Ecojustice Submissions to the National Energy Board Modernization Panel

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For any questions or clarifications please contact Karen Campbell at kcampbell@ecojustice.ca or (604) 685-5618 x 287

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Ecojustice Submission to the NEB Modernization Panel

Ecojustice is a national environmental law charity that works in the public interest. We represent clients in environmental regulatory review processes and litigation. Our work includes representing clients before the Enbridge Northern Gateway Joint Review Panel, the Kinder Morgan Trans Mountain Expansion Project National Energy Board ("NEB") Panel and the Trans Canada Pipeline Energy East NEB Panel. We represent clients in litigation resulting from the Northern Gateway and Trans Mountain pipeline approvals. We also participated in the Mackenzie Gas Project Joint Review Panel and various other energy related regulatory reviews.

We thank you for the opportunity to provide our thoughts on NEB modernization.

Introduction

There are two perspectives that ground our submission. First, we commend the Panel for inviting submissions in the context of the ongoing transition to a low carbon economy in light of Canada's climate change commitments. However, we note that given the critical importance of climate change, a modern energy regulator must do more than consider this context, but rather develop a regime to pursue the goal of decarbonisation of our energy supply, and ensure appropriate decommissioning of fossil fuel infrastructure, such as federally regulated pipelines and land reclamation. To do so would entail a bold rethinking of our preferred energy infrastructure design, anticipating future energy demands and how to regulate them, as well as decommissioning and phasing out the existing energy infrastructure on its path to obsolescence.

The second perspective is based upon our experience in *Canadian Environmental Assessment Act, 2012* (the "*CEAA 2012*") and *National Energy Board Act* (the "*NEB Act*") review processes. In our view, meaningful NEB reforms that will address many of the issues raised in the discussion papers must be proposed in the context of deep reforms to *CEAA 2012*. This is particularly so given the failures of the recent pipeline review processes that have contributed to the loss of public trust in this regulatory regime.

Since many of our recommendations are based upon our experience with federal environmental assessments of NEB-regulated projects, we refer to Ecojustice's December 2016 submissions to the Federal Environmental Assessment Review Panel. The issues raised in the Discussion Papers and germane to NEB modernization should be addressed and resolved through the environmental assessment reform process. The environmental assessment functions currently performed by the NEB should primarily lie with the Canadian Environmental Assessment Agency (the "Agency").

We will refer to our December 2016 submissions where they are directly relevant.[1] Continued operation of an effective parallel regulatory regime would provide clarity and efficiency in project reviews.

Our comments address six of the issue areas raised in the NEB Modernization Expert Panel's Discussion Papers:

I. Mandate and Regulatory Framework (2)
II. Public Participation (10)
III. The Hearing Process (11)
IV. Determining the Canadian Public Interest (5)
V. Decision-Making Roles on Projects (4)
VI. Safety and Environmental Protection (6)

I. Mandate and Regulatory Framework

(a) Who should conduct and/or oversee project reviews

The NEB's current mandate includes environmental assessments under *CEAA 2012* as part of its review of applications for projects under its jurisdiction that require a *CEAA 2012* environmental assessment. The NEB is not well suited to conducting environmental assessments, and the public lacks confidence in its environmental assessments to date.

The fact that the 2012 legal changes removed the role of the Agency in the conduct of a joint *CEAA 2012/NEB Act* review has proven problematic for many reasons relating to public trust, and the fact that the NEB's traditional expertise is energy regulation not environmental assessment. Environmental assessments of NEB-regulated projects should not be conducted by the NEB, but rather by the Agency (or the Agency's independent post-reform equivalent), whose primary mandate and expertise lies in environmental assessment.

As we proposed in our Environmental Assessment Review Panel submission, environmental assessments for all reviewable projects under federal jurisdiction, including NEB-regulated projects, should be done by a single independent authority at arm's length from departmental mandates and partisan political interests. Having one authority conduct all major project

1 See Federal Environmental Assessment for the Future, Ecojustice Submissions to the Environmental Assessment Review Panel, December, 2016 at http://eareview-examenee.ca/wp-content/uploads/uploaded_files/2016-12-19-ecojustice-submissions-to-the-ea-review-panel.pdf.

environmental assessments will allow for the consistent application of procedures and policies and facilitate the development of knowledge and expertise by the Agency.

We also proposed to the Environmental Assessment Review Panel that environmental assessments become sustainability assessments, which would entail the entity responsible for the environmental assessment of an NEB regulated (or other) project conducting a sustainability assessment of the project, including the consideration of the related upstream and downstream impacts, intergenerational impacts and considerations of environmental justice. This sustainability assessment would be conducted by the Agency, and the NEB review would involve more technical matters traditionally within the NEB's regulatory expertise. These considerations would be reviewed by the Agency, with input from the NEB, but not administered by the NEB.

Thus, one option in this regard could be a return to the pre-2012 joint review panel process whereby the new and strengthened Agency conducts an environmental assessment pursuant to the environmental assessment legislation and the NEB conducts a review pursuant to s. 52 of the *NEB Act*. Each agency would participate in project reviews in a manner appropriate to its expertise.

The remainder of our comments will refer to the Agency for the conduct of reviews, but these comments will apply regardless of whether it is the Agency or another entity that has responsibility for reviews of NEB-regulated projects under the new modernized system.

(b) Scope of NEB mandate should be reduced

The NEB's mandate with respect to major energy project reviews should diminish, not expand. While the NEB can contribute helpful energy data information and perspective for the *NEB Act* s. 52 requirements of project reviews, we are concerned that it is dominated by conventional industry perspectives and unable to objectively evaluate factors that must be associated with major project reviews in an era of decarbonisation and increasing emphasis on renewable energy.

Given that much of the NEB's jurisdiction concerns oil and gas, and in particular interprovincial and international pipelines, we expect that the NEB's role will necessarily decrease as we stop building new oil and gas infrastructure and transition to a decarbonized energy system.

II. Public Participation

(a) Standing must be broadened

Where an NEB regulated project or activity gives rise to a public hearing or review process, there must be broad opportunities for public participation. As noted above, ideally these would be coordinated through the Agency, and conducted as sustainability assessments.

Currently, s. 55.2 of the *NEB Act* stipulates that a person or group must be "directly affected" in order to participate in a review of an NEB-regulated pipeline. It also states that the Board may consider the submissions of those who have "relevant information or expertise". Prior to the 2012 amendments to the *NEB Act*, the test allowed participation by "any interested person".

These standing requirements must be broadened to allow for "all interested parties" to be heard. Public regulatory decisions in this era of climate change increasingly have impacts that transcend those of a specific project. It is important that the perspectives of all interested parties be considered on projects subject to hearings or reviews required under the *NEB Act*. Similar standing provisions should be adhered to by the Agency as well. Or, at a minimum, standing to participate in an environmental assessment of a proposed NEB-regulated project should be available to any party with a genuine interest in the project. This could reflect the "genuine interest" test that the courts use to determine public interest standing.[2]

We would also like to draw the Panel's attention to the inconsistency between the restrictive standing requirements and the public interest test (discussed further in part IV below). A broad overall test for decisions about proposed projects (the national public interest) is not compatible with a narrow standing test for participation in reviews of those projects. If, as is currently the case, the ultimate question is the national public interest, the decision-maker is hindered if it limits itself to the views of participants who are directly affected in the sense of narrow, local impacts. The standing test must be consistent with the test for approval, which is the interests of all Canadians.

[2] Canada (Attorney General) v Downtown Eastside Sex Workers United Against Violence Society, 2012 SCC 45 at para 43.

III. The Hearing Process

(a) There must be adequate review of evidence

All hearings of applications for NEB-regulated projects must allow for oral cross-examination of expert witnesses. Oral cross-examination is the most effective way to test evidence. Written information requests alone are not an adequate substitute. In the NEB review of the Trans Mountain Expansion Project, for example, the use of only written information requests resulted in numerous motions challenging the adequacy of responses to each round of intervenors' information requests, and ultimately left many parties with their questions unanswered. This contributed to a lack of confidence in the adequacy of the information before the NEB and in the NEB's recommendations.

Oral cross-examination need not make hearings unmanageable. We recognize that some stakeholders may cite recent pipeline review processes where there were hundreds of registered intervenors. However, in the joint review panel hearing for Enbridge's Northern Gateway project, which included cross-examination, only a fraction of the registered intervenors participated in the technical hearings and cross-examination. Even if there is a high number of registered intervenors, only a limited number will cross-examine witnesses. Moreover, in that process, those who did conduct cross-examinations contributed greatly to the evaluation of the evidence.

Also, another technique that was used in the Northern Gateway process was to include community hearings as well as technical hearings. Those who wanted their views heard were able to attend community hearings (with no cross-examination) and those with more technical interests were able to attend the technical hearings with cross-examination of witnesses.

Our recommendation in this regard is that the hearing process work to accommodate the public interest, as there are innovative ways to do so within a review process, rather than limiting access at the outset.

The need for cross-examination must also be considered in the context of the need to eliminate time limits, addressed in part V, below.

IV. Determining the Canadian Public Interest

(a) Broaden the Public Interest Test

One of the key overarching factors that has been employed as part of the decision making criteria in recent NEB reviews has been "the public interest". For example, the Joint Review Panel Report for the Enbridge Northern Gateway Project summed up the public interest as a finding that "…Canadians would be better off with this project than without it."[3]

We agree that the public interest determination is ultimately the correct test. However, it must be clarified. As the relevant NEB discussion paper (5) states, the "public interest" is not defined in the *NEB Act* but the NEB has described it as follows: "The public interest is inclusive of all Canadians and refers to a balance of economic, environmental and social interests that change as society's values and preferences evolve over time."

The NEB website further states that when making a decision or recommendation, it "assess[es] the overall public good a project may create and its potential negative aspects, [and] weigh[s] its various impacts", ultimately asking, "Would Canada be better or worse off if a particular project were to go ahead?"[4] It states that "the Canadian public interest encompasses local, regional and national interests, and that it "must makes its decision based on the overall Canadian public interest."

This public interest determination is reflected in s. 52(2) of the *NEB Act* which states generally that the Board may have regard to "any public interest that in the Board's opinion may be affected by the issuance of the certificate or the dismissal of the application."

Factors for the public interest determination need to be clearly defined in the legislation in order to provide more clarity as to how this determination is made in relation to NEB-regulated projects. As noted earlier, a sustainability assessment, conducted by the Agency, should be the primary means by which an NEB-regulated project should be evaluated. As a fallback, sustainability criteria could be incorporated into the *NEB Act*. At a minimum, the public interest must include contribution to national sustainability goals and respect for indigenous rights.[5]

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[3] Report of the Joint Review Panel for the Enbridge Northern Gateway Project, Vol 2, Considerations, 2013, page 13.

[4] National Energy Board, "Regulating in the Public Interest", online: https://www.neb-one.gc.ca/bts/nws/rgltrsnpshts/2016/22rgltrsnpsht-eng.pdf.

[5] See Good Governance in the Era of Low Carbon, Pembina Institute Submission to the NEB Modernization Panel, at https://www.pembina.org/reports/vision-for-neb-modernization-final.pdf.

Relevant factors must include environmental impacts, including local environmental impacts, and all greenhouse gas emissions associated with the project. Moreover, in keeping with the need to ensure long term action on climate change, greenhouse gas emissions must fit within national reduction plans and strategies.

(b) Lifecycle greenhouse gas emissions associated with a project must be consistent with national greenhouse gas reduction plans

Given that the context for the public interest determination is whether the NEB-regulated project is required by the present and future public convenience and necessity (s. 52(1)(a)), it must include consideration of project impacts in relation to Canada's greenhouse gas reduction targets and global greenhouse gas emission trends. The legislation must make clear that a project cannot be in the public interest or convenience, and cannot be necessary, it if is not consistent with Canada's greenhouse gas reduction targets, commitments, and policies. The NEB acknowledges that the public interest can change over time.[6] In the context of climate action and decarbonisation, these climate factors must be explicit in NEB review processes going forward.

Greenhouse gas emissions should be measured against Canada's climate targets and international commitments, including Canada's Nationally Determined Contribution under the Paris Agreement.[7] Where appropriate, under environmental assessments in provinces with their own standards, greenhouse gas emissions should also be measured against provincial standards, such as Alberta's 100 mega-tonne limit for the oil sands.[8]

We note that these clarifications are required to the *NEB Act* and ideally, would also be consistent with the reforms to the criteria used under a modernized Canadian Environmental Assessment Act as well.[9]

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[6] https://www.neb-one.gc.ca/bts/nws/rgltrsnpshts/2016/22rgltrsnpsht-eng html

[7] Canada's Intended Nationally Determined Contribution Submission to the United Nations Framework Convention on Climate Change, online: http://www4.unfccc.int/submissions/INDC/Published%20Documents/Canada/1/INDC%20- %20Canada%20-%20English.pdf.

[8] Capping Oil Sands Emissions, Government of Alberta, online: http://www.alberta.ca/climate-oilsands-emissions.aspx.

[9] Federal Environmental Assessment for the Future, Ecojustice Submissions to the Environmental Assessment Review Panel, December, 2016 at http://eareview-examenee.ca/wp-content/uploads/uploaded_files/2016-12-19-ecojustice-submissions-to-the-ea-review-panel.pdf, p. 21.

(c) Scoping of environmental assessments of NEB-regulated projects should include climate and incidental effects

As we recommend in our submissions to the Environmental Assessment Review Panel, once federal jurisdiction to conduct an environmental assessment is triggered, the scope of the assessment should be broad, including the environmental effects on all areas of federal jurisdiction, and relevant provincial matters.[10] The scope can and should include all environmental and social effects relevant to the decision.

This broad scoping should occur under the environmental assessment law and should apply to environmental assessments of NEB-regulated projects, regardless of who conducts them. Thus, the scope of environmental assessments of NEB-regulated projects must include the incidental activities that are part of the project, even if those activities are outside of the NEB's normal jurisdiction.

In the case of pipelines, for example, scoping should include upstream, direct, and downstream greenhouse gas emissions, capturing the full "lifecycle" impacts of a project. At present, upstream and downstream impacts are excluded from environmental assessments of pipelines, and the interim practice of having Environment and Climate Change Canada merely prepare reports on greenhouse gas emissions only captures upstream, not downstream, emissions.

One obvious example of incidental activities is the upstream and downstream environmental effects of a project, such as a pipeline. A pipeline review process should include the upstream environmental impacts, including GHG emissions, as well as the downstream effects of combustion of the fossil fuel on the atmosphere.

Another example also relates to major pipeline projects that may include activities within federal jurisdiction, such as marine shipping, which the NEB does not regulate day-to-day but which are part of the project as defined in the current *CEAA 2012*. These activities must be included in environmental assessments, regardless of which entity conducts the environmental assessment.

At present, despite *CEAA 2012* defining project to include incidental activities, such activities are not always included in environmental assessments in practice. For example, the NEB recently excluded marine shipping from its environmental assessment of the Trans Mountain Expansion Project, which includes a pipeline to the west coast and a marine shipping terminal,

[10] Friends of the Oldman River Society v Canada (Minister of Transport), [1992] 1 SCR 3; Quebec (Attorney General) v Canada (National Energy Board), [1994] 1 SCR 159 at 187.

and stated that marine shipping was not part of the project. To avoid similar situations in future and ensure that incidental activities are included in practice, the legislation could be amended to include a non-exhaustive, illustrative list of activities that must be included, such as marine shipping in the case of pipelines to marine export terminals.

V. Decision-Making Roles on Projects

(a) Arbitrary timelines must be removed

The arbitrary timelines for major project reviews in the current *NEB Act* should be replaced because they are impractical, unrealistic and, to date, have directly correlated with the lack of public trust in NEB review processes. Statutory timelines should be proportionate to the complexity and potential environmental impacts of a proposed project. They must be sufficient to allow for full review of project descriptions, environmental impact statements and technical reports by interveners and their consultants, and, in the case of certain projects, to allow for oral cross-examination of expert witnesses. That should include when the technical data is complex, or where public interest is high. This will allow additional time for more complicated reviews that need it, but in general it should not be expected to make most reviews longer.[11]

While we appreciate that time limits provide certainty, the arbitrariness of the existing time limits has proven problematic, thus we recommend either extending or waiving timelines in a broader range of appropriate circumstances. Another option could be to establish no automatic time limits, but rather allowing a review panel the discretion to set time limits beyond a set minimum where necessary.

(b) Decision making authority and reasons therefore must be clear

The current NEB decision making authority whereby the Governor in Council makes the decision based on the recommendation of the NEB is broken.

[11] The information provided to the modernization review panel states that, before the arbitrary time limit was introduced, all hearings in the 8 years before 2012 but for the Mackenzie Gas Project Joint Review Panel were completed within 15 months from the hearing order despite the lack of legislated time limits. As such, the panel need not be concerned that this change will result in long hearings in most cases. See "FAQs – 2012 Changes to the *National Energy Board Act*", online: http://www neb-modernization.ca/system/documents/attachments/a3c9ab47316f506352d3ed2a3dd09f5b4f7490cc/000/005/419/original/FAQ-2012_Changes_to_the_NEB_Act_v3_EN.pdf?1485811391.

Ecojustice's overarching position is that environmental assessments should be the primary purview of the Agency not the NEB. As such, environmental assessments should be conducted by an unbiased, independent authority at arm's length from departmental mandates and partisan political interests. Moreover, as we recommended to the Environmental Assessment Review Panel, such assessments should be sustainability assessments, which would be broader than environmental assessments. A single independent authority would ensure consistent application of procedures and policies, allow for the development of knowledge and expertise within the authority, including energy and climate expertise which is interwoven with environmental assessment, and which would free the authority from departmental influence.[12]

Ecojustice recommends that the Governor in Council continue to be the decision maker for approvals of NEB regulated projects, following the environmental assessment, provided that:

- The Governor in Council provides detailed decision statements and rationales for its decision, including comprehensive reasons for the public interest determination (as described above);
- All documents considered by the Governor in Council in making the decision are fully and transparently disclosed;
- The environmental assessment report provided to the Governor in Council be prepared in accordance with legislative requirements and the report itself is expressly subject to judicial review; and
- There is an explicit provision indicating that the Governor in Council decision is subject to judicial review.

The decision-maker should explicitly demonstrate that they adequately considered public input by, for example, including a high-level summary of the themes of the comments and submissions received and responses to the concerns raised. Decisions must be based on explicit, clearly-articulated criteria identified at the outset of the assessment and supported by persuasive evidence presented in the assessment. Decisions must be transparent and open, and all documents and information considered by the decision-maker must be publicly available online and searchable. The decision-maker must give full reasons that provide justification, transparency and intelligibility.

[12] Federal Environmental Assessment for the Future, Ecojustice Submissions to the Environmental Assessment Review Panel, December, 2016 at http://eareview-examenee.ca/wp-content/uploads/uploaded_files/2016-12-19-ecojustice-submissions-to-the-ea-review-panel.pdf, pp. 26-27.

We note that these would apply for major project decisions. There are other decisions made by the NEB such as toll and tariff applications that need not be subject to the same requirements provided that they are also to be subjected to judicial review.

(c) Rights of judicial review must be expressly guaranteed

Judicial review is necessary as a last resort to ensure that environmental assessments are conducted in accordance with the all applicable mandatory statutory requirements, including the *NEB Act*, *CEAA 2012* and the federal *Species at Risk Act*. Recent jurisprudence from the Federal Court of Appeal has suggested that there may be no possibility of judicial review of the environmental assessments of NEB-regulated pipelines under the current statutory framework in which Cabinet is the final decision-maker. The *NEB Act* must be amended as proposed above, and even where those amendments are made, it underscores the need for the new or revised legislation to clearly state that judicial review of environmental assessments is available.

The special requirement to seek leave to apply for judicial review for a decision to approve an NEB-regulated pipeline, introduced in the 2012 amendments to the *NEB Act*, should be eliminated. This added step adds unnecessary costs for all parties. If a respondent thinks that an application for judicial review is baseless, they may bring a motion to strike under the existing Federal Courts Rules. Furthermore, the normal 30-day deadline for bringing an application for judicial review, pursuant to the Federal Courts Rules, should apply instead of the expedited 15-day deadline, which was also introduced in the 2012 amendments.

VI. Safety and Environmental Protection

Long term safety and environmental protection are important and can be achieved through meaningful follow up and compliance monitoring. Conditions of project approval should be binding and enforceable. Information on follow up and monitoring should be publicly available.

(a) Robust follow up and compliance monitoring should be required

The *NEB Act* should require proponents to provide reports on the status and results of follow-up programs, and this information should be made publicly available. The NEB should evaluate the efficacy of follow-up programs and make this information publicly available, and it should report on compliance with conditions of approval.

A public online tracking system, with a searchable registry, would increase public confidence that conditions are being met, and allow for accountability if conditions are not met. It will also

allow future assessments, and people's participation in them, to be informed by whether and how well different follow-up programs have worked in other cases and will help mitigation, monitoring, and other conditions for future projects to be more effective.

Some models for independent environmental monitoring and reporting have been used in the context of northern land claims agreements. These independent environmental monitoring agencies have been helpful to ensure that when the company undertakes its project, there is ongoing monitoring to protect the environment and northern communities. We would encourage this Panel to consider such models in order to build and maintain public trust in large energy projects over time.

(b) Decommissioning Fossil Fuel Infrastructure

Finally, in the context of climate change, the NEB's regulatory authority over pipelines should require it to plan for and manage an orderly decommissioning of existing pipeline infrastructure over the coming decades, in accordance with Canada's climate change goals. This will provide certainty to industry and investors, reduce potential exposure of taxpayers, and reinforce the inevitable phase out of Canada's oil and gas production.