MAR 02 2017

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Co-Chairs, Expert Panel
NEB Modernization Review
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Dear Ms. Lauzon and Mr. Merasty:

Thank you for your letter of 27 February 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).

I understand that the questions included in the letter have been posed by Canadians during the Expert Panel engagement sessions and I am pleased to support the Expert Panel’s commitment to being transparent and responsive, traits which the NEB is also committed to. The NEB’s responses to the questions posed by Canadians at the Expert Panel engagement sessions are provided in the attached Annex 1.

I recognize that the Expert Panel is hearing a wide range of perspectives on the different themes within the review from public submissions. These include, for example, suggestions about the governance of the NEB, scope of the NEB’s mandate, the environmental assessment process, public participation throughout the lifecycle and Indigenous engagement in the NEB process. These also include the broader system-level issues, such as climate change and the nation-to-nation relationship between the Government and Indigenous peoples.

Please be advised that the NEB intends to provide a written submission to the Expert Panel before the 31 March 2017 deadline to offer our perspective, as a regulator, Responsible Authority, and key player (among others) in the energy system in Canada, on some of the themes that have emerged throughout the review. The NEB has a unique perspective to provide on these issues based on what we have heard and our experiences.

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I would also like to reiterate my offer to meet with the Expert Panel to provide further details on any of these topics or respond to any subsequent questions the Expert Panel may have throughout the review.

Yours sincerely,

C. Peter Watson, P. Eng., FCAE
Chair and CEO
Annex 1 – Responses to Modernization Expert Panel Questions Received 27 February 2017

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Question 1: Is there publicly available information on how many times right of entry orders have been issued and how much landowners were compensated? How many landowners have had to be compensated?

Yes, there is information available on right of entry orders that have been issued, on the public registry, accessible through the NEB’s website. The NEB issued one right of entry order in 2015/2016 and one right of entry order in 2016/2017.

No, there is no publicly available information on how much landowners were compensated. The amount of compensation is negotiated between the company and the landowner. The NEB does not have the authority to determine compensation for the acquisition of land, although compensation is always provided.

The NEB expects companies to start consulting and building relationships with landowners at the planning stage of a project and continue this relationship until a pipeline or facility is removed. The NEB process is designed to ideally avoid the need for right of entry applications to be filed.

When a landowner and a pipeline company cannot agree on compensation, either party may apply to the Minister of Natural Resources to receive the services of a negotiator, or to have the dispute settled by arbitration. The NEB can refer parties to Natural Resources Canada’s (NRCan's) Pipeline Arbitration Secretariat (PAS) to obtain additional information about negotiation or arbitration services available.¹

Through the recently revitalized Land Matters Group (LMG), landowners can also raise general issues with the NEB on key land topics including those related to right of entry and compensation.

Question 2: How often are there multi-agency or multi-department emergency response drills and exercises?

Multi-jurisdictional and multi-agency emergency response exercises for pipeline incidents occur regularly across Canada. Pipeline companies are required by regulators to have an effective emergency response program, and the proactive exercising of response activities is part of this program. The NEB, as part of its regulatory oversight will attend and evaluate a sampling of these exercises on an ongoing basis. In 2017, the NEB plans to evaluate 14 emergency response exercises conducted by its regulated companies, 12 of which are currently scheduled to be full-scale or functional exercises.

The NEB recognizes that safety and protection of the environment requires a system-wide approach to be effective. The NEB is directly involved in multi-jurisdictional and multi-agency emergency response exercises in several different ways to, among other things, prepare for emergency responses, enhance the understanding of the roles of various agencies, identify areas of strength and improvement, and identify situations where a Memorandum of Understanding can enhance response efforts. The NEB’s direct involvement includes:

- Attending and evaluating a number of regulated company emergency response exercises annually;
- Attending and participating in multi-jurisdictional emergency response exercises; and
- Testing and evaluating the NEB’s own internal emergency preparedness.

When selecting which regulated company emergency response exercises to attend and evaluate, the NEB considers a variety of criteria (e.g. type of exercise, multi-agency participation, risk factors), on an annual basis. The NEB generally focuses on full-scale or functional emergency response exercises. These exercises include multi-jurisdictional and multi-agency stakeholders and participants, including provincial or municipal authorities, first responders and spill response organizations and service providers.
Question 3: Does the NEB only report to the Minister of Natural Resources or are they part of the decision making process?

The NEB reports to Parliament through the Minister of Natural Resources. It is part of the “portfolio” of agencies under the Minister of Natural Resources. That said, the Minister of Natural Resources is not part of the decision making process for a specific project unless the Minister applies to participate in the hearing for that project.²

As noted in the NEB’s letter to the Expert Panel of 24 February 2017, the NEB is accountable to Parliament, and reports to Parliament annually through the Minister of Natural Resources. The NEB exists within the portfolio of the Minister of Natural Resources and follows an established protocol for communication with NRCan for financial and administrative purposes. This includes regular and consistent contact to support an environment of understanding and collaboration, outside the NEB’s adjudicative function.

In its adjudicative function, the NEB is independent from the Government, including the Minister of Natural Resources. The NEB communicates its decision or recommendation on projects to the Minister of Natural Resources, after the decision or recommendation has been made and the report is written.

For international and interprovincial pipeline projects 40 kilometres or less and other related facilities captured within the definition of a “pipeline” in the NEB Act, the NEB makes the final decision on whether the project should be approved.

For international and interprovincial pipeline projects greater than 40 kilometres in length, the NEB makes a recommendation to the Governor in Council (GIC) and the GIC makes the decision on whether the project should be approved. The Minister of Natural Resources passes the NEB’s recommendation report to the GIC.

Notwithstanding these reporting relationships and the independence of the NEB in its adjudicative function, the NEB believes that additional accountability to the Minister, Parliament and the public is of paramount importance. The NEB has put in place a Departmental Results

² Should the Minister or Department of Natural Resources wish to provide the NEB with information on an issue relevant to a specific hearing prior to the decision being made, the Government has the opportunity to apply to participate in the hearing process and place this information on the public record for the NEB’s consideration. In that case, they would be treated in the same manner as any other hearing participants. In its adjudicative role, the NEB cannot consider anything that is not on the public record.
Framework so that the Minister, Parliament and the public have the necessary information to properly understand, challenge and assess the NEB's overall organizational performance – even while the NEB makes independent quasi-judicial decisions.³

³ Further details on the NEB's entire Governance Framework are available at: https://www.neb-one.gc.ca/bts/whwr/gvrmnc/index-eng.html.
**Question 4: Have there been health impact assessments done on each individual First Nations or towns?**

The assessment of health issues is conducted as part of every project assessment. Companies must include in their application a description of socio-economic impacts of the proposed project, including the potential impacts on human health. The NEB specifies in its Filing Manual what must be considered in the quantification of sources of health effects and potential human receptors. These include such things as, ambient conditions and distances to nearest residences, schools and other public institutions.

The NEB’s definition of human health includes consideration of “physical, mental and social well-being, and the ability to adapt to the stresses of daily life”. Under this comprehensive definition, applicants must consider, among other things, any adverse emotional or social stressors potentially resulting from the project. This could include, for example, concerns for public safety from construction or operations-related accidents or malfunctions, or the disruption of normal, daily living activities.

Applicants are further required to consider the potential effects of the project on the health of susceptible groups. This may include, for example, local residents, landowners and tenants, the elderly and children, and others who may regularly use the proposed project area such as recreationalists, hunters and trappers.

Applicants are also required to specifically consider the potential effects of a project on the health of Indigenous peoples, as it relates to their traditional land and resource use. This includes, for example, how the project may affect the health of those Indigenous peoples using traditional areas for hunting, trapping, fishing, berry picking, and medicinal plant collection.

As part of the application to the NEB, and within the overall project assessment, companies must also include details of their consultation program with local, regional, Indigenous, provincial or territorial, and federal health service providers, agencies and institutions.

The information contained in the company’s application is then tested through the NEB hearing process. For example, intervenors or other participants, including government departments, can file submissions and evidence to challenge or support what has been submitted by the company. They may also ask questions and request additional information from the company. The NEB

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4 For further details see the NEB Filing Manual available at: [https://www.neb-one.gc.ca/bts/ctrg/gnnh/fngmnl/index-eng.html](https://www.neb-one.gc.ca/bts/ctrg/gnnh/fngmnl/index-eng.html).
evaluates all the information on the hearing record, including the application and the submissions and evidence of intervenors, before reaching its decision or recommendation.

If approved, the NEB regulates the project over its entire lifecycle. The NEB believes that as a lifecycle regulator, it has a meaningful role to play in helping to create deeper, longer-term relationships with Indigenous peoples. More specifically, maintaining an integrated approach to project and environmental assessment and oversight – where the NEB is working meaningfully with Indigenous peoples at all stages of a project’s lifecycle – can be extremely effective. A better, more consistent and more sustained approach to Indigenous engagement surrounding major energy infrastructure can contribute to the Government’s objective of reconciliation with Indigenous people.
Question 5: Have there been independent studies done for animal habitats or the effects of fish and other water habitats?

The NEB always considers, among other things, any potential effects of the proposed project on wildlife, wildlife habitat, fish and fish habitat, or species at risk. Companies must provide the NEB with information regarding impacts on wildlife, wildlife habitat, fish and fish habitat, and species at risk. The information provided by the company is typically based on previous government, industry, or academic studies or publications, or field work commissioned specifically for the proposed project.

As noted in question 4, the information contained in the application is then tested through the NEB hearing process, usually through the participation of Intervenors or Government departments. Examples of Government departments that have appeared at NEB hearings are Environment and Climate Change Canada, the Department of Fisheries and Oceans, and Health Canada.

The NEB evaluates all the information on the hearing record, including the application and the submissions and evidence of Intervenors, before reaching its decision or recommendation. If the decision or recommendation is to approve a project, any terms and conditions required to, among other things, mitigate impacts the project may have on wildlife, wildlife habitat, fish and fish habitat, and species at risk are included.

The conditions of a project approval may require follow-up studies. In some cases involving specialized research the work has been conducted by university researchers funded by the operator or other funding agencies.

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5 The NEB Filing Manual also specifies the circumstances and interactions requiring detailed biophysical and socioeconomic information to be filed. For further details see the NEB Filing Manual available at: https://www.neb-one.gc.ca/bts/ctrg/gnnb/lnqmn/index-eng.html.

6 The NEB also has a Memorandum of Understanding (MOU) with the Department of Fisheries and Oceans (DFO) regarding the assessment of potential effects of a project on fish or fish habitat and aquatic species at risk. If the NEB determines that a project could result in serious harm to fish or fish habitat, or adverse effects on species at risk, the NEB will notify DFO that a Fisheries Act authorization and Species at Risk Act permit may be required. For further details see the complete text of the MOU between the NEB and DFO, available at: https://www.neb-one.gc.ca/bts/ctrg/mrmdnr/2013fishrcnsccnd-eng.html.
Question 6: During its project review, does the NEB consider how a proposed oil pipeline could impact a province’s electricity sector (e.g., assessing the impacts resulting from new electricity demands required to support the operation of pumping stations)?

The NEB requires a company applying for a proposed oil pipeline to consider how construction and operation activities may affect local or regional infrastructure and services, including electricity. The NEB also requires companies to confirm that all non-NEB regulatory approvals for the application are or will be in place. This includes, for example, permits allowing the applicant to meet its construction schedule and planned in-service date, and any required permits and authorizations which would result in the facilities being used and useful.

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**Question 7: What is the NEB’s role with respect to interprovincial electricity trade?**

The NEB does not have a role in regulation of interprovincial electricity trade.

The NEB regulates the construction, operation and abandonment of international and designated interprovincial power lines as well as the export of electricity from Canada.

Under the NEB Act, interprovincial power lines may be brought under the jurisdiction of the NEB if they are designated by the GIC. To date, the GIC has not issued an order designating any interprovincial power lines, and accordingly the NEB does not regulate any interprovincial power lines. All interprovincial connections are currently regulated by the provinces.

With respect to electricity trade, the NEB does not regulate exchange of electricity from one province to another. The NEB does, however, have statutory authority over electricity exports outside of Canada.

Through its energy information program, the NEB studies energy systems to inform its regulatory decisions and to share energy market information with the public. The scope of the NEB energy market reporting is diverse and includes oil, gas and electricity information, as well as renewable energy, the role of emerging technologies, and the links between energy, economic, social, and environmental issues.

Additional information on the electricity market in Canada can be found in the NEB’s 2016 Energy Futures Report, online at https://www.neb-one.gc.ca/nrg/ntrd/ftr/2016updt/index-eng.html.
Question 8: Can the NEB confiscate land from a property owner as part of the public interest determination for a project?

No, the NEB cannot confiscate land from a property owner, as part of its public interest determination or otherwise.

As noted in the NEB’s response to question 1, and previously in its letter to the Expert Panel of 24 February 2017, in the event that a company and a landowner are unable to reach an agreement about land acquisition, and the landowner(s) refuses the company entry onto their lands for pipeline-related purposes, the company can apply to the NEB for a right of entry order.

It bears repeating however, that the NEB process is designed to avoid the need for right of entry applications to be filec. Rather, the NEB expects companies to start consulting and building relationships with landowners at the planning stage of a project and continue this relationship until a pipeline or facility is removed.

If a right of entry application is filed, it must include a summary of the land negotiation process between the company and landowner, a discussion of outstanding issues and the reasons that a voluntary agreement could not be reached.

If the NEB grants the application, the company will be given an immediate right to enter the lands. The NEB can attach terms and conditions to the right of entry order, as it deems appropriate.

The NEB issued one right of entry order in 2015/2016 and one right of entry order in 2016/2017.