

**Expert Panel on National Energy Board Modernization
Public Consultation
Yellowknife, Northwest Territories – March 10, 2017**

The Expert Panel for the modernization of the National Energy Board (NEB) met in Yellowknife on March 10, 2017, to listen to presentations and engage in a public dialogue session.

The following summary presents the comments and input received throughout this in-person engagement session. It is intended to present the views of participants, and not the views of the Panel itself.

The summary is organized using the Panel's review theme areas, and comment was welcome from all parties on any issue relevant to the renewal of the NEB. Theme areas are as follows:

1. Governance and structure
2. Mandate and future opportunities
3. Decision-making roles, including on major projects
4. Compliance, enforcement, and ongoing monitoring
5. Engagement with Indigenous peoples
6. Public participation

The Panel wishes to thank all those who participated for sharing their expertise and experience at this session.

THEME: Governance and Structure

The Panel heard that board members should be selected based on their skills, knowledge and decision-making abilities, rather than their political ties.

The Panel heard that, for the sake of credibility, the NEB should be representative of the people it affects, including Indigenous peoples. It was specified that having a board member who happens to be Indigenous is not sufficient and that the important thing is that someone be on the board to represent the interests of Indigenous groups – ideally someone selected by the people they are meant to represent. The importance of appointing temporary members with regional knowledge was discussed, noting that it is not fair to expect one Indigenous person to represent all Indigenous peoples from all regions to the NEB.

Participants suggested that the NEB establish regional NEB-Indigenous co-management boards to ensure that relevant voices are heard from coast-to-coast. People from each region could elect or appoint members to their local board for a set term during which they would be “on-call” for service on NEB-regulated projects in their regions. The Panel heard that regional co-management board members would have to be independent, with no ties to industry. One participant expressed a preference for an Indigenous advisory committee without decision-making powers. This committee could help compensate for

capacity gaps in Indigenous communities as a water specialist from one community could work alongside a wildlife expert from another. It was agreed that whatever its form, it is important that the NEB reflect regional views on matters such as community development and traditional knowledge.

The Panel heard that the members of project-specific hearing panels should understand the related land claim agreements and s.35 of the Constitution, so that these are given the weight they deserve. Additionally, project hearing panel members should have some regional knowledge, especially in places where special technical considerations and traditional knowledge exist, such as the Arctic.

The Panel heard that policy issues like greenhouse gas emissions should be decided on by federal and provincial governments rather than the NEB in debates surrounding specific project reviews. It was also suggested that someone with expertise on the environment sit on the NEB Board.

The Panel heard that an increase in the number of NEB staff members on the ground would be appreciated. Participants referred to the current practice by the NEB of providing support from NEB staff in navigating technical and administrative processes. It was shared that this has been very helpful, especially to organizations with limited capacity. Participants supported the continued supply of information on, and management of, frontier lands and off-shore locations. It was suggested that the NEB's administrative functions could be improved through greater awareness of Indigenous peoples' land claim agreements and treaties and through increased coordination with other regulators.

The Panel heard that the composition of the board is more important than its location and that where someone lives is less important than where someone comes from.

The Panel was left with an open question as to where the NEB should be headquartered. It was suggested that the NEB be located close to where projects are happening. They heard that being in Calgary gives them the image of a regulator captured by industry, but that moving it to Ottawa may give the idea that it is captured by political interests.

THEME: Mandate and Future Opportunities

The Panel heard that the NEB's 2015 annual report provides a definition of the Canadian Public Interest and that any definition used in deliberations should be put into the NEB Act itself. A participant suggested that the NEB Act should also define regional interests, in recognition of the different treaties in place and various risks and rewards in places where projects are proposed. The Panel also heard that Indigenous interests are not the same as the Canadian Public Interest and that they deserve special consideration, as mandated by the

Constitution.

The Panel heard that it would be best for industry to have the NEB act as their single point of contact with all government departments or agencies with jurisdiction over a project.

Participants told the Panel that the duplication of environmental assessment (EA) processes challenges the integrity of land claim agreements, slows things down, and creates confusion as to how to weight differing conclusions. It was suggested that the EA approach with the most stringent environmental standards be the one applied, regardless of which agency is conducting the EA, and that this be agreed upon before it is conducted.

The Panel heard that if there are multiple agencies deciding if a project goes ahead, it's more difficult from an industry perspective. One participant raised the Mackenzie Gas Project as an example of the regulatory process getting so complex and taking so long that the economics behind the process died.

THEME: Decision-making Roles, Including on Major Projects

The Panel heard a desire to see all pipelines approved by Cabinet, as it is considered to be accountable and because Indigenous and Northern Affairs Canada, Natural Resources Canada and Environment and Climate Change Canada play a vital role in all the ancillary issues that revolve around pipelines. There was concern that under the current system, the NEB can be used by Cabinet as a scapegoat for decisions.

The Panel heard that a balanced approach might entrust the NEB with providing the best information possible and entrust the government with making the decision. Another approach suggested was to have the NEB issue permits, but require the federal government to confirm or deny these permitting decisions based on its assessment of whether the process met the Crown's duty to consult, as enshrined in the Constitution. It was shared that Alberta's Energy Regulator has an office responsible for determining whether or not the Crown's consultation was adequate given the circumstances, which is factored into its decisions.

The Panel heard concern over companies investing years and hundreds of millions of dollars in an application only to be told 'no' by Cabinet without explanation.

The Panel heard that decision-making currently defaults to Common Law but that aboriginal principles of law need to be recognized to a greater degree.

The Panel heard from a member of industry that it must focus on regulatory efficiency and effectiveness. It was suggested that there should be a better way to come to decisions than

to expose companies to the risk of spending 500 million dollars and multiple years before getting to the point of a yes or no answer.

As one participant put it, industry is not so adamant about what criteria are used to make decisions, as much as it is interested in having a clear and consistent set of criteria that can inform whether they should embark on the pursuit of a project approval from the start. The Panel heard unclear processes, uncertain timelines, high costs, and political involvement described as “job killers” by one participant.

The Panel heard a suggestion of a two step process, with the first phase consisting of the NEB conducting a needs assessment and deciding on public interest, subject to Cabinet’s approval. The second phase would be to focus on the NEB assessing and deciding on the details under which a project would be developed. The Panel was also told that no one party should effectively or formally have a veto right over a project, as pipelines may span numerous communities that wish to see a project go through.

The Panel heard that the review process is uncomfortable and unwelcoming for Indigenous peoples and that, coupled with the diffusion of accountability and overlapping jurisdictions, it erodes trust among all parties, leaving environmental concerns and socioeconomic opportunities unaddressed.

Participants told the Panel that, where available, Regional Strategic Environmental Assessments (RSEA) should be considered in the NEB and Government in Council’s decisions and recommendations, as they provide land use and socio-economic considerations.

The Panel heard that for many present, the regulatory regimes of Northern Canada are exemplary. It was recommended that in modernizing the NEB, the regimes of the North be studied.

THEME: Compliance, Enforcement, and Ongoing Monitoring

The Panel heard that the NEB should strengthen its regulatory process and increase its oversight. This would involve increasing the accountability of proponents and provincial and territorial regulators to affected communities. It was suggested that the NEB could keep a register of all commitments made to communities throughout a project’s lifecycle and periodically report back on how well they are being met.

The Panel was offered the example of the Northwest Territories, where there are lifecycle committees, co-management, and a level of transparency that encourages the engagement of local and Indigenous peoples to the highest possible level in the areas of compliance and enforcement.

The Panel heard that safety provisions can be viewed as opportunities to employ local and Indigenous peoples. One participant said that if companies were to inform Indigenous governments of what skills they foresee needing, they could equip potential workers with the most relevant training.

There were specific concerns voiced over the age of pipelines and slope erosion. There was concern that some may wait until there is a leak or burst and that older pipelines often need more of an overhaul than a small repair. The Panel heard that the public must be more knowledgeable, especially in regions where there are pipelines, before a pipe bursts. It was said that raising the bar on safety standards and creating a plan for the country could help improve this. This plan should include an early warning system to protect the land, rivers and wildlife.

A participant shared the practice of her First Nation, which requires that a proponent have various plans covering waste management, contingency, groundwater monitoring, closure and reclamation. It also requests an engagement plan that explains how various stakeholders will be engaged throughout the lifecycle. The Panel heard that most of these plans have standard conditions that spell out the proponent's obligation to revisit them annually and update them appropriately, subject to the approval of their land and water board.

The Panel heard that communities must be consulted on reclamation projects, as in some cases, past consultations have led to minimal input into the final outcome.

THEME: Engagement With Indigenous Peoples

Participants discussed the Crown's constitutional duty to consult and, where appropriate, accommodate. The Panel heard that the Crown fulfilling land claim obligations and treaty rights should not be debatable. Another participant asked that the NEB Act clearly explain any delegation on the part of the Crown to the NEB in such a way as to be clear that the Crown retains ultimate responsibility, though sometimes the NEB or the proponent are better placed to conduct certain parts of a consultation. The existing NEB reliance on proponents for aspects of consultation was noted.

The Panel heard that consultation should scale with the activity proposed. It also heard that while many companies have made a good effort to consult extensively, reports and documents are in technical language, requiring increased capacity of Indigenous communities. Participants stated that it is important that these technical documents be available publicly but also that plain language summaries be available to permit the engagement of non-specialists.

The Panel was asked to consider if one can truly provide consent if one does not understand what to which one is consenting. An analogy was offered: everyone is entitled to a fair trial,

but is it truly fair if the defendant cannot procure themselves a lawyer? Seeking consent requires the development of a deeper understanding and capacity, it is not transactional.

The Panel was told that the solution to this is to provide more and steadier funding to communities as opposed to sporadic project-specific funding. This would allow communities to develop capacity internally, thereby preserving knowledge and preparing them to respond to any future requests that may arise. The Panel was told that funding needs to be provided in good faith, without dictating exactly what it is to be spent on. It was proposed that rather than set hard rules, funders could establish expenditure criteria in conversation with recipients.

With such internal capacity, Indigenous communities would be more likely to respond meaningfully and within a shorter time frame. Investments could be made in Indigenous participation in Regional Strategic Environmental Assessments during less active periods. While funding would not be tied to a real-time project, it would allow Indigenous communities to more fully participate in booming times.

Participants discussed the challenges of documenting traditional knowledge for use in NEB processes, stating that a crucial element involves the ability to speak and understand the native languages spoken by elders. It was acknowledged that traditional knowledge is fundamentally a different way of knowing. The example of the concept of sustainability was raised. It was offered that what is taught in universities is one thing, but a gathering of Indigenous people once defined it as “looking back ten generations and see what ancestors did to make sure we benefit”.

The Panel heard that traditional knowledge cannot be taught in the traditional sense of the word but rather has to be lived. To keep traditional knowledge from dying, visits by Indigenous youth to the land will need to be funded.

One participant brought up the guide to traditional knowledge developed by the Inuvialuit Regional Corporation (IRC), supported by environmental studies and a research fund. The Panel heard that this guide addresses who ought to be engaged, how to invite community members to participate, and how traditional knowledge can work with Western science. The IRC also has a traditional knowledge coordinator position. It was stated that this guide is exemplary but that it may not apply to other Indigenous groups. As such, as it was concluded that the NEB cannot legislate a one-size-fits-all approach to traditional knowledge.

Participants warned against perpetuating the false dichotomy between proponents and governments representing science and Indigenous groups representing traditional knowledge. Many Indigenous people are equipped to participate in scientific discussion, among other issues, as well. The Panel heard that there is a perception that when studies are conducted by or on behalf of Indigenous groups they are not sufficiently considered. It was

noted that with better Indigenous representation on the NEB itself, this is likely to improve.

The Panel heard that even in cases where a First Nation government is mandated to conduct its own approval process, the NEB retains jurisdiction over what happens underground, having resulted in the NEB approving fracking operations before a First Nation can conduct its assessments. It was noted that such Indigenous-led assessments tend to go further in their consideration of the environment.

However, the resources and capacity are not always there to conduct assessments themselves, so the NEB should be prepared to do a thorough environmental assessment for all projects. Indigenous governments may then use these assessments in their weighing the impacts of a project.

One participant stated that currently, no one body feels completely accountable to ensure that commitments made to Indigenous communities don't slip through the cracks. One-day consultations are held in their community by companies and the issues raised don't appear to get addressed. There is a perception among Indigenous peoples that the NEB is a servant of the industry.

The issue is not only gathering, interpreting and understanding traditional knowledge, but also of acting on it. An example was offered of a community having used traditional knowledge to support their request that a proponent not build an airport on a fishing lake. The claimant built it anyways, and the community made them remove it. While the company readily did, the action eroded trust and illustrated the poor appreciation of how Indigenous people feel about certain sites.

Additionally, it was stated that the NEB should not seek to integrate traditional knowledge into Western science, but that it is best used on its own.

A participant brought up a challenge their company faces in leveraging traditional knowledge. While it is understandable that community members are hesitant to make such knowledge public, if a company is made aware of it once and must return years later, they must seek out the same information again, beginning from scratch. They wonder whether a confidential database of traditional knowledge could be created.

It was stated that changes in the climate and ecosystems of the North are particularly alarming to the Indigenous peoples living there. Examples were given of species declining and invasive species arriving, erosion of the land occurring. The Panel heard that this is the context in which Indigenous peoples are seeking sustainable economic development, with locally retained benefits. The Panel heard that Indigenous peoples are seeking a balance between traditional use of natural resources and modern opportunities to improve the health and well-being of their communities.

The Panel heard that people in the North face contradictory messages. On the one hand,

they welcome the initiative to modernize the NEB to better reflect regional and traditional knowledge, environmental science and community development priorities. On the other, one in-person engagement session on NEB modernization was held in the North, while nine were held in Southern Canada. Meanwhile, the Prime Minister announced in December 2016 that Arctic Canadian Waters are designated as off-limits to future oil and gas licensing. All this leads northern communities to believe that the North is not a priority for the government.

Participants discussed the UN Declaration on the Rights of Indigenous Peoples (UNDRIP). The Panel heard that UNDRIP mandates the pursuit of reasonable consent, rather than the accordance of veto rights.

One participant shared the following proposed implementation of UNDRIP (quoted here from the presentation provided), where treaty rights are concerned:

- 1. Freedom from force and manipulation:** There must not be any threat of withholding benefits or rights in exchange for consent, nor requests to simply “rubber stamp” requests.
- 2. Mutual agreement on process:** This is essential to having a smooth and efficient process.
- 3. Robust and satisfactory engagement:** Enough time and resources must be put towards engagement for it to be meaningful.
- 4. Sufficient and timely multilateral information exchange:** There must be a demonstrated understanding of the information shared with and received from rights holders.
- 5. Proper resourcing – technical and financial:** Indigenous communities must be equipped with the capacity to assess projects. In places with a boom and bust economy, it is hard and possibly impractical to maintain constant capacity. In these places, co-management might not work.
- 6. Shared goal of obtaining consent:** Reasonable consent should be pursued as a discussion between two equals, rather than the “parent-child” style negotiations of the past. If a party can prove that consent is being withheld unreasonably, the ultimate decision-maker would have to go through an analysis, as set out in the *Sparrow* decision. Nobody has a final veto.

The Panel heard that a nation-to-nation relationship is not something that can be quantified in a matrix but is a paradigm shift whereby the NEB and Crown would regard Indigenous governments as truly equal, and would begin to think seven generations down the line.

THEME: Public Participation

The Panel heard that industry supports rigorous public involvement but that this participation should not extend the timeline for arriving at a go or no-go decision. It heard that while informal forms of consultation should be allowed, the assertion of facts must be subject to

formal testing. It was also noted that in testing evidence through cross-examination there is a practical limit to the numbers of individuals involved, and some grouping of interests may be necessary.

It was suggested that prior to making an application, the applicant would file a project description on which the NEB would facilitate public consultation. The results of consultation would then be summarized in a report to be included with the proponent's application. This report would augment the existing NEB Filing Guidelines to further define what questions the NEB should pursue in their discovery and consideration of the project.

It was stated that NEB consultations should take place along the length of a pipeline and online *before* a recommendation or decision is made. It was also specified that intervenors at a hearing should not be limited by a narrow definition of "directly affected". It was noted that in the past the NEB has rightfully deemed Indigenous peoples to be "directly affected", automatically granting them intervenor status in hearings.

GENERAL COMMENT

- Some participants feel that the NEB is currently one of the best if not *the* best regulatory process in the world. They believe we should not throw the process away and restart but rather make small changes, if any.
- Other participants welcome the government's commitment to modernize the NEB.
- One participant said that in consultations such as the one in Yellowknife, the government should provide translators capable of translating from traditional languages so that they can capture the nuances of what community members are saying.
- The Panel heard a participant expressing frustration that the legislation that guides the NEB's exploration and production work in the North is not part of the NEB Modernization review.