

Expert Panel Review of NEB Modernization

Submission by Enbridge

March 2017

Enbridge is North America's premier energy infrastructure company, with strategic business platforms that include an extensive network of crude oil, liquids and natural gas pipelines, and regulated natural gas distribution utilities. Our integrated assets include gathering, processing and transportation facilities. We are also one of Canada's largest renewable energy generators. Our portfolio has capacity to generate nearly 2,800 MW of green power capacity – enough to power over 1.1 million homes – with a goal of doubling this capacity by 2019. From 2006 to 2015, our liquids division delivered 17.2 billion barrels of crude oil and liquids with a safety record of 99.9995 percent. In order to address the shifting energy mix, our company is evolving too. In addition to growing our renewable energy business, we are expanding our natural gas business to make access to lower carbon and renewable energy more feasible. Our recent acquisition of Spectra Energy positions us well for this transition, by introducing a more equal balance between natural gas and liquids, along with our rapidly growing renewable power generation business.

Table of Contents

SUMMARY OF RECOMMENDATIONS.....	2
Governance.....	2
Mandate	2
Decision Making	3
Legislative Tools	3
Indigenous Engagement.....	3
Public Participation	4
General Recommendations	4
1.0 INTRODUCTION	5
2.0 PRINCIPLES OF REGULATORY EXCELLENCE.....	6
2.1 Independence	6
2.2 Expertise.....	7
2.3 Quasi-judicial Process.....	7
2.4 One Project, One Review.....	8
2.5 Lifecycle Oversight.....	8
3.0 MANDATE.....	8
3.1 Preserve the NEB's Lifecycle Oversight.....	9
3.2 Maintain One Project, One Review, Including Environmental Assessment.....	10
3.3 Clarify the Definition of "Public Interest"	11
3.4 Energy Information	12
3.5 No Expanded Mandate.....	12
4.0 GOVERNANCE.....	13
4.1 Composition and Expertise.....	13
4.2 Location of Board and Board Members.....	14
4.3 Governance Structure	14
5.0 DECISION MAKING.....	15
5.1 Science and Fact-Based Decision Making	15
5.2 Comment on Interim Measures.....	16
5.3 Current Challenges for Major Pipeline Projects.....	17
5.4 Potential Solution for Major Pipeline Projects – Two-Part Review	19
5.5 Timelines.....	20
5.6 Roles of Other Parties in Final Decision Making	21
6.0 LEGISLATIVE TOOLS FOR LIFECYCLE REGULATION	21
6.1 Lifecycle Compliance and Enforcement Tools	21
6.2 Monitoring Committees	23
6.3 Safety and Security.....	23

6.4	Land Acquisition and Compensation.....	24
6.5	The NEB's Role Regarding Best Practice on Pipeline Regulation	25
7.0	INDIGENOUS ENGAGEMENT	25
7.1	Recognizing the Importance of Traditional Knowledge	25
7.2	Clarifying the Crown's Duty to Consult	26
7.3	Enhanced Lifecycle Role for Indigenous Peoples	28
7.4	UNDRIP in the Canadian Context	28
8.0	PUBLIC PARTICIPATION	30
9.0	CONCLUSION	31

Summary of Recommendations

Enbridge's submission begins with specific recommendations for the Expert Panel to consider in its review of National Energy Board (NEB) modernization, both in terms of what is currently working well and what can be improved. Further detail regarding each of the recommendations is provided in the balance of this submission.

Governance

- Ensure the NEB's governance structure is designed with the goal of enabling the NEB to effectively fulfil its operational and adjudicative roles. This should include consideration of whether to separate the Chair of the Board, with responsibility over the NEB's adjudicative function, and the Chief Executive Officer, with management oversight of the NEB.
- Board members and NEB staff must collectively possess a high level of expertise and experience in a wide variety of areas, including: safety, environmental science, Indigenous issues, community development, pipeline design and construction, pipeline integrity, emergency management, and economics. While Board Members should reflect diverse interests, expertise and experience must be the top priorities.
- In order to maximize the NEB's effectiveness as a lifecycle regulator, the NEB's core adjudicative and operational functions must be consolidated in a single location. The NEB should be located such that it is able to attract and retain staff with the required expertise and experience. Should a move of the NEB be contemplated, consideration should be given to the impacts of disruption and long-term impacts on technical expertise versus value gained.
- The Government of Canada must be accountable for ensuring that the NEB is meeting its goals of effective lifecycle regulation, project adjudication, and regulatory excellence.

Mandate

- The Government of Canada must provide clear direction that distinguishes the role of government in setting policy and the role of the NEB in implementing that policy. Individual project reviews are not the appropriate forum for broad debate on policy issues (see also Decision Making below).
- Preserve and improve upon the NEB's mandate as a lifecycle regulator of pipelines, with its extensive experience in weighing economic, environmental and social factors in determining the public interest. There is no federal regulator better positioned to provide oversight over the entire lifecycle of a pipeline – from review and approval, to operations and maintenance, to eventual abandonment.
- In line with principles of regulatory excellence, keep the NEB whole in order to fully capitalize on its technical expertise and lifecycle mandate. This means keeping environmental assessments (EA) within the Board's scope of review in order to ensure that such assessments are not completed in isolation of decades of lifecycle pipeline experience. The NEB, as a full lifecycle regulator, is in the best position to both set conditions of approval for projects and monitor compliance with those conditions throughout the lifecycle of the asset.
- Maintain a one project, one review approach to project reviews, including keeping EA with the NEB. Maintaining this approach, as opposed to multiple, fragmented processes, supports a regulatory regime that is clear, efficient and well understood by all stakeholders, which in turn, contributes to increased confidence.
- Ensure the Panel's recommendations support the NEB's ability to carry out its day-to-day functions effectively and efficiently. Most of the comments and recommendations made to the Panel were in respect of the NEB's regulatory processes for large pipeline projects. However, the majority of the NEB's work is as a lifecycle regulator, overseeing the safe operation of over 70,000 km of federally-regulated pipelines.
- Enbridge recommends that the *National Energy Board Act (NEB Act)* be updated to require the NEB to consider economic, environmental and social factors when determining whether a project is in the public interest. Doing so

would ensure that the Board considers these factors while providing flexibility to adjust for changing circumstances over time.

Decision Making

- The NEB must be independent from government, industry, and private interests. Decisions must be based on clear policy, science, facts and evidence. This can be achieved by ensuring that the NEB remains an independent, expert, quasi-judicial tribunal and by authorizing the NEB to be the final decision-maker for all projects.
- To the extent that there remains a role for the Governor in Council (GIC), that role should be exercised early in the process rather than at the end. Major Pipeline Projects¹ are experiencing significant delays and uncertainty, in part due to broad policy issues that extend beyond the reach of a particular project. One potential solution is a two-part review, whereby the “national interest” determination is made by the GIC before the NEB conducts the detailed project review. This is a critical element of maintaining investor confidence in Canada’s natural resources, for the benefit of all Canadians.
- Improve role clarity by clearly outlining decision-making accountability across jurisdictions. Provincial / territorial, Indigenous and municipal governments can and should participate in the NEB’s regulatory process; however, as a federal regulator with jurisdiction over international and interprovincial pipelines, the NEB is not bound by the views of those governments.

Legislative Tools

- The existing compliance and enforcement tools available to the NEB are working well and should be maintained. These include audits, inspections, administrative monetary penalties, and the authority to stop work or revoke approvals. These tools are effective, well-used and transparent.
- In line with the principles of regulatory excellence, the NEB should develop a more performance-based, risk-informed framework for its use of these legislative tools.
- Strengthen the NEB’s legislative tools to help protect against pipeline tampering, which raises very serious environmental and safety concerns.
- Enbridge acknowledges the potential value of using monitoring committees. However, in order to be useful and effective, they must have a well-defined scope, mandate and timeline, with terms of reference developed collaboratively between the proponent and interested parties through the regulatory process. Monitoring committees should be complementary to, not duplicative of, the NEB’s compliance verification work.

Indigenous Engagement

- Improvements are required in order to build trust and ensure that Indigenous participation in the regulatory process is effective. To this end, Enbridge recommends the establishment of a Bureau within the NEB with specialized expertise in Indigenous issues to help facilitate and oversee ongoing engagement between companies and Indigenous Peoples. This could include: consultation on projects, involvement in emergency response activities, and resolution of issues and concerns.
- Canada should provide clear policy direction regarding the Crown’s duty to consult, through legislation, policy and guidelines (analogous to Alberta’s Aboriginal Consultation Office, Aboriginal Consultation Policy and Guidelines).

¹ Major Pipeline Projects are defined as large-scale, cross-Canada or international pipeline projects. This definition is not intended to span all section 52 pipelines, but specifically to those that raise broad public policy issues and garner national attention, for example, the Northern Gateway Project, Energy East, and Trans Mountain Expansion.

This includes clearly outlining the roles and responsibilities of the federal government, the proponent, the NEB, and Indigenous communities.

- For all types of applications, the NEB is well-situated to evaluate potential impacts on Aboriginal and treaty rights and to assess the adequacy of Crown consultation. This role can be enhanced through increased Indigenous representation and expertise and within the Board on Indigenous issues. Enbridge also recommends amending the *NEB Act* to clarify the NEB's role in discharging the Crown's duty to consult with Indigenous Peoples, particularly where the NEB is the final decision-maker (as in section 58 applications).
- Enbridge would be supportive of an expanded up-front process, similar to that used by the British Columbia Environmental Assessment Office (EAO), involving affected Indigenous groups and all levels of government to provide advice to the EAO regarding: what should be considered in the assessment, technical issues, and opportunities for public input. The EAO then works with Indigenous groups and governments to ensure the application is complete before it is issued for public comment.
- The principles of UNDRIP, and specifically the principle of "free, prior, and informed consent" (FPIC), must be achieved in harmony with Canadian constitutional law. In the context of NEB modernization, this can be achieved by establishing a regulatory scheme that requires open, transparent and meaningful consultation and cooperation in good faith. Enbridge's position is that FPIC should be interpreted as the objective of consultation, not as an absolute right or veto.

Public Participation

- There should be a balanced approach to public participation, providing different types of participation opportunities for different levels of impact. The greater the level of impact on a person, the greater that person's participation rights should be. Broad comments from interested parties should not dilute input from stakeholders who are most directly affected.
- Flexible approaches to public participation could be used to gather input, as long as this input is added to the evidentiary record and principles of natural justice and procedural fairness are maintained.
- Interested parties should be able to submit a letter of comment without the need to meet the same standing test that is required for intervenors.
- The NEB must maintain flexibility to determine its own process, including whether and in what circumstances cross-examination is appropriate.

General Recommendations

- NEB modernization is just one of four components of the federal government's review of environmental and regulatory processes, in addition to its reviews of EA processes, fisheries and navigation. Due to the highly intertwined nature of these reviews, it is critical that these reviews are integrated, including the recommendations put forward.
- The recommendations made in this and in the other reviews will be only the beginning of federal regulatory reform. Throughout these reviews, we have seen potential for significant alignment amongst stakeholders. Enbridge recommends that the federal government develop processes to facilitate continued dialogue and input, including options for implementing the recommendations made.

1.0 Introduction

Enbridge is North America's premier energy infrastructure company, with strategic business platforms that include an extensive network of crude oil, liquids and natural gas pipelines, and regulated natural gas distribution utilities. Our integrated assets include gathering, processing and transportation facilities. We are also one of Canada's largest renewable energy generators. Our portfolio has capacity to generate nearly 2,800 MW of green power capacity – enough to power over 1.1 million homes – with a goal of doubling this capacity by 2019. From 2006 to 2015, our liquids division delivered 17.2 billion barrels of crude oil and liquids with a safety record of 99.9995 percent. In order to address the shifting energy mix, our company is evolving too. In addition to growing our renewable energy business, we are expanding our natural gas business to make access to lower carbon and renewable energy more feasible. Our recent acquisition of Spectra Energy positions us well for this transition, by introducing a more equal balance between natural gas and liquids, along with our rapidly growing renewable power generation business.

The Prime Minister's mandate letter to the Minister of Natural Resources (NRCan) directed the Minister to: "Modernize the National Energy Board to ensure that its composition reflects regional views and has sufficient expertise in fields such as environmental science, community development, and Indigenous traditional knowledge."² This Expert Panel review of NEB modernization is of critical importance to Enbridge, because it impacts what we do every day – now and into the future. For a variety of reasons, which we will discuss in more detail below, confidence in the NEB process has deteriorated, particularly for Major Pipeline Projects, leading to significant delays and uncertainty. It is important to note that this is not just a concern for the pipeline industry; in fact, it impacts all Canadians. The importance of the energy industry was noted at the recent Energy and Mines Ministers' Conference:

The resource sector forms the backbone of the Canadian economy, accounting for nearly 20 percent of national GDP, nearly 1.8 million jobs across the country, more than half of exports (\$259 billion) and almost half of Canada's non-residential capital investment (\$126 billion). However, in order for resources to continue to provide value for Canadians, they must be developed sustainably and make their way to markets.³

This submission builds upon Enbridge's presentation to the Panel on March 7, 2017 and provides further information, including more detailed responses to the following questions posed by Panel members during our presentation:

- the mechanics of a two-part review, including the purpose of Part 1 and in which part GIC approval would occur (see *Section 5: Decision Making*);
- where EA fits in the two-part review process (see *Section 5: Decision Making*);
- whether there currently is an adequate public policy statement from the federal government (see *Section 5: Decision Making*);
- whether there is a role for the NEB to lead national best practice on pipeline regulation (see *Section 6: Legislative Tools for Lifecycle Regulation*); and
- ideas for how the NEB can regain trust (see *Section 7: Indigenous Engagement* and *Section 8: Public Participation*).

² Minister of Natural Resources Mandate Letter, <http://pm.gc.ca/eng/minister-natural-resources-mandate-letter>

³ Facilitating Responsible Mineral and Energy Development, Compendium of Case Studies on Building Public Confidence in the Mineral and Energy Resource Sectors, Energy and Mines Ministers' Conference, Winnipeg, MB, August 2016, at p. 2 [Energy and Mines Ministers' Conference]: https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/emmc/pdf/Compendium_access_16-0059%20eng.pdf.

There is some overlap between Enbridge's submission in this review and its separate submission to the Expert Panel reviewing federal EA processes.⁴ For a complete picture, we recommend reviewing those submissions together. NEB modernization is just one component of the federal government's review of environmental and regulatory processes, in addition to: federal EA processes, the *Fisheries Act* and the *Navigation Protection Act*. Due to their highly intertwined nature, it will be important to integrate all of these reviews, including the recommendations put forward.

2.0 Principles of Regulatory Excellence

When the federal government announced its review of environmental and regulatory processes in June 2016, Minister Carr stated that, by undertaking the review, the government was "demonstrating action to restore credibility to environmental and regulatory processes and ensure that decisions are based on science, facts, evidence and traditional knowledge of Indigenous Peoples."⁵ In order achieve this, any efforts to modernize the NEB must take into account principles of regulatory excellence, ensuring that any action taken by the government maintains areas and processes where the NEB exhibits these principles, and makes changes where it does not.

Various organizations have published work that defines and describes the attributes of regulatory excellence. For instance, the Organization for Economic Cooperation and Development (OECD) identified four necessary elements of better regulatory outcomes for resource development, as follows:

- well-designed rules and regulations that are efficient and effective;
- appropriate institutional frameworks and related government arrangements;
- effective, consistent and fair operational processes and practices;
- and high-quality and empowered institutional capacity and resources, especially leadership.⁶

In 2014, the Alberta Energy Regulator (AER) commissioned the University of Pennsylvania's Penn Program of Regulation (PPR) to conduct a "Best-in-Class Project", a process designed to help inform the AER and other regulators around the world about how to answer the question of what makes a best-in-class or excellent regulator. The PPR identified three core principles of regulatory excellence: utmost integrity, empathetic engagement, and stellar competence.⁷

Enbridge recommends that, in preparing its report and recommendations to the Minister on NEB modernization, this Panel consider the following principles of regulatory excellence:

2.1 Independence

In order to be effective, a regulator must operate at arms-length from government and from the industry which it regulates. As summarized by the OECD, "All regulators' decisions and activities should be objective, impartial, consistent and expert."⁸ Independent regulators are government entities that, by virtue of statute, possess and exercise some specialized public authority, but are neither directly elected by the public nor directly managed by elected officials. Such a structure facilitates decision making that is independent from the desires and motivations of government or the public. Rather, independent regulators base their decisions on their expertise, and if they are given quasi-judicial authority, on the

⁴ Enbridge Submission for Expert Panel Review of Environmental Assessment Processes, December 2016: <http://eareview-examenee.ca/view-submission/?id=1482333495.2392>.

⁵ Government of Canada News Release. June 20, 2016 <http://news.gc.ca/web/article-en.do?nid=1088199>.

⁶ Energy and Mines Ministers' Conference, *supra* Note 3, at pp. 3-4.

⁷ Cary Coglianese. Listening, Learning, Leading - A Framework for Regulatory Excellence, Penn Program of Regulation, 2015, at p.ii [PPR]: <https://www.law.upenn.edu/live/files/4946-pprfinalconvenersreportpdf>.

⁸ OECD (2014), The Governance of Regulators, OECD Best Practice Principles for Regulatory Policy, OECD Publishing. P. 91, p. 47 [OECD]: <http://www.oecd.org/gov/regulatory-policy/governance-regulators.htm>.

evidentiary record. Decisions made by independent tribunals are subject to judicial oversight – if a decision exhibits errors of law or jurisdiction, it may be appealed or judicially reviewed.

The NEB is an independent and professional body, designed to be free from the influence of government, industry, and the public. There are tools in place to reinforce the NEB's independence from industry and other parties. NEB staff are governed by a code of conduct,⁹ which aligns with the federal government's *Values and Ethics Code for the Public Sector*. This code of conduct identifies what its employees must do to avoid real or perceived conflicts of interest, and includes guidelines for meetings with stakeholders. The NEB Rules of Practice and Procedure¹⁰ govern the procedures to be followed during a proceeding. Regulations are also in place to govern cost recovery from industry.¹¹

Enbridge notes that during the Panel sessions, some participants stated that because the NEB infrequently rejects projects, this is proof that it is a “captured” regulator. Enbridge strongly disagrees with this assertion. As a proponent, Enbridge understands the regulatory requirements and carefully considers the likelihood of success of each potential project. It would not be in industry’s best interest to put forward projects that are not well thought out and that do not meet the expectations and tests of the regulator.

2.2 Expertise

On the topic of expertise, the PPR states: “An excellent regulator demonstrates consistently stellar competence by using its available resources to maximize public value,” and notes: “An excellent regulator consistently delivers significant positive public value, something which is not necessarily the same as making everyone happy (the latter which may be unattainable or undesirable anyway).”¹²

The NEB is an independent, expert, quasi-judicial tribunal. Both NEB Board members and staff possess multi-disciplinary expertise, built over decades. There is simply no other federal regulator that is more knowledgeable about the construction and operation of pipelines throughout their lifecycle than the NEB, and it brings this expertise to bear in its decision making.

2.3 Quasi-judicial Process

Some administrative tribunals are given quasi-judicial powers that enable the tribunal to determine the rights of those who appear before it. Quasi-judicial powers include the ability to: swear in witnesses, take in evidence, examine witnesses, compel the attendance of witnesses, determine facts, make binding decisions, and enforce those decisions.

Quasi-judicial decision makers must follow the principles of natural justice and procedural fairness, which include the following:

- A party must have an adequate opportunity to be heard by the decision maker and before a decision is made affecting that party’s interest;
- The decision must be made by an independent and impartial decision maker;
- Parties affected must be given adequate notice of the case to be met, of the right to bring evidence and to make argument (though the rules of natural justice do not require that a hearing be oral); and
- The decision maker must provide reasons for its decision.

⁹ Code of Conduct for National Energy Board Employees, Effective 1 June 2014: <http://www-one-neb.gc.ca/bts/whwr/gvrnnc/cdcndcfnbmply/cdcndcfnbmply-eng.html>

¹⁰ National Energy Board Rules of Practice and Procedure, 1995 (SOR/95-208): <http://laws-lois.justice.gc.ca/eng/regulations/SOR-95-208/index.html>

¹¹ National Energy Board Cost Recovery Regulations (SOR/91-7): <http://laws-lois.justice.gc.ca/eng/regulations/SOR-91-7/index.html>

¹² PPR, *supra* Note 7, at p. iii.

The NEB has well-established rules of procedure that ensure these principles of natural justice and procedural fairness are upheld. When the NEB holds a hearing, parties have the opportunity to submit evidence in support of their case, to test the evidence of others (through oral or written processes), and to make final argument. The NEB provides participant funding to assist participation in regulatory proceedings and issues detailed Reasons for Decision.

2.4 One Project, One Review

Multiple reviews by multiple bodies add to the complexity of the regulatory process and make it more difficult for stakeholders to understand and participate meaningfully, which could decrease public confidence. Complex regulatory processes can also act as a barrier to economic development and investment. Subjecting the same project to multiple assessments is not efficient – it adds time, uncertainty, unnecessary duplication and additional costs. One project, one review by the best placed regulator ensures accountability and accessibility by centralizing expertise and avoiding expensive and repetitive processes.

The changes made in 2012 in support of a one project, one review approach contributed to these goals and should be maintained. Specifically, environmental assessment for federally regulated pipeline projects, including the assessment of potential impacts to navigation and fisheries, and the mitigation measures to address those impacts, should remain with the NEB.

2.5 Lifecycle Oversight

Lifecycle oversight means that a regulator oversees all stages of the asset which it regulates. Lifecycle regulation is much more than assessing and approving a project. Without full lifecycle oversight, a project assessment and approval is essentially a snapshot in time. Lifecycle oversight brings accountability to the process, by empowering the regulator to influence the project at all stages in order to ensure the regulator's mandate is upheld. It promotes best industry practice and ongoing compliance for the life of the asset. Importantly, it enables regulators to take learnings from the operational phase of a project and apply them at the front end of future projects – mitigation measures that worked well in practice will become part of future conditions, and predictions that did not materialize may not be considered the next time.

The NEB is a full lifecycle regulator. Project approval is just the beginning. The NEB holds companies accountable throughout the entire lifecycle of the asset, using a wide variety of compliance verification and enforcement tools. This includes conducting ongoing assessment of company performance, including management systems and emergency preparedness, analysis of trends, root cause of non-compliances and incidents.¹³ Compliance verification and enforcement information is posted to the NEB's website. Such transparency is important in assuring the public that the NEB is holding companies accountable to comply with the conditions of approval.

3.0 Mandate

The NEB's public interest mandate is set by Parliament and applies to the regulation of interprovincial and international oil and gas pipelines, international power lines and designated interprovincial power lines, energy development and trade. The NEB has long been considered a "world-class" regulator. Moving forward, we must reinforce and strengthen the principles of regulatory excellence and position the NEB as a "world-leading" lifecycle regulator, as follows:

- Ensure the NEB remains an independent, expert, quasi-judicial tribunal;
- Preserve the NEB's mandate as a lifecycle regulator; and
- Maintain a one project, one review approach to project reviews.

¹³ NEB, "Driving Regulatory Excellence": <https://www.neb-one.gc.ca/bts/whwr/gvrnnc/dprtmtlrsllfrmwrk/rqltrxclncc-eng.pdf>.

3.1 *Preserve the NEB's Lifecycle Oversight*

Most submissions to the Panel have been in relation to the NEB's process for large-scale, new pipeline proposals. However, this is only a small portion of the NEB's work, which is comprised of mainly smaller projects and overseeing the operation and maintenance of Canada's vast existing network of infrastructure, including over 70,000 km of federally-regulated pipelines. These day-to-day functions of the NEB must continue effectively and efficiently.

Enbridge strongly recommends preserving and improving upon the NEB's role as a lifecycle regulator, with its extensive experience in weighing economic, environmental and social factors in determining the public interest. There is no federal regulator better positioned to provide oversight over the entire lifecycle of a pipeline – from review and approval, to operations and maintenance, to eventual abandonment. These day-to-day functions of the NEB must continue effectively and efficiently. Since 1959, the NEB has overseen the full lifecycle of pipelines that cross international and provincial borders.

Companies regulated by the NEB are required to obtain approval, or follow established regulatory requirements, for many proposed activities, including: adding new facilities or modifying or abandoning existing facilities; exporting or importing oil and gas products; and setting tolls and tariffs. At the pre-application stage, the NEB provides guidance on what is required for pipeline design and applications, including explicitly incorporating Canadian Standards Association requirements, which place a heavy emphasis on quality and safety throughout the lifecycle of an asset.

In the application assessment stage, the NEB conducts a thorough technical review and environmental and socioeconomic assessment and then determines if the project can be built and operated safely and in a manner that protects the environment. If the NEB determines that the project is in the public interest, it imposes conditions of approval which apply before, during and after construction as well as during operations. These conditions are above and beyond the measures required by regulations and often are designed to address stakeholder concerns raised through the regulatory process.

After construction and into operations, companies are typically required to submit post-construction monitoring reports, which are posted on the NEB's public website. Throughout this period, the NEB oversees compliance with approval conditions, statutes and regulations, and commitments made by proponents during the regulatory process. The NEB is active in compliance verification through inspections, audits, meetings and investigations. During construction and after a project is built, the NEB addresses stakeholder and landowner concerns through a variety of mechanisms, which may involve field visits, in-person follow-ups with the landowner and company, facilitated mediation, or if required, more formal proceedings.

The NEB is well positioned for monitoring and follow-up and is active in compliance and enforcement. The NEB uses a wide variety of enforcement tools, which focus on pipeline integrity, work safety and environmental protection. These include: Notices of Non-Compliance, requirements to submit corrective action plans, Administrative Monetary Penalties (AMPs), Inspection Officer Orders, Safety Orders, Board Orders, suspension of operation, revocation of approvals, disallowance or suspension of tolls or tariffs, and prosecution. Moreover under the *Pipeline Safety Act*, the NEB has enhanced enforcement tools, including new powers for Inspection Officers and new authority to assume control of abandoned facilities. The NEB posts all of its compliance and enforcement actions on its public website. Companies are also required to have effective management systems, awareness programs and pipeline crossing guidelines to ensure safe development for those who live and work nearby. In the event of an unplanned release, the NEB has trained staff that are ready to respond, to monitor and oversee response activities, and to verify that clean-up was conducted in a manner that meets stringent remediation criteria.

Finally, at the end of the project's lifecycle, the company must submit an abandonment application (including an environmental and socioeconomic assessment and details regarding safety and protection of the environment) and obtain the NEB's approval prior to proceeding. The NEB can impose conditions and may inspect the abandonment activities. The NEB retains oversight of abandoned pipelines for as long as they remain in the ground, and can continue to require

companies to take any action it deems necessary. Companies must also have the required funds available to address any issues during and after abandonment.

As a lifecycle regulator, the NEB has the ability to apply lessons learned in the field through these activities to new projects being proposed. NEB staff with expertise regarding industry best practices for pipeline construction, including environmental mitigation, can advise hearing panels about whether the mitigation methods proposed by a proponent have been proven and effective in the field.

3.2 *Maintain One Project, One Review, Including Environmental Assessment*

In line with principles of regulatory excellence, maintaining a one project, one review approach (as opposed to multiple, fragmented processes) supports a regulatory regime that is clear, efficient and well understood for all stakeholders, which in turn, contributes to increased confidence. Importantly, maintaining one project, one review means keeping EA within the Board's review, as part of the NEB's longstanding public interest mandate and to fully capitalize on its technical expertise and lifecycle mandate.

There have been some suggestions made to this Panel that the EAs should be removed from the NEB's mandate. Enbridge strongly recommends that EAs remain with the NEB for a number of reasons:

- In line with principles of regulatory excellence, the NEB must be kept whole in order to fully capitalize on its technical expertise and lifecycle mandate. This means keeping EA within the Board's review in order to ensure that such assessments are not completed in isolation of decades of lifecycle pipeline experience. EA is a critical planning tool and a key component of assessing whether a project is in the public interest.
- It may not be common knowledge, but the NEB has extensive experience in conducting EAs for pipelines (long before the 2012 amendments to the *Canadian Environmental Assessment Act* (CEAA). Pre-2012, Responsible Authorities (including the NEB) conducted EAs for pipelines under CEAA. In the NEB's case, it was done as a separate report to the NEB Reasons for Decision. Even prior to CEAA, the NEB considered environmental matters pursuant to the *Environmental Assessment and Review Process Guidelines Order* (1984) and included environment as a separate chapter in its Reasons for Decision. EA has always been a fundamental consideration of the NEB in making decisions. Currently, the EA is integrated into the NEB's overall review, which is appropriate, as environmental considerations are an integral part of the overall "public interest" determination.
- Because of its expertise, experience and lifecycle oversight, there is no federal agency that better understands environmental impacts and mitigation measures for pipelines, from the planning stage through construction, operations and eventual abandonment. As a planning tool, the objectives of EA are to minimize environmental effects before they occur and incorporate environmental aspects into decision making. The Board then sets conditions of approval, which are designed to protect the environment by reducing possible risks identified in the application review process. Accordingly, the NEB is best positioned to set and enforce conditions for the protection of the environment.
- The NEB's quasi-judicial process allows for evidence to be rigorously tested (*i.e.*, through cross-examination and information requests). In contrast, the CEA Agency is not a quasi-judicial tribunal – it has no powers to hear and weigh evidence or to make final decisions. This is an important distinction and a key benefit of an EA conducted by the NEB versus an EA conducted by the CEA Agency.
- The NEB requires EAs for all types of projects, not just those on the designated project list. Further, the NEB's EA requirements are much more extensive than those conducted by the CEA Agency¹⁴. Under CEAA, the scope

¹⁴ National Energy Board Filing Manual, Release 2016-01: <http://www.neb-one.gc.ca/bts/ctrq/gnnb/flngmnl/flngmnl-eng.pdf> (See section A.2 Environmental and Socio-Economic Assessment (starting at p. 4A-16).

of federal EAs is limited to areas of the environment that are under federal responsibility (fish and fish habitat, migratory birds, marine plants, cross-border impacts, impacts on federal lands and impacts on Indigenous people resulting from a change in the environment). In comparison, the NEB's EA requirements include a wide array of factors, including: physical and meteorological environment, soil, vegetation, wetlands, water quality and quantity, fish, wildlife and their habitat, species at risk or species of special status and related habitat, heritage resources, traditional land and resource use, human health, aesthetics and noise.

- The NEB imposes enforceable conditions on projects to ensure environmental protection measures will be implemented and appropriate. The NEB also imposes conditions to address issues raised by Indigenous communities and public stakeholders throughout the regulatory process.
- As discussed above, NEB has robust compliance verification and enforcement tools (e.g., audits, inspections, Inspection Officer Orders) which it uses more extensively than the CEA Agency uses its tools.
- Project EAs and other studies required to be completed in support of project applications and conditions of approval (e.g., post construction monitoring reports) have long been posted publically on the NEB's website. In recent years, the NEB has been implementing new tools to increase transparency. The public now has access to compliance and enforcement information, including: status of condition compliance, inspection reports, Inspection Officer Orders, information related to AMPs, and Board Orders, Letters or Directives that are related to safety and environmental protection issues.

In summary, Enbridge believes that if EA responsibilities were to be removed from the NEB to the CEA Agency (or another regulator), the level of environmental protection would decrease because the CEA Agency simply does not have the pipeline expertise and experience of the NEB. Further, moving EAs to another body would contradict the principles of one project, one review by the best-placed regulator, which would result in multiple and potentially duplicative processes. The value of lifecycle regulation would also be diminished and the opportunity for continual improvement would be greatly reduced. The agency responsible for imposing environmental conditions would not have the practical pipeline experience required to effectively assess proposed environmental impacts and mitigation measures. Conversely, the NEB staff in the field enforcing compliance with those conditions would not have the detailed understanding of the environmental assessment conducted for a particular pipeline.

3.3 Clarify the Definition of “Public Interest”

The NEB has a mandate to make decisions in the “public interest.” This is no easy task; it involves balancing and weighing multiple, and often competing, interests. In exercising this mandate, the NEB must confront difficult tradeoffs and clearly communicate how it reached its decision on these complicated issues. Following his pipeline announcement on November 30, 2016, Prime Minister Trudeau acknowledged: “There will be people who will disagree with this decision and that’s fine. We’re a country of people who have a broad range of perspectives and opinions — and people are more than welcome to express their opinions, to campaign against me, to support politicians who will agree with them and not agree with me. That’s all part of our democratic process.”¹⁵

The same is true of the NEB’s decisions – not everyone will agree with the result. That is one reason why the NEB’s public interest mandate is so important – it must balance the broad range of interests raised in the regulatory process. The NEB has developed a definition of “public interest” that it applies in decision-making:

Recommendations and decisions are made based on the Canadian public interest. The public interest refers to a balance of economic, environmental and social interests that changes as society’s values and preferences evolve. The NEB must assess the overall public good a project may create and its potential

¹⁵ The Canadian Press, Trudeau sells Trans Mountain decision, discusses overdose deaths during B.C. visit, December 20, 2017: <http://www.cbc.ca/news/canada/british-columbia/trudeau-sells-trans-mountain-decision-discusses-overdose-deaths-during-b-c-visit-1.3906285>

negative aspects. The NEB must also weigh its various impacts and make a recommendation or decision.¹⁶

Enbridge recommends that the *NEB Act* be updated to require the NEB to consider economic, environmental and social factors when determining whether a project is in the public interest. Doing so would ensure that the Board considers these factors while providing flexibility to adjust for changing circumstances over time.

We have heard Indigenous groups submit to the Panel that Aboriginal and treaty rights must supersede the public interest assessment by the NEB. Indeed, that is true. No project can be approved by the NEB unless the duty to consult with Indigenous Peoples is satisfied, as is required by section 35 of the *Constitution Act, 1982*. It is undisputable that the rights under section 35 must be respected. This does not mean, however, that Indigenous interests are not relevant to the public interest assessment by the NEB. In making its public interest determination, the NEB must weigh the potential impacts on the constitutional rights of Indigenous Peoples as well as the potential benefits in support of broader reconciliation.

3.4 Energy Information

The provision of energy information and statistics is an important function that benefits all Canadians, and assists the NEB in fulfilling its function. As an expert tribunal, the NEB must have a good understanding of supply and markets. The types of data and frequency of its distribution could be expanded as follows:

- Report on import condensate, volumes by mode and port of entry;
- Report on crude imports and exports by rail, barge or tanker, and truck by port of entry or departure, including inter-provincial movements of crude where applicable;
- Report on refined products imports and exports by pipeline, rail, barge or tanker, or truck, by port of entry or departure, including inter-provincial movements as applicable;
- Issue annually the publication “Canada’s Pipeline Transportation System”, or similar report, for all Group 1 and Group 2 pipelines;
- Report on supply and disposition data, including imports on a monthly basis;
- Consider data reporting on a monthly basis (quarterly or annual basis is not of sufficient frequency to assess the market); and
- Update historic data on a more frequent basis.

Wherever the energy information function lies, the energy information program must ensure transparency and equitable treatment of information so as to not provide a competitive advantage to some companies over others. It must also ensure competitive information of shippers remains confidential.

3.5 No Expanded Mandate

The NEB’s mandate, as defined in the *NEB Act*, *Canada Oil and Gas Operations Act* and the *Canada Petroleum Resources Act*, includes:

- the construction, operation, and abandonment of pipelines that cross international borders or provincial boundaries, as well as the related pipeline tolls and tariffs;
- the construction and operation of international power lines and designated interprovincial power lines;

¹⁶ National Energy Board, Hearing Process Handbook, September 2016, at p. 25: <https://www.neb-one.gc.ca/prtcptn/hrng/hndbk/pblchrngpmphlt-eng.pdf>

- imports of natural gas and exports of crude oil, natural gas liquids, natural gas, refined petroleum products, and electricity; and
- oil and gas exploration and production activities in specified areas that are not regulated under joint federal/provincial accords.

It is the role of the government to set policy direction and the role of regulators, like the NEB, to implement that policy in its review of individual projects. The NEB's mandate should not be expanded to support the transition to a low carbon economy. The federal and provincial governments, and not the NEB, are responsible for setting and communicating that policy direction. Individual project reviews are not the appropriate forum for broad debate on climate change issues.

The transition to a lower carbon economy is a policy role that should be undertaken by the federal government, in consultation and cooperation with other levels of government who have responsibilities over upstream development and downstream consumption of energy resources. For example, although there may be a Pan-Canadian Framework on Climate Change, regulations are enacted at the provincial level. Such provincial requirements must be considered and jurisdictional boundaries respected. The Panel has heard from several commenters that one of the factors contributing to decreased confidence in the NEB is its refusal to include upstream and downstream GHGs in its review of pipeline applications. In fact, the NEB does not have the jurisdiction to do so. As noted by the Federal Court of Appeal, "The Board does not regulate upstream and downstream facilities and activities. These facilities and activities require approvals from other regulators. If those facilities and activities are affecting climate change and in a manner that requires action, it is for those regulators to act or, more broadly, for Parliament to act."¹⁷

One of the Panel's discussion papers noted that no federal regime has yet been established for other emerging offshore energy sources such as offshore renewables or other emerging forms of renewable energy. Currently, such projects are regulated through a patchwork of laws and procedures. A coherent regulatory framework should be developed, with a single regulator. However, the development of such a framework requires policy intervention by elected government officials, with consideration made for provincial and federal jurisdictional boundaries. Absent such policy, it would be premature to add offshore energy to the NEB's mandate at this time.

4.0 Governance

This Panel has been tasked with making findings and recommendations in support of the Minister's mandate to ensure that the Board's composition is diverse and has sufficient expertise in relevant fields such as environmental science, community development, and Indigenous traditional knowledge.

4.1 Composition and Expertise

Enbridge believes that Board members and NEB staff must collectively possess a high level of expertise and experience in a wide variety of areas, including: safety, environmental science, Indigenous issues, community development, pipeline design and construction, pipeline integrity, emergency management, and economics. This also includes legal expertise, as Board Members and NEB staff are assisted by legal counsel, who provide advice to the Board on legal matters. Board Members should be diverse, and should include Indigenous representation. However, the first priority is that Board Members have sufficient expertise and practical experience to fully understand and assess the nuanced and complex socio-economic, environment and technical information required for decision making about pipelines.

¹⁷ Forest Ethics Advocacy Association and Donna Sinclair v. National Energy Board, 2014 FCA 245, at para. 69.

4.2 Location of Board and Board Members

The Panel's discussion papers included questions regarding the location of the NEB and Board members. Enbridge strongly recommends that the NEB is located such that it is able to attract and retain staff with the required technical expertise and experience (economic, technical, social and environmental expertise in the oil and gas industry). The vast majority of Canada's oil and gas assets are in western Canada, and accordingly, that is where this talent pool is most likely to be found. Should a move of the NEB be contemplated, consideration should be given of the impacts of disruption and long-term impacts on technical expertise versus value gained. Some commenters have suggested that the NEB should be located in Ottawa. There is no basis for doing so; the NEB is not a government department, and it must operate independently from government as much as it must operate independently from industry. Further, in order to maximize the NEB's effectiveness as a lifecycle regulator, the NEB's core adjudicative and operational functions should be consolidated in a single location. Specifically, it would be inefficient to separate the Board's adjudicative and lifecycle oversight functions, as those functions are highly intertwined. Finally, residency requirements for permanent Board members do not need to be retained, as long as there is appropriate technology in place in order for Board members to effectively carry out their functions.

Some parties have expressed concerns about the Board's location in Calgary and the independence of Board members with backgrounds in industry. That experience should not be seen as a negative. As noted by the OECD:

Many of the staff and members of regulators' governing boards will have backgrounds in the industry they are regulating, and in many cases will return to roles in that industry. These staff movements transfer skills and experience between regulators and industry, and can have benefits in: building shared understandings of the context within which each is operating; helping regulators stay in touch with current operating processes within the industry; improving the industry's understanding and navigation of the regulatory system; and improving industry compliance. Preventing post-employment staff movement to industry can limit regulators' ability to attract the necessary talented staff, as employment by the regulator would narrow potential later career opportunities.¹⁸

In recent years, the NEB has opened regional offices in Vancouver, Montreal and Yellowknife to establish a presence outside of Calgary. Enbridge agrees that this approach can be an effective tool to raise awareness about the Board's work and to establish relationships with Indigenous groups and local stakeholders in locations outside of Calgary, particularly in regions where large projects are being proposed.

4.3 Governance Structure

Regarding the structure of the NEB, different delivery models could be considered, with the goal of ensuring the NEB can effectively execute its operational and adjudicative functions. The NEB's adjudicative function could be separated from the governance function, in order to avoid conflict and maximize efficiency. This could include consideration of a governance structure similar to that of the AER, where there is a separation between the Chair of the Board (responsible for the adjudicative function) and the Chief Executive Officer (responsible for management oversight).

Whatever structural model is chosen, it is important that the leadership and management of the NEB be highly experienced, strategically focused, and goal-oriented. The NEB must have the appropriate funding to be able to hire and retain the right people in order to efficiently and effectively carry out its mandate. Currently, the NEB is viewed as a cost-efficient organization, as its costs are recovered largely by industry. Cost control and efficiency should be considered in the design of the NEB's governance structure.

¹⁸ OECD, *supra* Note 8, at p. 62.

5.0 Decision Making

5.1 Science and Fact-Based Decision Making

The principles of regulatory excellence provide the framework for sound decision making by the NEB. The NEB must operate independently from government, industry, and private interests. Decisions must be based on clear policy, science, facts and evidence. In support of this, Enbridge's key recommendation regarding decision making is to maintain the NEB as an independent, expert, quasi-judicial tribunal and to authorize the NEB to be the final decision-maker for all decisions.

Currently, final decisions for section 52 applications rests with the GIC. This has potential for decisions to be based on considerations other than science, facts and evidence adduced in the regulatory process. The Northern Gateway Pipeline (NGP) Project is a case in point. In 2014, after an extensive three-year regulatory review, the GIC approved the NGP project, following the NEB's recommendation that the project be approved, subject to 209 conditions. Subsequently, in 2016, the new federal government reversed that decision and rejected the project, stating that "the Great Bear Rainforest is no place for a pipeline, and the Douglas Channel is no place for oil tanker traffic."¹⁹ Nowhere in the government's news release, public address, or in any subsequent document or statement did the federal government reference the extensive regulatory process as the basis for its denial. This was not a case where the project was denied on the basis of evidence adduced in the regulatory process (for example, a finding that there would be significant adverse effects that could not be mitigated). In contrast, on the same day, in approving the Trans Mountain Expansion Project (TMX), the federal government relied, in part, on that same regulatory process, specifically referencing the 157 conditions set by the NEB.

These concepts were the subject of a Senate interim report on pipeline infrastructure, which recommended that NRCan modernize the NEB regulatory process by removing the GIC's ability to issue final approval of pipeline projects. The Senate report recommended empowering the NEB to act in Canada's national interests on pipeline decisions by issuing final approval of pipeline projects, subject to appeal to the GIC (which would be similar to some licensing decisions by the Canadian Radio-television and Telecommunications Commission).²⁰

In order to ensure that decisions are based on science, facts and evidence, Enbridge recommends maintaining the NEB as an independent, expert, quasi-judicial tribunal and by authorizing the NEB (not the GIC) to be the final decision-maker for federally-regulated pipeline projects, no different from any other expert, independent administrative tribunal.

One of the Panel's discussion paper questions related to what principles should determine who should make the final decisions for section 52 applications (pipelines greater than 40 km in length) and section 58 applications (pipelines 40 km or less). Some commenters suggested that there should be no distinction between these types of applications and went as far as to suggest that hearings should be required for all pipeline projects. Requiring a public hearing for every project would go against the regulatory excellence principles of efficiency and effectiveness. Enbridge believes that the current distinction is appropriate. It would be impractical to require a mandatory hearing for every project submitted. The NEB has the discretion to direct a public hearing if the scope, complexity, or stakeholder concerns warrant one. The NEB does not hesitate to exercise this discretion when required, as for the recent Enbridge Line 9B and Line 10 section 58 applications.

¹⁹ Prime Minister Justin Trudeau's Pipeline Announcement, November 30, 2016: <http://pm.gc.ca/eng/news/2016/11/30/prime-minister-justin-trudeaus-pipeline-announcement>

²⁰ Interim Report of the Standing Senate Committee on Transport and Communications, "Pipelines for Oil: Protecting our economy, respecting our environment, December 2016: https://sencanada.ca/content/sen/committee/421/TRCM/Reports/FINALVERSION-PipelineStudy-2016-12-07_e.pdf

5.2 Comment on Interim Measures

In January 2016, the federal government implemented interim measures for pipeline reviews to guide its decision making on major natural resource projects while it undertakes a review of environmental assessment processes. These interim measures were applied to the Enbridge Line 3 Replacement Project (L3R) after the NEB had already submitted its recommendations report to the Minister on April 25, 2016. The additional measures undertaken were to:

- Undertake deeper consultations with Indigenous Peoples;
- Facilitate further public engagement;
- Assess the upstream greenhouse gas emissions associated with the project; and
- Extend the legislated time limit for the government's decision on the project.²¹

That process resulted in three additional reports to be put to Cabinet, in addition to the NEB's recommendation, for Cabinet's review and decision on whether to approve the project:

- A report summarizing the results of an on-line survey that solicited the views of the public and affected communities;
- A report summarizing Crown consultation with Indigenous Peoples that took place from June through September 2016; and
- A report assessing the direct and upstream greenhouse gas emissions linked with the project.

In order to prepare the above listed reports and include them in the GIC's review prior to deciding on approval of the Project, the timeline for the GIC decision was more than doubled from the prescribed three month period to a seven month period. This extension was only communicated to the proponent after the NEB hearing process had closed. Both the on-line survey and Crown consultation took place after the issuance of the NEB recommendation.

In the case of L3R, the GIC ultimately approved the project without imposing additional conditions to the 89 included in the NEB Report. However, in its press release regarding the project, the government announced that "To respond to what we heard during these consultations, the Government will provide up to \$21.6 million for an Indigenous advisory and monitoring committee that will work with federal regulators and the proponents to oversee environmental aspects throughout the project life cycle."²² Such a monitoring committee was not included in the NEB's conditions of approval. The NEB did include a condition requiring Enbridge to submit a plan describing participation by Aboriginal groups in monitoring during construction, but made no reference to a monitoring committee.²³ As the Indigenous advisory and monitoring committee was not contemplated in the regulatory process, the role and purpose of this Indigenous advisory and monitoring committee is not at all clear.

In developing its recommendations for NEB modernization, Enbridge encourages the Panel to consider the issues created by the government's interim additional measures. Starting with the additional Crown consultation with Indigenous Peoples, by having this take place after the NEB process, there is a potential for additional issues (including any issues raised in relation to the proponent's engagement efforts) and potential impacts to be raised that have not been considered by the NEB and to which the proponent has no opportunity to respond. Furthermore, there is also an opportunity for the GIC to recommend or possibly impose additional conditions in relation to the issues raised during Crown consultation, again to which the proponent would have no opportunity to respond. This would contravene the principles of natural justice and procedural fairness. Based upon our experience, Enbridge recommends that Crown consultation take place contemporaneously with the regulatory process and as an integral part of that process, so that any potential impacts or

²¹ Major Projects Management Office, Line 3 Replacement Program Project, April 20, 2016: <https://mpmo.gc.ca/measures/258>

²² Natural Resources Canada, Line 3 Replacement Project, December 7, 2016: <http://www.nrcan.gc.ca/energy/resources/19188>

²³ National Energy Board Report, OH-002-2015, April 2016, Condition 12, at p. 219: <https://apps.neb-one.gc.ca/REGDOCS/Item/View/2955931>

other relevant issues raised during that process can be included in the NEB's evidentiary record, with full opportunity for all participants to review and respond.

Similarly, with the greenhouse gas (GHG) assessment report, Enbridge recommends that this be included as part of the NEB's overall review of projects. For L3R, Environment and Climate Change Canada prepared the GHG assessment report; however, Enbridge understands that for projects initiated after the issuance of the interim measures, it is the proponent that will prepare that report which will then be issued for public comment. Enbridge agrees with the process to have the proponent prepare the report based upon a clearly prescribed methodology. Including the GHG assessment directly in the NEB process would allow for greater certainty regarding timelines and would maintain a fair process allowing all interested parties to make submissions before the final decision is made. In addition, the environmental considerations could then be weighed alongside social and economic considerations.

Finally, in relation to the report summarizing the results of the on-line survey, it is not clear how this report would be factored into the GIC decision or what additional value this survey brings to the process. In the case of L3R, the survey responses were not verified in any way and Enbridge had no opportunity to test the submissions or provide a response. This survey results in the potential for additional information that otherwise should have been presented to and considered by the NEB in making its decision. In Enbridge's view, public participation in the NEB process, including as a commenter, already provides opportunity for interested parties to make their views known. Perhaps most importantly, it is difficult to understand how this type of on-line survey, conducted well after the regulatory process has concluded, would be considered to be meaningful consultation.

In Enbridge's experience, these additional processes have not contributed to increased confidence in the regulatory process. Enbridge recommends that a single regulatory process be maintained – one with a single evidentiary record that can be considered by the regulator in making its decision.

5.3 Current Challenges for Major Pipeline Projects

The energy industry is on the cusp of a major transition as Canada moves toward a lower-carbon economy. In the meantime, while this transition unfolds, global energy demand continues to rise. Much of the demand growth over the next three decades is expected to come from lower carbon energy sources, including natural gas and renewables, and clean technologies. However, according to the International Energy Agency, despite this shift, traditional energy sources will continue to address a significant portion of global energy demand for the foreseeable future, and in that context, additional pipeline capacity is required to support that demand.²⁴

As global demand for energy continues to rise, it is increasingly important for Canadian resources to reach growing global markets. Canada must be ready to leverage the energy resources of today in order to meet the energy demands of tomorrow. As Minister Carr recently noted, "Our duty is to permit infrastructure so Canada's resources get to market in a more environmentally-responsible way, creating jobs and a thriving economy".²⁵ Enbridge fully supports doing this safely, sustainably, and responsibly.

When the federal government launched its review of environmental and regulatory process, it referred to restoring public trust and confidence.²⁶ Enbridge acknowledges the current challenges with the NEB but cautions that a negative

²⁴ World Energy Outlook 2016: <https://www.iea.org/newsroom/news/2016/november/world-energy-outlook-2016.html>

²⁵ Government of Canada News Release, "Government of Canada announces pipeline plan that will protect the environment and grow the economy", November 29, 2016. <http://news.gc.ca/web/article-en.do?crtr.s1D=&crtr.mnthndVl=12&mthd=advSrch&crtr.dpt1D=&nid=1162449&crtr.lc1D=&crtr.tp1D=&crtr.yrStrtVl=2016&crtr.kw=kinder&crtr.dyStrtVl=15&crtr.aud1D=&crtr.mnthStrtVl=11&crtr.page=1&crtr.yrndVl=2016&crtr.dyndVl=15>

²⁶ Government of Canada News Release, "Government launches review of environmental and regulatory processes to restore public trust", June 20, 2016: <http://news.gc.ca/web/article-en.do?nid=1088199>

perception of the NEB is not held by all Canadians, or even the majority of Canadians. With respect to restoring public trust and confidence, it should be emphasized that regulators will never be able to satisfy the expectations of all Canadians. In its report on regulatory excellence, the PPR observed:

Regulators' reputations, after all, depend not only on how the public views what the regulator does, but also how the public views the regulated industry. ... A reputation might well be heavily influenced, for example, by people's *satisfaction* with a regulator's decisions. And yet regulators – even, if not especially, excellent ones – cannot and should not always satisfy everyone.²⁷

From what Enbridge has observed, there appear to be several underlying factors contributing to this perceived loss of confidence:

- Lack of clearly defined federal government policies against which the NEB can assess Major Pipeline Projects in determining whether a project is in the public interest;
- Lack of venue for public participation in broad policy issues that are important to them, such as climate change (including upstream and downstream GHGs) and non-project-related issues between the federal government and Indigenous Peoples;
- Changes in public expectations regarding resource development in general, and dissatisfaction with decisions that facilitate this development;
- Lack of understanding that the NEB does not regulate all forms of energy in Canada;
- Uncertain or inconsistent regulatory processes and timelines; and
- Lack of transparency and predictability in the GIC's final decision regarding Major Pipeline Projects.

The distinction between the policy-making role of government and the quasi-judicial role of the NEB must be preserved. The government should set the broader policy framework and the NEB should apply that policy through independent project-specific reviews. As noted by the Canada West Foundation, "the problem begins not with regulation but with policy; particularly with unresolved policy issues that cascade into regulatory processes. These demand far more of regulatory processes (*i.e.*, energy project assessment processes) than they are designed to bear."²⁸ In the current regulatory and project environment, our experience has been that issues outside the mandate of the NEB are increasingly challenging the NEB's review of individual projects. Without a clear policy framework or an appropriate forum for discussion on broad public policy issues, project-specific reviews of Major Pipeline Projects have become a platform to debate these policy issues which go beyond the scope of any single project.

This lack of a clear policy framework was noted by the Ministerial Panel for the TMX Project: "In the absence of a comprehensive national energy strategy, how can policy-makers effectively assess projects such as the Trans Mountain pipeline?"²⁹ Specifically, the Ministerial Panel noted: "... absent a transparent calculation of how a new pipeline development might fit within an orderly reduction of greenhouse gas emissions, a certain proportion of the community will stand against every pipeline proposal." Further, "a broader and more transparent planning regime would offer certainty to

²⁷ PPR, *supra* Note 7, at p. 17.

²⁸ "A Matter of Trust – The Role of Communities in Energy Decision-Making", Michael Cleland with Stephen Bird, Stewart Fast, Shafak Sajid, and Louis Simard, Canada West Foundation, University of Ottawa, November 24, 2016: <http://cwf.ca/research/publications/a-matter-of-trust-the-role-of-communities-in-energy-decision-making/>

²⁹ Report from the Ministerial Panel for the Trans Mountain Expansion Project, November 1, 2016, p. 49:

https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/files/pdf/16-011_TMX%20Full%20Report-en_nov2-11-30am.pdf

industry and reassurance to those who are worried about the social, environmental and economic consequences of huge new resource-related developments.”³⁰

We support this government’s commitments to help restore this perceived lack of public confidence. Canadians need to feel that the regulatory process is transparent, inclusive, and objective, based on science and fact-based evidence. Investors, too, need to have confidence in this process. Without long-term capital investment, responsible energy development will not happen, nor will job creation, greater tax revenues, and safe and reliable access to the energy we all need.

In order to address these challenges, the federal government must take the lead and ensure a strong public policy framework, including: an energy policy that supports development and market access, a responsible climate strategy, and a clear statement on Indigenous reconciliation. In the absence of a clear policy framework and appropriate forum for discussion on these topics, individual project reviews have become platforms for broader debate. As a result, project proponents are investing hundreds of millions of dollars and years of regulatory review only to have their projects stalled because these broad public policy issues remain unresolved.

This is why Enbridge, along with our colleagues at the Canadian Energy Pipeline Association (CEPA), have been working on developing the concept of a two-part review for Major Pipeline Projects, where the “national interest” determination would occur before the NEB conducts the detailed project review.

5.4 Potential Solution for Major Pipeline Projects – Two-Part Review

The two-part review described in this section is a potential solution for removing broad public policy issues from NEB reviews of Major Pipeline Projects only. It is not intended to apply to smaller projects, as the NEB’s day-to-day work must continue effectively and efficiently.

As noted above, Enbridge believes that the NEB is the appropriate final decision-maker for federally-regulated pipelines. Indeed, if the federal government clearly defines this policy framework, and if there are adequate opportunities for public participation in the development of those policies, these issues would not need to be raised in the context of NEB reviews, and the existing NEB regulatory process should function effectively.

However, to the extent that the GIC retains a decision-making role, it should relate to broad policy issues and take place early in the process rather than at the end. Major Pipeline Projects are experiencing significant delays and uncertainty, in part due to broad policy issues that extend beyond the reach of a particular project. One potential solution is a two-part review, whereby the “national interest” determination is made by the GIC before the NEB conducts the detailed project review. This is a critical element of maintaining investor confidence in Canada’s natural resources, for the benefit of all Canadians. Essentially, the pipeline industry is asking that the GIC decision be moved from the end of the regulatory process to the beginning, before proponents invest years of work and hundreds of millions of dollars.

The federal government must lead by defining the broader policy framework in the following areas:

- Energy strategy (including interprovincial considerations);
- Climate change policies (including interprovincial considerations); and
- Reconciliation with Indigenous Peoples.

Part 1 of the two-part review would be an assessment of “if” the project should proceed. The purpose of Part 1 would be to assess the project against this broad policy framework – for instance, whether new infrastructure for market access is

³⁰ Ibid.

needed and whether the project fits within the national energy strategy and climate change policies. Part 1 would review those aspects of the project that are of national interest that go beyond the scope of a single project, taking into consideration the dual imperatives of economic prosperity and environmental protection. Part 1 would be conducted by an independent government body or agency, such as the Major Projects Management Office (MPMO), and not the NEB. The proponent would submit a Project Description, similar to that currently required by the MPMO for major resource projects. As the scope of Part 1 is intended to deal with broad issues, participation opportunities for Indigenous communities and the public would be broad as well, and could include non-hearing approaches, such as community meetings, online engagement, or working group sessions. Assuming that a clear policy framework has been established by the federal government, we estimate that Part 1 could be completed within six months of receiving a Project Description, with an additional three to six months for the issuance of a decision by GIC. At the end of Part 1, the GIC would issue its decision regarding whether the project can proceed to Part 2. The GIC's decision could include conditions, including issues to be considered in Part 2. If the project proceeds to Part 2, there would be no further role for the GIC.

With respect to Indigenous engagement, Enbridge acknowledges that Traditional Knowledge (TK) provides the foundation for discussion of potential impacts of the project on Aboriginal and treaty rights. Ongoing engagement and discussions between proponents and communities are important to ensure both that the proponent understands these potential impacts and that communities understand how their TK is incorporated into the project design, construction and operations. Within the two-part review for Major Pipeline Projects, these community consultations could span a considerable period of time, with the goal of mutual agreement. Enbridge also acknowledges that there are some concerns that Indigenous communities may have that go beyond the scope of the project, such as pre-existing disturbance or land settlement agreements. As a result, not all elements of Indigenous engagement may be fully addressed in Part 1. The goal of Indigenous engagement in Part 1 would be primarily to understand the claims being made and the process that will be followed. Elements that could be included in Part 1 are: identifying potentially impacted Indigenous communities, conducting strength of claim analyses, and defining clear processes and timelines for consultation based upon the scope and scale of the project.

Part 2 would be the assessment of "how" the project should proceed and would be conducted by the NEB, in accordance with any conditions provided by the GIC. Part 2 would be very similar to the way the NEB currently conducts its project assessments, but with public policy issues removed. This would be the detailed, technical assessment of the project, including: engineering and design, detailed route, methods of construction, and environmental and socio-economic assessment. Participation opportunities at this stage would be narrower than in Part 1, with a focus on stakeholders who are most directly impacted by the project. The NEB's current standing test would be appropriate in Part 2, where those who are directly affected must be allowed to participate, and the Board would also have discretion to allow the participation of others with relevant information or expertise. Regarding Indigenous engagement, Part 2 would include an assessment of the potential project-specific impacts to asserted Aboriginal and treaty rights, including any appropriate mitigation or accommodation measures. At the end of Part 2, should the NEB decide to approve the project, it would issue a Certificate, including associated conditions. In keeping with its lifecycle mandate, the NEB would continue to oversee the proponent's compliance with conditions, and would regulate construction and operations for the life of the project.

5.5 Timelines

Enbridge fully supports thorough regulatory reviews of proposed projects, including allowing sufficient time for meaningful engagement with potentially affected stakeholders and Indigenous communities. However, timelines are important in order to support rational and responsible resource development.

The 2012 changes to CEAA and the *NEB Act* included the establishment of mandatory timelines. However, legislated timelines have not resulted in predictability and consistency as expected. This is primarily because the 2012 amendments introduced multiple opportunities for time extensions and time outs, for instance:

- Regulator deems application to be incomplete (clock does not start);

- Regulator issues information requests or requires additional studies (clock stops running);
- Minister and /or GIC may extend the time limit (more than one extension is possible); or
- GIC may refer the report back to the NEB for reconsideration.

In our experience, overall timelines, from the date the application is filed to the date of GIC approval, have actually increased since 2012³¹. Timeliness and predictability allow for greater investor certainty, transparency and clarity for all involved (including proponents, public participants and Indigenous groups).

Enbridge encourages the Panel to consider the need for timelines that are fixed, clear and transparent, and for tools to ensure that parties are accountable to follow them, leading to greater predictability for all parties.

5.6 Roles of Other Parties in Final Decision Making

A question raised in one of the Panel's discussion papers was: "What are your views with respect to the role(s) of other parties in the final decision-making process, such as Indigenous groups, provinces/territories or municipalities?" Enbridge believes that provincial / territorial, Indigenous and municipal governments can and should participate in the NEB's regulatory process. However, as a federal regulator with jurisdiction over international and interprovincial pipelines, the NEB is not bound by the views of those governments. Rather, the NEB should consider, weigh and balance this input as part of its overall public interest decision. Enbridge encourages the Panel to improve role clarity by recommending that the federal government clearly outline decision-making accountability across jurisdictions.

6.0 Legislative Tools for Lifecycle Regulation

6.1 Lifecycle Compliance and Enforcement Tools

The existing compliance and enforcement tools available to the NEB are working well and should be maintained – these include audits, inspections, AMPs, and the authority to stop work or revoke approvals. These tools are effective, well-used and transparent.

As stated in Section 3 above, the NEB has a full suite of compliance verification and enforcement tools to confirm compliance during construction and operations. If necessary, the NEB also has a suite of escalating enforcement tools that it can use to obtain compliance, deter future non-compliance, and prevent harm. The NEB posts information related to compliance and enforcement on its website, striving to do so in a manner that is clear and accessible. In Enbridge's submission, these tools and their use exceed that of most other regulators.

To provide context for the scope of compliance and enforcement activities conducted by the NEB in a single year, in 2015 the NEB conducted 142 construction and operations inspections, evaluated 20 emergency response exercises, reviewed 13 emergency procedures manuals, held 137 compliance meetings, conducted six management system audits and reviewed 30 environmental reports related to monitoring of reclamation success on rights-of-way. During that same year, it issued 143 Notices of Non-Compliance and Assurances of Voluntary Compliance, four Inspection Officer Orders, eight Safety Orders and nine AMPs. In total, the NEB conducted 348 compliance activities related to security, public safety and environmental protection.

³¹ Timelines for major Enbridge pipeline projects from application to issuance of Certificate were as follows: Southern Lights (filed Mar 2007) – 14 months, Alberta Clipper (filed May 2007) – 12 months, Line 4 Extension Project (filed Jun 2007) – 12 months; Bakken Pipeline (filed Jan 2011) – 14 months, Edmonton to Hardisty Pipeline (filed Dec 2012) – 16 months, and Line 3 Replacement Program (filed Nov 2014) – 25 months. Though not an Enbridge project, the TransMountain Expansion took 36 months to process.

This Panel has heard some comments that these compliance verification activities are insufficient. However, from the perspective of a regulated company, these activities are both extensive and effective. To illustrate just one example, in December, 2013, the NEB notified Enbridge that it would be conducting an audit of its management system. Over the course of 2014, as part of that single audit:

- 35 departments or groups were directly involved, including all five of Enbridge's operating regions;
- Over 200 individuals were directly involved in interviews and presentations, which translated into over 10,000 hours of work;
- Enbridge responded to over 1,000 information requests and provided over 2,800 documents, comprising over 60,000 pages of information; and
- The NEB conducted approximately 20 inspections of Enbridge's facilities.

With respect to emergency response plans, the Panel heard some comments that the NEB does not review nor participate in emergency response exercises conducted by companies. Some commenters believed that companies do not conduct such exercises. In fact, Enbridge is required to submit to the NEB details of its planned exercises each calendar year. For 2017, Enbridge is planning more than 50 emergency response activities, ranging from table top exercises to notification drills, boom deployment and water exercises, to full scale exercises. The NEB actively participates in those activities, as it deems appropriate.

Companies strive to consistently meet the NEB's requirements and expectations not only because it is the right thing to do, but also because it is in their best interests to do so. Nevertheless, there are opportunities for improvement:

- All parties would benefit from increased public education about the current suite of tools available, how the Board is using them and impacts and positive changes that industry has made as a result.
- As with project approvals, transparency and timelines are also important for compliance verification activities. Specifically, the NEB's audit program would benefit from clear and enforced timelines and transparent audit protocols that are applied consistently. To illustrate, in the management system audit referenced above, the NEB notified Enbridge of its intent to conduct an audit in December 2013 and officially kicked off the audit in May 2014. Document review, interviews and inspections were carried out throughout the balance of 2014, concluding in an audit close-out meeting in December 2014. The NEB issued its final audit report on March 31, 2015. On April 30, 2015, Enbridge filed a comprehensive Corrective Action Plan (CAP) to address the findings in the audit report. The Board did not approve the CAP for almost a full year (not until April 28, 2016). The Board's approach to management system audits has not been consistent, with each regulated company being subject to differing interpretations of the requirements.
- Although there is a wealth of information available on the NEB website related to applications, compliance and enforcement, the website can be confusing and difficult to navigate, despite the NEB's recent efforts to make this information more accessible. The NEB would benefit by seeking assistance in re-designing its website to aid accessibility for all Canadians, and perhaps, by being released from any constraints imposed by Treasury Board or other government policies and guidelines that limit its ability to do so.
- Enbridge has seen an increase in the number of "formal" landowner complaints in the last few years. The NEB does not have a clearly-defined tool or process to deal with such formal complaints. All parties, including NEB staff, proponents and landowners, would benefit from clear guidance on the processes and tools to address landowner complaints.
- In recent years, the NEB has moved away from a goal-oriented approach to more prescriptive requirements. Enbridge recommends that the NEB return to a more performance-based, risk-informed approach to lifecycle regulation. In its paper on regulatory excellence, the PPR noted that performance-based regulation is widely favoured. Rather than telling regulated companies exactly what to do, regulators adopting a performance-based

approach allow companies to choose from a variety of flexible options. The benefits of performance-based approaches include: more cost-effective options, innovation and best practice.³² Generally speaking, NEB-regulated companies apply industry best practice, enhanced from collaboration with each other as well as through ongoing and sustained engagement with stakeholders. NEB decisions and conditions should support those practices by enabling companies to make decisions which apply the best practices, science and technologies available that are best suited to their circumstances. If the option chosen by a company for achieving a particular goal is not met, the NEB has the power to direct the company to take specific measures.

6.2 Monitoring Committees

Enbridge acknowledges the potential value of monitoring committees. However, in order to be useful and effective, they must have a well-defined scope, mandate and timeline, with terms of reference developed collaboratively between the proponent and interested parties or through evidence filed during the regulatory process (see discussion on Interim Measures in Section 5 above). Monitoring committees should be complementary to, not duplicative of, the NEB's compliance verification work, including inspections and audits.

It must be clear that monitoring committees fulfill an advisory function – they should not provide oversight or direction, as that is the role of the regulator. Any such committee should be recommended to the NEB in the course of regulatory proceedings, before the NEB makes its decision or recommendation. The federal government should not establish monitoring committees post-approval as that has the potential to result in duplication or conflict with Board-imposed conditions and the NEB's compliance verification work. Enbridge recommends that monitoring committees focus on long-term engagement or relationship building with communities throughout the lifecycle of the pipeline.

6.3 Safety and Security

The NEB is best situated to lead industry issues related to safety. The NEB produces safety and information advisories for all of industry, based on its knowledge and experience throughout the pipeline lifecycle, including investigations into incidents that have occurred as well as analysis of pipeline performance measures. These advisories contain important information related to potential safety matters, thus ensuring that companies take a proactive approach to managing them. The NEB also has the ability to hold detailed inquiries into issues of concern. For example, in the early 1990's, a concern about stress-corrosion cracking (SCC) on a specific NEB-regulated asset led the Board to initiate the first comprehensive inquiry in the world on SCC. It provided new insights into SCC, and provided "valuable scientific and technical data that relate to the Canadian situation."³³ The Board's ability to bring industry together to collaborate on an issue of concern to the whole of the industry is an important role that must not be hampered or diluted.

On the topic of safety and security, in the past several years, Enbridge and other pipeline companies have been the target of pipeline tampering – deliberate intent to harm pipeline facilities and equipment, as a form of environmental activism. Pipeline tampering is a matter of serious concern, as it can result in considerable harm to the public and the environment. It is also a significant safety issue and has the potential to interrupt the transport of product, resulting in substantial economic loss.

Typically, those involved in pipeline tampering are charged criminally with mischief. In Enbridge's experience, those charges are quite often withdrawn. General mischief and vandalism charges are not effective tools to prevent pipeline tampering. Such charges are too generic in nature and do not reflect the very real risk that tampering poses to the environment and public safety or to the importance of such infrastructure to the effective functioning of the economy.

³² PPR, pp. 46-47.

³³ National Energy Board. Report of the Inquiry – Stress Corrosion Cracking on Canadian Oil and Gas Pipelines, MH-2-95, December 1996, <https://apps.neb-one.gc.ca/REGDOCS/Item/View/90474>.

Enbridge recommends that the NEB mandate be strengthened so that that NEB can impose fines or other penalties upon perpetrators, similar to the provisions found in the AMP regulations where AMPs could be issued to a landowner for conducting a high risk unauthorized activity within the 30 metre safety zone. In addition, Enbridge recommends the inclusion of a hybrid (summary conviction or indictable at the Crown's election) criminal offence in the *NEB Act* or *Criminal Code* with a *mens rea* (wrongful intent) element that is targeted at the act of tampering with a pipeline or other NEB-regulated infrastructure (intention to tamper) rather than the consequences (intention to endanger life).

6.4 Land Acquisition and Compensation

Enbridge recognizes the importance of strong relationships with landowners who are impacted by our operations. Those relationships have been built over multiple generations – since Enbridge constructed its first pipeline in 1950.

Landowners are partners during the lifecycle of our assets. It is in Enbridge's best interest, and indeed in the best interests of all pipeline companies, to maintain good working relationships with landowners where they operate, as we are continually engaging those individuals to access their land for operation and maintenance activities or new construction. In terms of compensation, Enbridge aims to treat similarly-situated landowners equitably to ensure landowners are not in competition against one another. That is not good for communities and not good for Enbridge.

During this review, we have heard some comments about the imbalance of negotiation power between landowners and pipeline companies. In Enbridge's experience, the majority of landowners are more sophisticated and knowledgeable about land acquisition processes now than they have ever been. Enbridge is motivated to reach mutually agreeable settlements with landowners, as these support strong working relationships that are needed as long as the pipeline is in operation. In addition, this approach results in fewer delays and reduces costs overall. To provide some perspective, of the thousands of landowners from whom Enbridge has acquired land rights, only a very small percentage of cases have gone to detailed route hearings or to right of entry proceedings.³⁴ Enbridge has also had good experience with the NEB's mediation program in reaching mutually agreeable resolution of issues with landowners and landowner associations.

Enbridge rarely, if ever, asks landowners to sign agreements during the first meeting with a landowner about a new project. In the overwhelming majority of cases, Enbridge meets with landowners multiple times prior to finalizing an agreement, and certainly many more times over the lifecycle of a project. Land agents must be respectful in all dealings with landowners and are required to adhere to Enbridge's Statement on Business Conduct or risk dismissal. Enbridge also uses the Code of Conduct that was developed by CEPA in 2014³⁵. Finally, land agents in certain jurisdictions, for example, in Alberta, must be licensed and undergo strict licensing requirements.

There are many different touchpoints with landowners throughout the course of project development, construction, operations, and up to eventual abandonment. Enbridge uses a variety of methods to communicate with and build relationships with landowners, from Community Advisory Boards (as was used on the NGP Project), one-on-one meetings, coffee chats, Chamber luncheons, community BBQs, and open houses, to letters, e-mails, and webpages.

With respect to issues of compensation, currently, compensation matters are the responsibility of NRCan. Enbridge recommends that matters of compensation not be added to the NEB's mandate, as that would dilute the NEB's core function in pipeline lifecycle oversight. The NEB's focus should be on ensuring that pipelines are constructed and operated safely and in a manner that protects the environment; compensation is not related to that core function. Processes for negotiating fair compensation for land access are more effectively managed outside of the regulatory

³⁴ For example, on Alberta Clipper (in 2007), Enbridge obtained land rights from nearly 1000 landowners. Of those, only 3 went to detailed route hearing and 5 to right of entry (roughly 1%). There have been even fewer in more recent section 52 applications. For example, for the Bakken Pipeline Expansion Project (in 2011, 179 landowners and occupants) and Edmonton to Hardisty Pipeline Project (2012, 473 landowners and occupants) each had zero detailed route hearings and zero rights of entry.

³⁵ Canadian Energy Pipeline Association, CEPA Code of Conduct for Land Representatives / Agents: <http://www.cepa.com/wp-content/uploads/2016/11/Code-of-Conduct-for-Land-Agents-FINAL.pdf>

process, and any remaining issues related to compensation should be determined by an independent body, analogous to the Alberta or British Columbia Surface Rights Boards.

Finally, as it relates to land issues, Enbridge recommends changes to the *NEB Act* regarding detailed route hearings, particularly where the company has agreements with the private landowners already in place for the route of the project. Where agreements have been finalized, the parties have already agreed to the detailed route and this route has been assessed in the regulatory review process. Where agreements have been finalized, the parties have already agreed to the detailed route. Requiring parties to go through the detailed route process is cumbersome, costly, and unpredictable, as there are no set timelines for resolution. Further, the detailed route hearing process is not conclusive; in the event the detailed route is denied, parties must begin again by filing a new proposed route and proceed through the same detailed process once again. Other regulators, including the AER, hold a single hearing to evaluate all aspects of a project, including the detailed route and methods of construction. A similar approach could be used for NEB hearings.

6.5 The NEB's Role Regarding Best Practice on Pipeline Regulation

During Enbridge's presentation to the Panel in Edmonton on March 7, 2017, the Panel asked whether, in Enbridge's opinion, there is a role for the NEB to lead national best practice on pipeline regulation. Enbridge believes that there is. Currently, there is open and transparent sharing of best practices within the pipeline industry, and reaching into other industries as well. The NEB could take a more proactive role in the development of best practices regarding pipeline regulation, for example, by working together with other energy regulators and by acting as a facilitator between companies. One means would be to set up a committee that works with academic institutions and stakeholders to identify and conduct scientifically valid research aimed at enhancing environmental protection and public trust.

7.0 Indigenous Engagement

At Enbridge, we understand the importance of local and Indigenous engagement and the role that communities must play in our projects and operations in order to be successful. This sets the foundation of Enbridge's Indigenous Peoples Policy. In this Policy:

- We recognize the importance of UNDRIP in the context of existing Canadian law and the protection of Indigenous Peoples under the Constitution.
- We respect Indigenous Peoples' legal and constitutional rights and we commit to ensuring our operations are carried out in an environmentally responsible way.
- We also commit to helping Indigenous Peoples achieve mutual benefits, including opportunities in training, employment, procurement and community development.

7.1 Recognizing the Importance of Traditional Knowledge

Enbridge recognizes the importance of TK as it provides the foundation for discussion of potential impacts of a project on Aboriginal and treaty rights. However, TK and Traditional Ecological Knowledge (TEK) need to be better defined in the legislation so proponents know what to solicit, and Indigenous groups know what to provide. This includes an express acknowledgement that TK and TEK may take the form of oral traditional evidence. Traditional knowledge and land use (TKLU) studies require adequate time to complete, usually with extensive community involvement. All parties would benefit from clear guidance about when TKLU studies are needed, how they should be prepared, what content they should include, and how that knowledge can be incorporated into the design of projects. Guidance should also be given about when the scope of TKLU studies can be focused, for example, to exclude private lands. Providing guidance and certainty around TK and TEK would help to build public confidence in the regulatory process by ensuring that Indigenous knowledge is used effectively.

One of the Panel's discussion paper questions is: "How can Indigenous traditional knowledge (including Traditional Ecological Knowledge) and information be further integrated into the NEB application and hearing process?" For section 52 applications (including those that would be subject to a two part review as outlined in Section 5 above), Enbridge would be supportive of an expanded up-front process (this would occur in Part 2 of a two-part process), similar to that used by the British Columbia Environmental Assessment Office (EAO). In that process, the EAO invites affected Indigenous groups and all levels of government to provide advice to the EAO regarding: what should be considered in the assessment, technical issues, and opportunities for public input. The EAO then works with Indigenous groups and governments to ensure the application is complete before it is issued for public comment. This up-front involvement could provide a forum for local and Indigenous communities to help shape the scope of the EA, including a mechanism to incorporate TK (to the extent it is available and willingly shared). This also enables the proponent to identify issues early in the process, when they can be considered during the EA and incorporated into the project design (as opposed to during a hearing).

7.2 Clarifying the Crown's Duty to Consult

Canada should provide clear policy direction regarding the Crown's duty to consult, through legislation, policy and guidelines (analogous to Alberta's Aboriginal Consultation Office (ACO), Aboriginal Consultation Policy and Guidelines). This includes clearly outlining the roles and responsibilities of the federal government, the proponent, the NEB, and Indigenous communities.

There is significant opportunity to improve Crown consultation processes and mitigate the likelihood of post-approval legal challenges. All parties (including the NEB, proponents, and Indigenous communities) would benefit from greater clarity regarding roles and responsibilities. Currently, there is a lack of common understanding of what is required and by whom in order to satisfy the Crown's duty to consult and accommodate in the context of NEB project reviews. This is evident in the Federal Court of Appeal's decision regarding the NGP Project, where, in a split decision, the Court concluded that the Crown did not satisfy its duty to consult, despite a positive assessment of Northern Gateway's engagement efforts.³⁶

Some provinces have introduced policies and guidelines which provide greater certainty regarding Indigenous engagement. For example, Alberta has implemented policies and guidelines for consultation with First Nations and Metis communities on land and natural resource management.³⁷ The guidelines outline the roles and responsibilities of all parties engaged in the consultation process and clearly outline the consultation process. The purpose is to demonstrate how Alberta is seeking to fulfil its consultation responsibilities under the Policy. The general process is as follows:

- Early in the development of a project, the proponent contacts the ACO and the ACO provides a list of Aboriginal communities that must be engaged, together with the level of consultation that is required.
- The proponent consults the identified Aboriginal communities about the project and keeps consultation records.
- When the proponent feels that it has completed consultation, it submits the consultation records to Aboriginal communities for review and comment.
- Once the required timelines have passed, and after comments have been considered, the proponent may request a determination of adequacy of consultation from the ACO.
- The ACO issues a letter in which it assesses the adequacy of consultation (Letter of Adequacy), by considering a list of factors.

³⁶ Gitxaala Nation v. Canada, 2016 FCA 187 <http://decisions.fca-caf.gc.ca/fca-caf/decisions/en/item/145744/index.do?r=AAAAAQAMbWljaGFibCByeWVvAQ>

³⁷ See the Alberta Aboriginal Consultation Office website – includes links to the Alberta Indigenous Consultation Policy and Guidelines: <http://indigenous.alberta.ca/1.cfm>

- Generally speaking, the regulator (in this case, the AER) does not issue a license for the project until this Letter of Adequacy is issued. Although the objective of consultation is mutual agreement, the Guidelines recognize that agreement of all parties is not required in order for consultation to be adequate.
- There are timelines built in for each of these steps.

To the extent that Crown consultation is not satisfied solely through the regulatory process, Enbridge also recommends earlier involvement of the Crown and less reliance on the proponent to report on concerns raised by Indigenous groups. Enbridge acknowledges that most relevant information is not available publicly until it is filed by the proponent in the context of the EA or regulatory process. Proponents can (and do) engage with Indigenous groups before filing, often well in advance. Such engagement should be encouraged and reported upon. The regulatory process should also be structured such that projects can be revised to address any Indigenous concerns as they arise between the filing date and the hearing. That flexibility is what ensures the effectiveness of the regulatory process as a consultative tool.

Regarding the satisfaction of the duty to consult in the context of NEB applications (of all types), Enbridge has the following recommendations:

- For all types of applications, the NEB is well-situated to evaluate potential impacts on Aboriginal and treaty rights and to assess the adequacy of Crown consultation. This role can be enhanced through increased Indigenous representation and expertise within the Board on Indigenous issues. Enbridge also recommends amending the *NEB Act* to clarify and enhance the NEB's role in discharging the Crown's duty to consult with Indigenous Peoples, particularly where the NEB is the final decision-maker (as in section 58 applications).
- The NEB is best situated to evaluate potential impacts on Aboriginal and treaty rights. The Board's inquisitorial and adjudicative processes make it well-suited to that task. In fact, the NEB is better suited than, for example, the MPMO, which has no power to compel evidence or to impose conditions. Empowering the NEB to be the sole assessor of potential impacts to Aboriginal and treaty rights would ensure that relevant evidence is put forth and that proponents are provided opportunities to respond, all while avoiding duplicative processes. Further, the NEB's ability to impose conditions provides a mechanism to achieve accommodation.
- The NEB should be empowered not only to make decisions about potential impacts to Aboriginal and treaty rights, but also to seek out relevant information. In its current form, the NEB has both inquisitorial and adjudicative functions, which is appropriate. The Board must consider whatever evidence is adduced by parties through its processes, but it is also empowered to proactively seek out evidence to resolve conflicting points of view. Further, the NEB is (and should be) equipped with technical experts (including in understanding the importance of TK) to help it understand the evidence so that it knows what additional evidence to seek out. The Board's expertise regarding Indigenous issues should be enhanced in order to better equip the NEB to assess and determine whether the duty to consult is satisfied on a case-by-case basis.
- A regulator is empowered to assess the adequacy of consultation if it is empowered to decide questions of law³⁸. In the past, the NEB has not embraced that power; specifically, it has not traditionally drawn any conclusions about the satisfaction (or not) of the duty to consult in the context of a recommendation under section 52. It also has not drawn any conclusions about the satisfaction (or not) of the duty to consult in the context of approving (or not) projects under section 58 (with the recent approval of the Line 10 Westover Segment Replacement Project³⁹ being an exception). The NEB should embrace the duty to consult assessment both as a

³⁸ *Rio Tinto Alcan Inc. v. Carrier Sekani Tribal Council*, [2010] 2 SCR 650 at para. 69, <https://www.canlii.org/en/ca/scc/doc/2010/2010sc43/2010sc43.html?resultIndex=1>

³⁹ NEB Reasons for Decision – Enbridge Line 10 Replacement – OH-001-2016, January 26, 2017, <https://apps.neb-one.gc.ca/REGDOCS/Search/RecentDecisions?p=4&txhl=line10>

matter of law and as a practical matter. Any doubt about the empowerment of the NEB to undertake that assessment should be clarified in the enabling legislation.

- Whatever policy direction is provided should explicitly clarify and recognize that the NEB is the Crown. The NEB is a manifestation of the executive branch of government:⁴⁰ Reconciliation and the building of relationships would be strengthened by more clearly empowering the NEB not only to evaluate the adequacy of consultation, but also to itself consult with indigenous groups and accommodate them, as appropriate in the regulatory process, and by eliminating any duplicative/parallel consultation processes that undermine the authority of the NEB. More clearly empowering the NEB to consult and accommodate would have the collateral benefit of maintaining the independence of the approval process for Major Pipeline Projects.

7.3 Enhanced Lifecycle Role for Indigenous Peoples

Ongoing Indigenous involvement is critical for success, which is why Enbridge is focused on building long-term operational or full life-cycle relationships with Indigenous communities. This includes ongoing engagement, participation in emergency preparedness training and activities, collection of TK and participation in stewardship initiatives regarding high consequence areas, plus skills-training and economic development opportunities.

Improvements are required in order to build trust and ensure that Indigenous participation in the regulatory process is effective. To this end, Enbridge recommends the establishment of an Indigenous Bureau, within the NEB, with specialized expertise in Indigenous issues to help facilitate and oversee ongoing consultation by proponents and operators with Indigenous Peoples. This could include the following:

- consultation on projects, including defining the role of TK and TEK in the regulatory process;
- assisting in understanding complex information, such as EAs and emergency response plans;
- involvement in emergency response activities, including collection of data for areas of importance to Indigenous Peoples and participation in emergency response exercises; and
- resolution of issues and concerns.

Such a Bureau could be developed in consultation with Indigenous communities and staffed with individuals with expertise in Indigenous issues. This would assist in enhancing the Board's expertise in this area. At the Yellowknife session, Kinder Morgan recommended the establishment of advisory committees for lifecycle regulation that could include Indigenous representation. Enbridge's proposed Indigenous Bureau could fulfill similar functions to such an advisory committee.

To illustrate one potential role of an Indigenous Bureau, it is important for pipeline companies to be aware of traditional use sites, cultural and spiritual sites, or other sites of importance to Indigenous communities so that appropriate emergency response plans can be developed to protect those sites. An Indigenous Bureau within the NEB could, for example, facilitate the gathering of such data, and could also implement training programs for Indigenous communities in proximity to operating pipelines regarding emergency response procedures.

7.4 UNDRIP in the Canadian Context

The principles of UNDRIP, and specifically the principle of "free, prior, and informed consent" (FPIC), must be achieved in harmony with Canadian constitutional law. In the context of NEB modernization, this can be achieved by establishing a regulatory scheme that requires open, transparent and meaningful consultation and cooperation in good faith. Enbridge's position is that FPIC should be interpreted as the objective of consultation, not as an absolute right or veto.

⁴⁰ *Ocean Port Hotel Ltd. v. B.C.* 40 [2001] 2 SCR 781 at para. 24.

The implementation of FPIC is complicated in Canada because of the vast geography of Canada (requiring linear infrastructure projects, like pipelines, of a scale that is unmatched anywhere else) and the diversity of the Indigenous Peoples of Canada who span that vast geography. Whereas UNDRIP contemplates Indigenous Peoples generally, Canadian constitutional law has evolved to recognize the differing opinions, intentions and aspirations of potentially-impacted Indigenous societies and the goal of reconciling Indigenous interests with those of all Canadians. The diversity of Indigenous perspectives is demanding of a regulatory process that is open and participatory with an objective of balancing non-Indigenous interests with varying Indigenous interests, both supportive and oppositional. Indeed, one shortcoming of the existing NEB regulatory process is the seeming lack of weight that it ascribes to expressions of non-objection or support from Indigenous groups relative to expressions of objection.

Achieving an open and participatory regulatory process in harmony with FPIC may be achieved by having Indigenous representation among NEB Board members, the hiring of new NEB staff with expertise in Indigenous issues and the establishment of a Bureau within the NEB (to be staffed by newly-hired experts) to facilitate the sharing of Indigenous perspectives and the resolution of issues between proponents and Indigenous Peoples (and indeed also between different Indigenous Peoples).

Respectfully, the goal of reconciling Indigenous and non-Indigenous issues would not be facilitated by recognizing FPIC as a veto in favour of any oppositional Indigenous group. Indigenous opposition must be based on a project's potential to impact Aboriginal or treaty rights as proven with evidence in the regulatory process. The focus should not be on any lack of "consent" in the abstract but rather on establishing an open and participatory process whereby the interests of Indigenous Peoples may be expressed and proven, and then mitigated (if possible) with voluntarily-adopted strategies or NEB-imposed conditions.

In Yellowknife, the Panel heard from the Inuvialuit, who agreed that FPIC does not mean a veto in the context of Canadian law, and instead presented a structured approach to the Crown's duty to consult, comprised of the following six factors:

1. Freedom from force or manipulation;
2. Mutual agreement on process;
3. Robust and satisfactory engagement;
4. Sufficient and timely information exchange;
5. Proper resourcing (both technical and financial); and
6. Shared goal of obtaining consent (understanding that consent may not always be achieved).

Enbridge agrees with this approach in principle, with the exception of point #2. For long, linear projects involving many diverse Indigenous communities, while discussion about process would be beneficial, mutual agreement on process would be unworkable. To illustrate the magnitude of this, on L3R, Enbridge engaged with over 150 Indigenous governments, communities and organizations. It would not be practical to achieve mutual agreement from all engaged parties, and even if mutual agreement was somehow reached, it would be very difficult to engage in different consultation protocols with each community. The process to be used for any given project is a topic on which an Indigenous Bureau could provide direction. Point #6 is consistent with Enbridge's position that consent should be interpreted as the objective of consultation, not as an absolute right or veto.

8.0 Public Participation

Enbridge is committed to timely and meaningful dialogue with all stakeholders, including Indigenous Peoples and landowners.⁴¹ Enbridge supports broad public participation; however, there must be a balance – different types of participation opportunities should be provided for different levels of impact. In general, the greater the potential impact on a person, the greater that person's participation rights should be. Independent project review is not the appropriate place for broad policy debate. Such broader comments typically do not bear on the merits or impacts of a particular project and dilute input from stakeholders who are most directly affected. Depending on the project, the NEB may receive hundreds or even thousands of applications to participate.⁴² To deal with this, the NEB should allow parties who are interested, but not necessarily impacted, to submit letters of comment without the need to meet a standing test (like intervenors must meet). However, Enbridge believes that the current test for standing in section 55.2 of the *NEB Act* is appropriate for those wishing to be intervenors (the Board must hear from those who are directly affected and may hear from those with relevant information or expertise). Ideally, the discussion of policy issues should happen separate from the regulatory process and not when a regulator is reviewing a discrete project. If the underlying public policy has been appropriately articulated, the regulatory processes will capture this.

Public participation also does not mean that public opinion should sway a regulatory process that is based on science, fact and evidence. As stated by the PPR in its report on regulatory excellence, on the topic of public engagement:

As with personal relationships, *listening is essential*. Listening, of course, is not the same as agreeing. The regulator needs to deliver public value, which means that it will at times (perhaps even often) make decisions that are respectfully in tension with some interests in society.⁴³

To this end, Enbridge supports flexible approaches (e.g., web forums, technical meetings, community meetings, hearing information sessions etc.) as alternative means to participation than direct participation in regulatory hearings. As noted by the OECD, “one objective of good regulator governance is to enhance public and stakeholder confidence in the regulator, its decisions and its actions. Effective engagement with regulated parties and other stakeholders helps achieve this.”⁴⁴ However gathered, this input must form part of the evidentiary record, and natural justice and procedural fairness must be maintained. Specifically, if other means of public participation are created that are outside of the hearing process, the proponent must have an opportunity to test the evidence and to respond to the case made against it. Such engagement must be both thorough and timely, in order to achieve effective and efficient regulatory processes.

The NEB must maintain flexibility to determine its own process. For example, cross-examination for all intervenors is not an absolute right. However, it could be helpful to develop some guidance around when it would be appropriate and when written information requests and responses might be more effective. Other regulators (e.g., AER) have rules to balance the ability to test evidence with procedural efficiency.

One potential improvement to the NEB process would be to introduce incentives for stakeholders to coordinate their input across like-minded groups, which would minimize duplication of voices and focus public resources on common interests. The AER does this well. When an application is before the AER, parties that wish to participate must file a statement of concern about the application. The submission must include a statement indicating why and how the person may be directly and adversely affected, or what the nature of the person's interest in the matter is and why the person should be permitted to participate. The AER will then consider the submissions and determine how each party will be able to

⁴¹ Enbridge Corporate Social Responsibility Policies: <http://www.enbridge.com/About-Us/Corporate-Social-Responsibility/CSR-Policies.aspx>

⁴² For Northern Gateway (OH-4-2011), there were 209 intervenors, 12 government participants, 1,179 oral statements and 9,400 letters of comment. For Line 9B Reversal (OH-2-2013), there were 60 intervenors and 111 commenters.

⁴³ PPR, *supra* Note 7, at pp. 49-50.

⁴⁴ OECD, *supra* Note 8, at p. 91.

participate. When awarding funds for a participant in respect of an application, the AER encourages efficiencies by looking at whether or not the participant has attempted to consolidate common issues or resources with other parties and whether or not the submission of the participant made a substantial contribution to the hearing.⁴⁵

9.0 Conclusion

Enbridge has participated fully in the Expert Panel's review processes, including attending public presentations, dialogue sessions, open houses, and Indigenous engagement sessions, reviewing submissions, and presenting to the Panel. We have listened to the perspectives of others who have participated in the process – everyone from Indigenous leaders, environmental groups, and academics, to industry partners and interested citizens. We see the potential for significant alignment amongst the various views presented and believe that there are opportunities to reach a common ground on many fronts. As Canada's largest pipeline company, we have a large stake in this review process, and are prepared to do our part by listening to and working with stakeholders as these processes move forward.

During this review, the Panel, and Enbridge, heard many views related to several key themes, including: the role of government policy related to energy, climate change and Indigenous reconciliation, independence of the NEB, public participation, the definition of "public interest" and the mandate of the NEB, including its role in EA. Enbridge acknowledges these themes and our submission reflects our perspective and recommendations for addressing them.

Our submission also highlights some of the things that we are prepared to do differently, including, but not limited to the following:

- In order to provide for a forum for policy issues that extend beyond the reach of a particular project, consider a two-part process for Major Pipeline Projects whereby the "national interest" determination is made by the GIC before the NEB conducts the detailed project review;
- Consider different governance structures to ensure that the NEB can effectively fulfill its operational and adjudicative roles;
- Update the *NEB Act* to include a definition of public interest that includes the assessment of economic, social and environmental considerations in NEB decision making;
- Establish a Bureau within the NEB with specialized expertise, including Indigenous professionals, to build trust and help facilitate and oversee ongoing consultation engagement by proponents and operators with Indigenous Peoples throughout the pipeline lifecycle;
- Amend the *NEB Act* to clarify the NEB's role in discharging the Crown's duty to consult with Indigenous Peoples;
- Consider an expanded up-front process (similar to the British Columbia EAO) involving affected Indigenous groups and all levels of government to provide advice to the EAO regarding the project assessment; and
- Allow interested parties to submit a letter of comment without the need to meet a standing test that is required for intervenors.

Whatever changes the Panel recommends and which of these the Government of Canada pursues, the principles of regulatory excellence must be maintained. The NEB must remain an independent, expert, quasi-judicial tribunal; the NEB must remain a full lifecycle regulator which includes keeping EA within the Board's scope of review; and the one project, one review approach must prevail. These principles will ensure that Canada's regulatory system allows for efficient and effective decision-making that enables responsible energy development and achievement of goals related to job creation,

⁴⁵ Section 59, AR 99/2013. Alberta Energy Regulator Rules of Practice. http://www.qp.alberta.ca/documents/Regs/2013_099.pdf

a larger tax base and reliable access to the energy we all need. Whatever the outcome, the Government of Canada must be accountable for ensuring that the NEB meets its goals of effective lifecycle regulation and regulatory excellence.

As with the regulatory process itself, not all viewpoints can be incorporated into the recommendations and not everyone will agree with the result; balance will be required. In the words of Minister Carr: “In our consultations with Canadians, we've seen a consensus forming, a widening middle ground that sees economic growth and environmental stewardship as equal components of a single engine of innovation. Our government is determined to lead the way.”⁴⁶ Enbridge supports this government's efforts to bridge the gap and recommends that the federal government develop processes to facilitate continued dialogue and input, including options for implementing the recommendations made.

We thank you for the opportunity to make these submissions.

⁴⁶ Standing Committee on Natural Resources, December 6, 2016:
<http://www.parl.gc.ca/HousePublications/Publication.aspx?DocId=8678495&Language=E&Mode=1>