sector as well and looking forward into greener more sustainable options that match other environmental and social goals. The public interest assessment must include an assessment of broader cumulative impacts, as well as upstream and downstream effects. An equal distribution of benefits versus associated costs must also be taken into consideration in the public

interests assessments. An assessment of Aboriginal interests should be conducted outside the public interest assessment. An infringement on Aboriginal rights cannot be considered to be within the public interest. There is a need to early in the scoping phase identify aboriginal interests versus the public interests.

### **Legislative tools**

Conditions are meaningless without standards and enforcement. NEB is currently failing to enforce conditions. Monitoring should be conducted by independent agencies, with oversight by potentially impacted First Nations. The proponents should be required to pay First Nations to engage meaningfully in monitoring activities. Culturally appropriate mitigation and monitoring conditions should be developed and adequately enforced.