

National Energy  
Board



Office national  
de l'énergie

Office of the Chair and CEO

Bureau du président et premier dirigeant

**MAR 24 2017**

Hélène Lauzon and Gary Merasty  
Co-Chairs, Expert Panel  
NEB Modernization Review  
[christopher.piercey@canada.ca](mailto:christopher.piercey@canada.ca)

Dear Ms. Lauzon and Mr. Merasty:

Thank you for your letter of 17 March 2017 on behalf of the Expert Panel conducting the review of the role, structure and mandate of the National Energy Board (NEB) under the *National Energy Board Act* (NEB Act).

In your letter you have relayed to the NEB five questions which the Expert Panel received during public engagement sessions in Fort St. John, British Columbia. We are pleased to provide you with responses to those questions, included in the attached Annex 1.

As always, we remain available to respond to any questions the Expert Panel may have to assist with the review process.

Yours sincerely,

A handwritten signature in blue ink, appearing to read 'C. Peter Watson'.

C. Peter Watson, P. Eng., FCAE  
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*Annex 1 – Responses to Modernization Expert Panel Questions Received 17 March 2017*

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***Question 1: What do NEB regulations say about archeological findings on sites in their jurisdiction? Concerns were raised regarding the Site C dam project and participants want to know how the NEB handles it?***

The NEB requires companies to describe and assess the potential impacts of a proposed project on heritage resources, including archaeological, paleontological and historical resources.<sup>1</sup> In particular, the NEB's Filing Manual, which sets out filing requirements for companies completing a project application to the NEB, requires them to describe known resources that may be impacted, and determine the potential for any undiscovered heritage resources in the study area.

Companies must also be aware of federal, provincial or territorial legislation or guidelines for identifying and protecting heritage resources. Copies of correspondence from provincial or territorial heritage resource authorities must be provided, with comments on heritage resource assessment requirements and proposed mitigation measures. Companies must also indicate whether they will implement the recommendations of the provincial or territorial authorities.

Companies must further consult with Indigenous groups with concerns about heritage resources in the project area. Although lands may be previously disturbed, an archaeological and paleontological assessment may still be required. The heritage resources assessment must be completed by a qualified archaeologist or paleontologist and include details of the field methodology used in the study. Where there is potential for discovery of heritage resources during construction or operations activities, a heritage resources contingency plan must be submitted. The plan must state, at a minimum, who would be contacted and under what conditions work would stop and resume.

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<sup>1</sup> For NEB applications that are also designated projects as a result of the *Canadian Environmental Assessment Act, 2012* (CEAA 2012), the potential environmental effects of a proposed project on the interests of Indigenous groups with respect to any structure or site or thing of historical, archeological, paleontological, or architectural significance must be considered.

***Question 2: Does the NEB take into consideration greenhouse gas emissions, including upstream and downstream emissions, during project reviews? Do they take into consideration the Paris agreement?***

Under the *NEB Act* the Board must consider matters that are “directly related to the pipeline” and “relevant” when making its recommendation as to whether a major pipeline project is in the public interest. The determination on the issues to be considered for a specific project review will be made by the panel considering the proposed project, based on the facts of the application being reviewed.

In past project reviews, the NEB has considered greenhouse gas (GHG) emissions that are emitted directly from the construction and operation of the proposed pipeline. The NEB has typically not considered the upstream activities associated with the development of oil sands, or the downstream and end use of the oil transported by a proposed project.

The NEB has, infrequently, included upstream or downstream facilities into the scope of a project review, where the reviewing panel has found there to have been a direct connection between the project under review and the associated facilities. In accordance with the interim measures set out by the Government in January of 2016, Environment and Climate Change Canada (ECCC) has assessed the upstream GHG emissions from some projects which have been, or are to be, considered by Governor in Council (e.g. Trans Mountain Expansion).

The NEB has not, in past project reviews, considered the Paris Agreement, as the agreement has not been implemented into Canadian law. The NEB awaits further direction from Government of Canada on how this international agreement should be implemented in the context of NEB project reviews.

***Question 3: Does the NEB examine macro data analytics to determine where there may be issues in the pipeline system?***

Yes. In fulfilling its safety and environmental oversight mandate over the lifecycle of projects it regulates, the NEB uses data for, among other things, compliance planning (to help focus inspections and other compliance activities) and issue-specific trending and analysis (for example, trending of incidents reported by NEB-regulated companies).<sup>2</sup>

Data for these purposes is collected through:

- Applications for new facilities
- The NEB's Event Reporting System;
- NEB requirements for companies to file information; and
- Various compliance verification activities, such as inspections, management system audits, formal compliance meetings, emergency exercises, and the evaluation of manuals or project-specific conditions.

The data collected from these systems and activities includes information about incidents, crossing violations, non-compliances, and leading performance indicators. Information about a company's facilities and the surrounding environment is also collected. This facility-specific data includes things like: size of pipe, authorized and actual operating pressure, product type, age of facility, and proximity of the pipeline or facilities to population, presence of workers, land-use types, watercourses, possible upset conditions, etc. Trending and analysis of this data is used to help identify specific issues and areas on which to focus the NEB's inspections and other compliance efforts.

Examples of the data used by the NEB to promote pipeline safety and environmental protection can be found at a variety of locations on our website, such as:

- Non-compliances and audit findings (<http://www.neb-one.gc.ca/sftnvrnmnt/cmplnc/index-eng.html>)
- Incident information (<http://www.neb-one.gc.ca/sftnvrnmnt/sft/dshbrd/mp/index-eng.html>)
- Leading performance indicators ([http://www.neb-one.gc.ca/sftnvrnmnt/sft/pplnprfrmncmsr/2015\\_12\\_21nbl-eng.html](http://www.neb-one.gc.ca/sftnvrnmnt/sft/pplnprfrmncmsr/2015_12_21nbl-eng.html))
- General industry performance (<http://www.neb-one.gc.ca/sftnvrnmnt/sft/dshbrd/dshbrd-eng.html>)
- Event Reporting System (<https://apps.neb-one.gc.ca/ers>)

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<sup>2</sup> The NEB also uses data for issue-specific trending and analysis, external reporting (e.g. NEB safety performance portal), and internal process monitoring (eg. counting the number of inspections and audits completed).

***Question 4: Does the NEB have the power or jurisdiction to actually set up a rental program, that is, can they require that a company enter into annual rent agreements with landowners with review clauses every few years?***

The NEB does not have the mandate or jurisdiction to determine the amount or method of compensation payable for land acquisition. The *NEB Act* sets out certain requirements with respect to land acquisition agreements (including, as set out below, a review of compensation every five years), but the NEB's mandate is limited to ensuring that these requirements are adhered to.

Companies must secure permission to locate a proposed project on privately-owned land. This could be achieved through either purchasing the land or by negotiating an easement agreement with the landowner. An easement agreement sets out the rights and obligations of both the company and the landowner in regard to the use of the lands for the location of the pipeline and will often specify restrictions on the use of the land. Under section 86 of the *NEB Act*, a company may not acquire lands for a pipeline under a land acquisition agreement, unless the agreement contains certain provisions including, among others, for:

- Compensation for the acquisition of the lands. This money could be paid by annual or periodic payments or by a onetime lump sum payment. It is at the option of the owner of the lands to select the payment method;
- A review every five years of the amount of any compensation payable;
- Compensation for damages caused by the company's operations, pipelines or abandoned pipelines; and
- Details surrounding the use of the land by the pipeline company.

While land acquisition agreements must comply with section 86 of the *NEB Act*, it is the parties signing the agreement who control the final contents of negotiated agreements. Land acquisition agreements can be enforced by the provincial court in the province where the lands are located.

***Question 5: What process does the NEB follow to notify a landowner that they've issued a right of entry order?***

Under the NEB Act, landowners whose land is subject to a potential Right of Entry Order (Order) must receive notice before a company submits its application. The affected landowners must also be provided with an opportunity to make any objection to the application, in writing.

If an Order is issued by the NEB, the affected landowners are notified in writing by way of a letter. In its letter, the NEB will provide its reasons for the decision to issue the Order and any related terms and conditions imposed by the NEB. All applications for a Right of Entry Order, together with the NEB's decision, are publicly available on the NEB's website in its electronic document repository (REGDOCS). Further, these Orders must be registered in the provincial registry system for the province in which the lands are located.

REGDOCS is accessible at: (<https://apps.neb-one.gc.ca/REGDOCS/>)