

# **Submission to the National Energy Board Modernization Expert Panel**

**Federation of Canadian Municipalities**

**March 30, 2017**





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## FCM submission to the NEB Modernization Expert Panel

Dear panel members:

Canada has changed a great deal since the National Energy Board's legislative foundation was drafted, largely in the 1950s and 1960s. One important change has been the tremendous evolution of our cities and communities.

In 2017, Canadian municipalities are modern, sophisticated governments that provide a wide range of essential services and serve as stewards of economic development, public safety, the environment and public health and well-being.

Today's municipalities constitute Canada's most accessible order of government. We make it our business to understand local realities, need and priorities. We strive to build more livable, competitive communities. And by doing this, we drive economic growth and quality-of-life improvements across Canada.

Local governments are specifically responsible for 60 per cent of Canada's public infrastructure—including the transportation networks, water/wastewater systems and other public works that underpin Canadian commerce. The federal government increasingly turns to municipalities to deliver local infrastructure solutions to national challenges such as growth, productivity and public safety.

As the national voice of local government, the Federation of Canadian Municipalities supports the ambitious scope of this review of the NEB's mandate, operation and decision-making. We are hopeful that this will result in a modernized review process—and a robust, coordinated regulatory framework for the full lifecycle of energy transportation infrastructure.

This document presents 37 recommendations that reflect a broad consensus among our 2000 members, who represent 91 per cent of Canadians. These recommendations are grounded in a vision. That vision is for a modern regulator that honours local perspectives, respects municipal jurisdiction, and provides meaningful opportunities for engagement in decision-making.

Sincerely,

Clark Somerville  
Councillor, Regional Municipality of Halton  
FCM President

**President  
Président**

Clark Somerville  
Councillor  
Regional Municipality of  
Halton, ON

**First Vice-President  
Première vice-présidente**

Jenny Gerbasi  
Councillor  
City of Winnipeg, MB

**Second Vice-President  
Deuxième vice-présidente**

Sylvie Goneau  
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Ville de Gatineau, QC

**Third Vice-President  
Troisième vice-président**

Bill Karsten  
Councillor  
Halifax Regional  
Municipality, NS

**Past President  
Président sortant**

Raymond Louie  
Acting Mayor  
City of Vancouver, BC

**Chief Executive Officer  
Chef de la direction**

Brock Cariton  
Ottawa, ON

24, rue Clarence Street,  
Ottawa, Ontario, K1N 5P3

T. 613-241-5221  
F. 613-241-7440

www.fcm.ca



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## Context of this submission

Municipalities are directly affected by pipelines and electrical transmission lines regulated by the NEB. This includes daily interaction with the existing network of 73,000 kilometres of NEB-regulated pipelines.

Communities of all sizes benefit from economic activity associated with resource development and energy transportation infrastructure. In 2015 alone, FCM recognizes that oil and natural gas transported by pipelines added \$11.5 billion to Canada's economy—and that pipeline operators contributed \$709 million to municipal revenues through property taxes on pipelines and supporting infrastructure.

Energy transportation infrastructure directly impacts municipal governments, including their emergency response planning, land-use planning, construction and maintenance of municipal infrastructure, and enforcement of municipal by-laws. Specific to pipelines, the possibility of a catastrophic failure presents considerable risks to local governments in terms of drinking water, local ecosystems, including marine environments, and local economies.

For these reasons, in March 2014, FCM's National Board of Directors adopted three *Principles to Protect Municipal Interests in Federal Assessment Processes*:

1. Protect and strengthen local economies, quality of life and the health and integrity of the local environment as top priorities in federal assessment and review processes.
2. Equip and support municipal first responders to respond to emergencies related to proposed projects.
3. Prevent downloading of project-related safety, emergency response and other costs to municipal taxpayers.

Subsequently, in March 2016, FCM's National Board of Directors approved the creation of an internal National Municipal Energy Infrastructure Task Force, comprising municipal elected officials representing communities of all sizes across Canada. FCM's diverse national membership has united behind a set of shared concerns and priorities. The 37 recommendations in this submission reflect the work of FCM's Task Force and represent that broad consensus.



## Enhanced role for local governments

Municipal governments have detailed knowledge and expertise that is critical to effectively assessing major energy infrastructure projects regulated by the NEB. This includes knowledge and expertise on land-use planning, local and regional environments, local and regional economies, public health, quality of life and public safety.

Municipal governments require a stronger voice in the NEB public hearing process. After project approval, municipalities also require more direct input in the roll-out of energy transportation infrastructure—including the ability to negotiate terms of access and to refuse certain elements under certain circumstances. On matters of land use planning, infrastructure planning, emergency response planning and preserving local cost neutrality, the municipal role must extend beyond participation in the public hearing process.

Some other federally-regulated sectors provide for a direct municipal decision-making role when installing infrastructure or transporting dangerous goods results in local impacts. In sectors such as railways and telecommunications, these models have been developed over time, often with direct input from municipalities and industry. In some cases they are enshrined in legislation. Some have a built-in conflict-resolution system.

In all instances, the goal is to build and/or operate federally-regulated infrastructure in ways that allow federal objectives to be achieved while serving the broader public interest, minimizing local disruptions, and respecting the responsibilities and jurisdiction of local governments. These models are worthy of study as part of this NEB review.



## NEB governance

Consistent with its current legislative mandate, National Energy Board member selection has prioritized expertise and experience in the energy sector. This subject-matter expertise is important. Moving forward, however, Board composition should more fully reflect the modern realities of regulating energy infrastructure in Canada.

In particular, the Board's composition should reflect the diversity of Canadians, a range of regional perspectives and insight on local issues. Board members and NEB staff should also have expertise in land-use planning, environmental protection and public safety.

### Recommendations

Strengthen the composition of the NEB to reflect regional diversity and include municipal knowledge and expertise

1. Amend the *National Energy Board Act* (NEB Act) to specify that the composition of the Board includes at least one member with knowledge of, or experience in, municipal government or the functions of municipal government (e.g. emergency response, water treatment or land-use planning).
2. Amend the NEB Act to remove the requirement that Board members be required to reside in Calgary. This will enable a Board composition that better reflects regional differences and local interests.
3. Ensure that NEB staff have sufficient knowledge and experience of municipal government or the functions of municipal government, for instance related to emergency response, water treatment and land-use planning.

Reinstate the Joint Review Panel for public hearings

4. Amend the NEB Act and the *Canadian Environmental Assessment Act* (CEAA) to provide for the appointment of Joint Review Panels to review applications for major projects. Panels should include individuals with expertise in energy, environmental and local issues. For a specific project, a panel would conduct a hearing, with the environmental issues representative responsible for discharging obligations under the CEAA, the energy issues representative responsible for discharging obligations under the NEB Act, and the local issues representative considering local impacts as required under both Acts.



## NEB mandate

Under current legislation, the NEB must determine whether a particular project is in the public interest. However, it does not provide enough guidance for the NEB to ensure that matters of local concern are considered in the public interest determination

The NEB Act does not set out any factors that the NEB *must* consider in making that public-interest determination. In the case of environmental assessments of pipelines, section 19(1) of the CEEA does specify the factors that *must* be considered. However, the full scope of factors is to be set by the responsible authority (the NEB), and there are no requirements that it must consult affected parties in doing so. Furthermore, section 19(1) does not provide for the consideration of municipal issues or the costs to municipalities of major projects.

One of the factors to be considered under s. 19(1) of the CEEA is the “(g) *alternative means of carrying out the designated project that are technically and economically feasible and the environmental effects of any such alternative means.*”

On its face, the term “alternative means” would seem to include alternate routes and locations. However, the legislation should be clarified to specify that proponents *must* consider alternate routes and locations—in order to determine the route with the least impacts. A Joint Review Panel (Recommendation 4, above) should be presented with evidence on the feasible routes and their impacts, so that the best route can be chosen by the panel, not the proponent. The onus to provide this comparison of feasible routes should be on the proponent.

## Recommendations

Define the scope of factors that must be considered in the determination of “public interest”

5. Amend the NEB Act and the CEEA to include a list of factors that a Joint Review Panel must consider in making its public interest determination for projects. These factors should include: municipal interests and costs; alternate locations and routes for projects, and their impacts; and other alternate proposed projects. The proponent must have an obligation under the Acts to provide both a comparison of the impacts of the feasible routes and locations, and a justification for their preferred route and location. The definition of “public interest” could include areas of critical importance to the local economy, environment and public health of a community affected by a project—including, for example, the safety and security of local sources of drinking water. The scope of the factors to be considered by the Joint Review Panel for a particular project should be determined in consultation with municipalities and affected stakeholders.



## NEB decision-making

The outcomes of the assessment and review of large projects have extensive impacts on areas of municipal responsibility. However, federal legislation governing the review, approval and regulation of pipeline projects is largely silent on the rights of municipalities in these processes. It falls far short of recognizing their role and interests as an order of government.

No single municipality will have the final decision on the fate of a major energy infrastructure project that serves Canada's economic interest. However, decision-making should be reformed to recognize municipalities' legitimate interests and expertise in assessing local impacts. These reforms should ensure that local governments have a meaningful voice in the development of a project proposal, that they can exert influence through the public hearing process to address local concerns to the greatest extent possible, and that local impacts are considered in a project's public-interest determination.

As noted above, other federally-regulated sectors do provide for a direct municipal decision-making role when installing infrastructure or transporting dangerous goods would have local impacts. An adaptation of these models could be applied to the legislation governing NEB-regulated infrastructure.

### Recommendations

#### Respect for municipal by-laws

6. Amend the NEB Act to specifically provide that municipal bylaws and official plans be complied with, except where they would render the project inoperative.

#### Require municipal consent for local routing determination

7. Amend the NEB Act to provide that the proponent has a duty to design the final routing of the project in consultation with the municipal governments through whose boundaries the project crosses, and in a manner that accommodates all reasonable municipal concerns, and that the consent of the municipality must be granted prior to construction.

#### Grant municipalities rights over access to municipal land during planning and construction

8. Amend the NEB Act (section 73) to include a procedure for accessing municipal lands to carry out surveys, examinations or other necessary arrangements for fixing the site of the pipeline—including a requirement that any access must be secured with the consent of the municipality. If the municipality objects to access, the NEB Act should provide for a hearing process by which the proponent can apply to the NEB for access, and any such access can be granted subject to conditions set by the NEB. The impacted municipality must be given full participatory rights as a party to the hearing.
9. Amend the NEB Act to provide that if invasive work is required on municipal lands to set the route for a pipeline, the proponent must secure municipal consent to undertake the work, and if the municipality does not consent, the proponent must apply to the NEB for permission to undertake the work. The NEB Act should then set out a hearing process within which the proponent must outline the work to be done, the justification for the work and the plan to remediate the municipal lands afterwards. The impacted municipality must be given full participatory rights as a party to the hearing.



- 10.** Amend the NEB Act to ensure that municipalities are fully compensated for costs related to pipeline construction, including costs related to the loss of municipal land that has been expropriated for use as a pipeline right of way.

Eliminate legislated time limits for NEB reviews

- 11.** Amend the NEB Act to remove the current 15 month timeline for the review of pipeline applications under section 52(4), so that hearing timelines are determined prior to the beginning of a hearing on a project-by-project basis, and due consideration can be given to municipal concerns.



## Legislative tools for lifecycle regulation

Energy transportation infrastructure has direct impacts on municipalities through its entire lifecycle, from approval through construction, operation, maintenance and end-of-life. Ensuring public safety throughout is a special priority—and this will require more effective integration of emergency response plans among all orders of government and industry, and adequate training and resources for municipal first responders.

The 2016 release of hydrocarbons from a Husky Energy project near Lloydminster into the North Saskatchewan River—while not involving NEB-regulated infrastructure—underlines the direct impacts municipalities can face. A relatively small release into a major waterway affected the primary drinking water sources of 70,000 people and had a direct impact on municipal services. This incident underscores the need to plan and design projects and emergency response plans in partnership with municipal governments.

### *Sendai Framework for Disaster Risk Reduction*

The United Nations Sendai Framework for Disaster Risk Reduction (2015-2030) provides an overarching policy framework for reducing risk to communities, including risks arising from failures of energy transportation infrastructure. Canada is a signatory to the Sendai Framework, and FCM serves on the body responsible for its implementation: the Advisory Committee for Canada's Platform for Disaster Risk Reduction.

Sendai includes policy priorities relevant to any consideration of the NEB's role in regulating energy transportation infrastructure in Canada. Especially relevant to FCM's recommendations are the following three priorities:

*Priority 2f:* To assign, as appropriate, clear roles and tasks to community representatives within disaster risk management institutions and processes and decision-making through relevant legal frameworks, and undertake comprehensive public and community consultations during the development of such laws and regulations to support their implementation;

*Priority 3a:* To allocate the necessary resources, including finance and logistics, as appropriate, at all levels of administration for the development and the implementation of disaster risk reduction strategies, policies, plans, laws and regulations in all relevant sectors;

*Priority 4c:* To promote the resilience of new and existing critical infrastructure, including water, transportation and telecommunications infrastructure, educational facilities, hospitals and other health facilities, to ensure that they remain safe, effective and operational during and after disasters in order to provide life-saving and essential services.

### *Rail safety*

FCM has considerable experience working with Transport Canada and the Railway Association of Canada to improve rail safety. This work has taken on particular significance since the tragic derailment in Lac Megantic in 2013. Insight from the federal regulation of the rail transportation of oil and other dangerous goods could inform the NEB's modernization review.

In particular, Transport Canada's Emergency Response Assistance Plans (ERAP) program creates a regulatory requirement for shippers to provide specialized resources to assist in the event of a rail incident.



There are two key components to an ERAP:

- it provides technical experts and specially trained and equipped emergency response personnel and equipment to help local emergency responders; and
- it addresses emergency preparedness, including personnel training, response exercises and equipment maintenance.

The ERAP program clarifies the roles and responsibilities of municipal first responders, railways and shippers, and it limits municipal liability in the event of an emergency. Practically, however, municipal fire services are generally the first to respond to incidents. They therefore require resources to adequately respond while awaiting specialized ERAP services, as well as training to use specialized equipment supplied by ERAP holders or carriers.

### *Damage prevention regulations*

Existing NEB-regulated pipelines cross through urban areas, creating challenges for municipalities with jurisdiction over local road, water, wastewater and storm water infrastructure. Municipalities have statutory obligations to maintain roads in safe condition, and in some cases this work must occur within the rights-of-way of federally regulated pipelines.

As one example, in 2015, five municipalities in the Lower Mainland of British Columbia commissioned a study by Associated Engineering of the additional costs to operate, maintain and construct municipal infrastructure as a result of Kinder Morgan's existing and proposed TransMountain pipelines. The projected additional costs that the subject municipalities will incur as a result of the pipeline expansion exceed \$93 million over 50 years.

In 2015, the federal government amended the Damage Prevention Regulations under the *Pipeline Safety Act*. However, while FCM commends the government for attempting to improve pipeline safety legislation, the regulations do not adequately address municipal concerns. In particular, FCM is concerned that the regulations unfairly shift burdens, obligations, costs and liabilities to municipalities and continue to compromise their ability to conduct routine maintenance on municipal highways

New regulations must ensure that municipalities can conduct routine maintenance on municipal highways without undue burden from pipeline operators, while still ensuring appropriate consultation on safety and environmental considerations. Further, new regulations must not place additional liability on municipalities for activities undertaken by third-party contractors.

Specific concerns from municipalities with experience conducting highway maintenance and construction projects in proximity to federally regulated pipelines were submitted to the NEB during consultations on the amended regulations. Individual municipalities will detail these concerns in their own submissions to the NEB Modernization Expert Panel.

### *Specific risks to marine environments*

In September, 2015, FCM's National Board of Directors passed a resolution directing FCM to call on the NEB to compel all pipeline operators shipping diluted bitumen, to provide site specific consequence analyses and response plans and tactics for submerged and sunken oil to be available for public and impacted communities review.



## Recommendations

Strengthen regulatory requirements for preventing major incidents such as pipeline breaches

12. Establish a higher standard for the mandatory installation of leak-detection equipment, such as remote sensing pressure valves, capabilities such as shut-off valves and remote control valves, and cathodic protection to battle corrosion.
13. Include stringent performance criteria related to the protection of sources of clean drinking water as part of conditions for the approval of new pipelines.
14. Require robust monitoring programs using industry best-practices as a condition of project approval, and require that proponents consult with municipalities directly affected by the project on the development and operation of the plan.
15. Ensure that the NEB is adequately resourced, by proponents and by the federal government, to dutifully enforce the terms, conditions and orders imposed on proponents as part of project approvals, and that sufficient oversight and public reporting mechanisms are in place to verify compliance.

Strengthen emergency response requirements, improve the coordination of emergency response, and ensure that municipalities and first responders have adequate information and training to participate in emergency response

16. Require project proponents to develop comprehensive emergency response plans in consultation with local governments and municipal first responders, which is made public in advance of submitting an application to the NEB for a project approval.
17. Require project proponents to publically disclose emergency response plans prior to the public review process for new projects, and require that emergency response plans are publically available throughout the lifespan of the infrastructure.
18. Ensure that municipalities have access to information and documents about a project that are relevant to emergency response, both during the application process and throughout the lifecycle of the infrastructure, in a transparent and timely manner.
19. Ensure that municipal first responders receive adequate training related to containing a leak or spill of liquid hydrocarbons, including diluted bitumen, and including training with respect to the containment of a spill in a major watercourse.
20. Require pipeline proponents to provide education and awareness programs for municipal first responders, including presentations for fire captains. These education programs are especially important in rural areas. Consideration could be given to developing a training curriculum that includes various levels—awareness, operational and specialized—depending on the capacity of the municipality and their role in response.
21. Address gaps in the required continuing education program for those agencies listed in the NEB regulations, whether that be in an urban setting or a rural setting.
22. Ensure that pipeline operators have specialized equipment available to respond to a leak or spill of liquid hydrocarbons, including any specialized equipment needed to contain diluted bitumen in a marine environment, and that municipal first responders are aware of the location and capabilities of the equipment and have the training to interface with it.
23. Consider establishing requirements that emergency response plans must meet, including minimum response times or minimum standards that pipeline operators have to meet for



having specialized equipment and trained staff within a specified distance of relevant infrastructure.

Enable municipalities to conduct routine maintenance activities on municipal highways without undue burdens from pipeline operators

- 24.** Reconsider changes to the Damage Prevention Regulations under the *Pipeline Safety Act* that unfairly shift burdens, obligations, costs and liabilities to municipalities and compromise municipalities' ability to conduct routine maintenance on municipal highways.
- 25.** Improve education and awareness for municipal staff responsible for operating and maintaining infrastructure in proximity to existing federal pipeline infrastructure.
- 26.** Clarify the obligations of municipalities to obtain permission from pipeline operators prior to conducting routine maintenance activities.
- 27.** Consider requiring operators to provide spatially accurate location data (horizontal and vertical coordinates) and as-built drawings to affected municipalities and to relevant agencies such as One Call organizations.

Prevent downloading of costs and liability to municipalities

- 28.** Ensure that costs related to equipment, training and personnel for emergency response are the responsibility of the project proponent.
- 29.** Ensure that costs incurred by local governments in response to emergencies are borne by the project proponent, including staff time and use of municipal resources, facilities and equipment.
- 30.** Ensure that municipalities are fully compensated for costs related to an incident involving NEB-regulated infrastructure, including municipal buildings, roads, bridges, culverts, water and wastewater treatment facilities, solid waste facilities, etc.
- 31.** Ensure that pipeline operators are required to carry sufficient liability insurance, and that operators are held accountable to provide adequate compensation in a timely manner.
- 32.** Investigate the possibility of establishing an emergency response fund—funded by industry and managed by the federal government—to cover the costs of responding to major incidents.
- 33.** Ensure that municipalities are fairly compensated and that liability is not unfairly transferred to municipalities regarding the construction and maintenance of municipal infrastructure within pipeline rights of ways.



## Indigenous engagement

The Truth and Reconciliation Commission released its final report in July 2015.

At that time, municipal leaders and FCM committed to work with the federal government to address the Calls to Action on a path towards reconciliation between Indigenous and non-Indigenous Canadians. In September 2016, FCM released Pathways to Reconciliation, a toolkit for municipalities that highlights actions that local governments have taken.

Consistent with this commitment to reconciliation, FCM is pleased to see the focus on Indigenous engagement in this review. While Indigenous people and organizations are best positioned to make detailed recommendations on how the NEB can be reformed to better include Indigenous peoples, FCM encourages the Expert Panel to use the Final Report of the Truth and Reconciliation Commission as a guiding framework.

### Recommendation

- 34.** Demonstrate the commitment to enacting the recommendations of the Truth and Reconciliation Commission in the NEB modernization process, including that the process put in place for the review, approval and compliance verification process contributes to reconciliation efforts with indigenous peoples.



## Public participation

In recent years, local governments have participated in NEB hearings on major pipeline projects. Twenty-seven municipalities intervened in the Line 9 Reversal, Northern Gateway and Trans Mountain Expansion hearings, and 15 municipalities were approved to participate in Energy East hearings prior to their suspension.

Based on this direct experience, municipalities have identified specific concerns with the public hearing process, and these inform the recommendations below.

In March, 2015, FCM's National Board of Directors adopted a resolution calling on FCM to oppose the loss of the standard public hearing process from the National Energy Board's application review and tribunal process, and to call on the federal government to develop, in consultation with local governments, First Nations, and citizens, the restoration of a full public hearing process to the National Energy Board's consideration of all applications.

### Recommendations

Elevate the status of municipalities in NEB hearings

35. Amend the NEB Act and the CEAA so that municipalities are automatically granted status in any hearing with respect to NEB-regulated infrastructure that is proposed to be routed through the municipality. The amendment should specify that costs cannot be awarded against municipalities. Consideration should be given to granting municipalities "full party status," which would be defined to include the same rights to participation and procedural fairness in the hearing as given to the proponent for the proposed project.

Incorporate the review and proper testing of the evidence through cross-examination by all parties

36. Amend the NEB Act and the CEAA to set out the procedural steps that must be taken in a public hearing for a pipeline application, including a step for the review and proper testing of evidence of the proponent through cross-examination by all parties.

Fully compensate municipalities for their participation in NEB hearings

37. Amend the NEB Act to enshrine the principle that costs for participating in NEB hearing processes shouldn't be downloaded to municipal governments. To adequately assess the risks posed by a pipeline project, municipalities must conduct technical analyses, often provided by third-party technical experts. Participant funding provided by the NEB should reflect the scale of the work that must be completed by the intervener—for example the population a municipal government is acting on behalf of, or the territory or watershed that it is responsible for—rather than establishing an arbitrary maximum.

