

**Expert Panel on National Energy Board Modernization
Public Consultation
Toronto, Ontario – February 1-2, 2017**

The Expert Panel for the modernization of the National Energy Board met in Toronto February 1-2, 2017, for in-person sessions which included public and Indigenous presentations, a public dialogue session and an Indigenous open dialogue session.

The following summary presents the comments and input received throughout these in-person engagement sessions. 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 these sessions.

THEME: Governance and Structure

Public Session – February 1, 2017

The Panel heard that there exist serious questions on the part of participants about the real and perceived independence of the NEB. To some the NEB appears to be largely aligned with the interests of traditional industry, and participants suggested several possible revisions to address this. First, the requirement that Board members reside in Calgary was noted as being unnecessary, and seemingly reinforcing an industry perspective on the Board.

Also, Panel members heard that a more representative Board would be important for the future. Representativeness in this sense means Indigenous Peoples (including Indigenous language competency), regional diversity, and a wider range of knowledge and expertise. Participants suggested that important areas of knowledge include: the oil and gas industry, climate change, traditional knowledge, emerging energy technologies, governance, and public engagement. There was also a suggestion that Board members receive training in various issues or disciplines to bridge any knowledge gaps, particularly climate change. Moreover, participants indicated that merit must be at the heart of NEB appointments to ensure public trust in the institution.

The Panel heard that the roles of Board Chair and CEO should be separated, as is most often the case in other organizations.

Finally, participants stressed the importance of addressing real and perceived conflicts of interest, particularly around relationships between Board members and the energy sector. This includes not just direct industry relationships or investments on the part of Board members, but also their families. This may also include an exclusion period between when individuals and their families may be employed in the energy industry and with the NEB.

Indigenous Engagement Session – February 2, 2017

Participants suggested that the composition of the Board is critical to ensuring that its decisions take into account Indigenous worldviews. It was suggested that the Board ensure Indigenous representation. Participants acknowledged that there is no single Indigenous perspective or culture, with a wide variety of peoples across Canada, and including First Nations, Inuit, and Métis peoples. The Panel heard that participants do not expect to see every group or region formally represented at the Board, as this would be impractical, but do expect to see an Indigenous worldview at the table, this could include formal consultation with Indigenous groups and delegation of a specific individuals. Achieving this might include some degree of training or outreach to ensure that Indigenous Board members hear a diversity of views from Indigenous communities.

Participants discussed the importance of language as it relates to representation. The Panel heard that many elements of Indigenous worldviews and traditional knowledge are fundamentally embedded in Indigenous languages, and may not be directly translatable. When English or French speaking decision makers are considering these concepts they must do so on the basis of imperfect translation, that can lose or distort the essence of the philosophical concepts at issue. For this reason, it was suggested that the Board consider Indigenous language capacity as an important competency.

Participants were clear that tokenism is not desired, and is a threat to progress.

It was also suggested that the NEB establish an advisory panel of Indigenous peoples to guide the Board in its decisions. Further, it was noted that such an advisory Board could include both experienced members and youth participants to reflect a diversity of views and build capacity for the next generation of leaders.

THEME: Mandate and Future Opportunities

Public Session – February 2, 2017

Participants told the Panel that NEB activities must be aligned with government policy objectives and commitments (including international agreements) in general, and to do with climate change in particular. Participants offered the view that the NEB of today appears to operate as if the policy context around climate change does not exist. Participants stressed that if Canada is serious about meeting the commitments set out in the Paris Agreement, as an example, then significant changes in energy policy must occur. The NEB as a regulator of the energy sector, then, should take these objectives into account when considering individual projects and the cumulative effects of many projects. Participants noted a seeming disconnect between stated government goals around de-carbonization of the economy, and NEB forecasts which present scenarios of increasing global demand for fossil fuels.

With respect to NEB forecasts, participants suggested that the NEB develop a broader range of forecasts that include scenarios where Canada and the global community are successful in reducing fossil fuel use, and where renewable energy sources – whose growth may not be linear as barriers to adoption are overcome – are factored into future scenarios. It was further suggested that the NEB develop tools to compare the reality of energy sector effect on climate change against policy objectives. More generally, the Panel heard views that forecasts should take a longer-term view, looking ahead 20 to 30 years, and not just the immediate future.

The Panel heard many views around the NEB's role as a centre for energy information. Participants suggested that the NEB greatly enhance its role in this regard in order to inform debate and discussion with a more robust view of the energy sector, trends, and new factors such as renewable energy sources which have a bearing on national energy policy and regulatory activity. Participants noted that today researchers will gather information about Canada from sources in the United States, as Canada lacks an authoritative, single source of information on energy matters (today the NEB, NRCan, ECC, Statscan, and Transport are all responsible for pieces of the overall picture). Participants offered the view that there should be one government centre for energy information, and that the NEB seems best-positioned to play that role, which would carry with it a requirement for increased resources. Participants also noted that provincial and even international data can be essential for a complete picture of the energy sector, and that the NEB could work to find ways to integrate information from other jurisdictions.

Accessibility of data is also important, as raw data files must be made available, not summaries or formats that cannot be downloaded and used. The Panel heard that NEB information provision is important to inform decisions but also more generally that there exists a public education role for the NEB.

Participants raised the question of funding for peer-review of information, which would help establish a level playing field for all parties to a proposal, and remove a barrier to participation.

The Panel also heard views around the concept of public interest, most pointedly that public interest be defined formally and that that definition include a reflection of environmental considerations. It was further suggested that public interest formally include the interests of future generations, and sustainable development, to ensure long-term oriented decision-making (Lake Ontario Waterkeeper was cited as an example in this regard). On this subject, the Panel heard that Indigenous interests are not subordinate to or part of an evolving concept of public interest. Indigenous rights and concerns are distinct from public interest considerations.

The notion of aligning energy regulation to environmental policy objectives was raised, with the specific suggestion that the NEB adopt a climate test, as outlined at climatetest.org.

Participants suggest that the Board look to Strategic or Regional Environmental Assessments as a means to establish broad baseline information for regions or ecosystems. As of today, some participants felt that project-based reviews make it difficult or impossible to consider overarching issues and effects which may not be decisive in the context of any individual project.

Participants suggested that land acquisition without landowner consent should not be permitted.

Indigenous Engagement Session – February 2, 2017

Participants discussed the concept of “public interest” in the NEB’s current mandate, and stressed that Indigenous rights and views represent a special public interest – acknowledged by the courts – that supersedes general social and economic interests. The Panel heard serious concern that the NEB not attempt to balance these interests, as they are fundamentally different. The concept of public interest does involve finding a balance within the public sphere and the many competing groups and viewpoints therein, however this is separate from consideration of Indigenous interests.

The Panel heard that participants would like to see a broader range of energy futures considered, and that the NEB should consider its work in the context of an overall future that relies on renewable sources of energy.

The Panel heard that Indigenous peoples expect to engage with Canada on a nation-to-nation basis, in the spirit of the UN Declaration on the Rights of Indigenous Peoples, to which Canada has pledged its support. Doing so entails a reconsideration of how the NEB views its own mandate and processes, particularly around how the duty to consult and accommodate Indigenous peoples is discharged. The Panel heard suggestions that the NEB not take on the

Crown duty to consult and accommodate Indigenous peoples, nor delegate this responsibility to proponents. Participants suggested that a separate Crown entity be made formally responsible for this function, with the NEB role being that of assessment that adequate consultation had taken place during a project review. It was further suggested that Canada establish a separate office to ensure compliance, on the part of government entities, with the duty to consult and accommodate Indigenous peoples.

THEME: Decision-making Roles, Including on Major Projects

Public Session – February 1, 2017

The Panel heard that participants would like to see clearer criteria for NEB or Cabinet decisions (including alignment to government policy and climate objectives), and also greater transparency around decisions.

Participants suggested that transparency around processes and decisions is critical, particularly in explaining how a decision was reached, and what factors were or were not considered. This transparency was cited as important not just for purposes of establishing a jurisprudential record of decisions, but also for demonstrating to intervenors that their views have been considered, and general public education on issues before the Board.

Participants suggest that which body takes an ultimate decision on a project – the NEB or the Governor-In-Council – is less important than the process by which recommendations and decisions are made. It was put forward that making the NEB the decision-making authority may seem like a simple way to depoliticize its decisions, but that that structural change will do little absent other reforms to assure strong and credible review and decision-making processes. However, with respect to the role of the Governor-In-Council, participants suggested that the GIC not be asked to review project proposals that the NEB does not recommend for approval. In any case, participants stressed the importance of transparency in decision-making.

Regarding timing, the Panel heard that the time required to thoughtfully review project proposals can be a serious consideration, with project documents numbering in the tens of thousands of pages. This can make it difficult for any party to participate fully and in a timely matter, as the simple act of reading all of the relevant materials can be very time and resource intensive. This is exacerbated when project information changes during a process, making it that much more difficult to stay abreast of evolving proposal content. The Panel also heard differing views on fixed project timelines. On the one hand some suggested that timelines should not be in place, so as not to rush decisions, whereas others offered that predictable timelines for a process are reasonable and helpful to all involved, but that they should scale to the nature of the project in question.

It was suggested that there be a moratorium on all major NEB decisions until the Expert Panel has tabled its recommendations.

Furthermore, it was suggested that – linked to the concurrent CEEA review – environmental assessments be made the responsibility of the Canadian Environmental Assessment Agency or a future central body with responsibility for all environmental assessment duties within federal jurisdiction. Panelists were urged to coordinate to the extent possible with the Expert Panel for CEEA review, as these roles overlap and complement one another.

Overall, participants emphasized the NEB decisions should be evidence-based, and should take into account the upstream and downstream effects of a project.

Indigenous Engagement Session – February 2, 2017

The Panel heard views that the specific roles of Indigenous peoples in project approval decision-making processes are not adequately defined. Participants suggested that today language around a duty to “consult” Indigenous peoples can be interpreted on a wide spectrum, sometimes being seen merely as a duty to inform communities of planned activity in their immediate area, and little more. Without clear guidelines it is difficult for communities or proponents to understand what “consultation” means, to know when it has actually occurred, and – critically – to know what role this duty creates for Indigenous groups in formal decision making.

Participants expressed the view that the UNDRIP espouses a requirement for free, prior, and informed *consent* on the part of Indigenous peoples, for projects affecting them. This requirement is fundamentally different than ambiguous notions of consultation, and must be incorporated into NEB decision-making models.

The Panel also heard concerns around the transparency of NEB decisions. Participants expressed the view that they need to see and understand what the NEB has decided, why it has reached its conclusions, and what factors it has considered to inform its decisions. Today Indigenous peoples are left to wonder if their submissions and worldviews have been rejected, considered, or even properly understood. For this reason it was suggested that the NEB be given the mandate for all decision making, as the current model involves Cabinet confidence, which prevents any discussion or scrutiny of NEB-recommended decisions.

THEME: Compliance, Enforcement, and Ongoing Monitoring

Public Session – February 1, 2017

The Panel heard interest particularly in first responders, and issues of preparedness for emergency response to NEB-approved pipelines. Participants expressed the view that many local first responders – such as fire departments – may not even be aware that they have pipelines located in their communities, much less processes for responding to incidents. In this sense, monitoring is about more than just the NEB role, and includes ensuring that industry works with first responders to have clear plans in place to deal with issues and clear

lines of communication in managing responses. Participants urged the Panel to consider action move from mere notification of incidents to true involvement of first responders and local communities.

The Panel also heard concerns around responses to safety issues identified by the NEB through its existing monitoring activities. Participants suggested that action to address identified issues can be lacking, either because of a lack of follow-up to confirm that a project owner has addressed a compliance issue or, more broadly, by not levying penalties sufficient to change systemic non-compliance patterns. The Panel also heard that the NEB could play a stronger role in supporting and protecting whistle blowers who may come forward with information on issues within their organizations, as there may be cases where industry does not follow its own guidelines.

The Panel heard that some substances and practices are untested, and that this introduces a greater amount of risk into projects than is currently accounted for. In spite of good-faith plans for responses to major spills, for example, it may not be possible to fully cleanup and remediate after a catastrophic spill whose real effects on the environment cannot be known before the fact.

Participants suggested that the reliability of monitoring technologies may be overstated, and overvalued in project approvals, as in practice it may well be passersby or local community members who first observe a spill. The idea of a specific review of safety practices was suggested.

In addition, the Panel heard that Indigenous peoples could be engaged to perform on-the-ground monitoring of projects. Indigenous communities know and use the lands and question, and are often best suited to perform this function.

The Panel heard views that when conditions are imposed on a project, the NEB should more clearly show whether those conditions are met, and the results of any follow-up monitoring.

It was further suggested the industry players be required to pool resources in order to create a standing body capable of responding to incidents, so as to mitigate the risk that a company responding to its own spill, for example, might address the issue to the lowest standard possible.

Participants mentioned integrity digs specifically, and suggested that in total, large numbers of integrity digs on a pipeline – which are considered normal maintenance procedures – may require greater oversight. It was suggested that Indigenous peoples be more involved in these digs, as they can affect lands in ways similar to pipeline construction projects.

Indigenous Engagement Session – February 2, 2017

The Panel heard that existing pipelines are just as important as new project approvals. The large network of pipelines already in the ground, many of which are 30-40 years old,

represent real risks and merit increased monitoring activity. Participants noted that aging infrastructure may be used to transmit new fuel products, which may be more corrosive or abrasive, and these effects and risks should be considered. Moreover, the standing of those involved in reviewing and monitoring compliance around existing pipelines should be considered, as previous decisions, some decades old, may reflect earlier attitudes and narrower definitions of the interests and rights of Indigenous Peoples.

Participants also mentioned the 2012 omnibus Budget Act as having a major effect on compliance objectives and activities. It was suggested that the Act significantly diminished environmental protections for species at risk and inland fisheries, issues which are inherently connected to NEB-approved projects. The Panel was urged to consider its recommendations in the context of a holistic federal government approach to the environment, where environmental regulations, monitoring, and compliance actions under the jurisdiction of many different entities interact with and complement each other.

Compliance, monitoring, and enforcement, and the ability to understand the cumulative effects of many projects, are of particular importance to Indigenous Peoples because many NEB-approved projects are directly on traditional lands, and near Aboriginal communities, who have a greater inherent connection to the land than people living in large cities. As an example, the Panel heard that the cumulative effects of heavy-metals in the environment are directly observable by Indigenous peoples when harvesting animals for food. These are not abstract considerations or numbers in report.

The Panel also heard that Indigenous peoples, and the public at large, should have direct access to monitoring data, so that it can be reviewed and analysed in public fora.

Participants expressed interest in emergency preparedness, and more information about plans, scenarios, and risks associated with emergencies.

The Panel heard that Indigenous peoples would like to see more involvement in cleanup projects, especially in overseeing overall integrity, and that there should be guidelines in place to ensure consistent remediation standards across different projects.

THEME: Engagement With Indigenous Peoples

Public Session – February 1, 2017

The Panel heard that definitions of impact and proximity do not reflect the reality of Indigenous communities and their connection to their lands. Specifically, the NEB or proponents may deem a certain community to be not affected by a project because the location of a reserve is not immediately proximate to a project. However, participants stressed that Indigenous land use is inherently broader than just a specific reserve, and includes all traditional lands and hunting grounds in areas that can be much larger than the legal boundaries of a reserve. For this reason, communities can be scoped-out of projects where they should not be. Moreover, the Panel heard that the ancillary components of a

project – winter roads, loading areas, transmission lines to pumping stations – must be considered as the total impact of a project.

The Panel heard that the principles of the United Nations Declaration on the Rights of Indigenous Peoples and Canadian Constitutional rights as they relate to the duty to consult and accommodate Indigenous Peoples are often left to project proponents and First Nations communities to sort out, with the Crown only playing a role later in the process. Further to this topic, participants questioned the need to “balance” Indigenous concerns with economic or environmental considerations. The Panel heard that Indigenous rights supersede other considerations, and the very notion of trying to balance these viewpoints misunderstands the nature of the nation-to-nation relationship Canada has with Indigenous communities. It was suggested that the concept of free, prior, and informed consent for projects on the part of Indigenous communities is a decision-making authority, not a “consultation”.

The Panel heard views around Canada’s legal standing with respect to Treaties. Specifically, it was proposed that certain established treaties (in this case the example cited was Treaty Nine, 1905) were and are between Indigenous communities and the Crown directly, and that these agreements and obligations were not and cannot be delegated to Canada via the Constitution or any other means. For this reason, inherent and treaty rights supersede Canada’s Constitution, and do not constitute an obligation to consult, but call for a nation-to-nation relationship that is fundamentally different than how Canada relates to other organizations.

It was further mentioned that guidelines for meaningful Indigenous engagement would be helpful for all parties, to understand expectations, roles, and process. There are existing best practices, such as First Nations who have developed sovereign environmental assessment processes, which may be of some guidance in this area.

Indigenous Engagement Session – February 2, 2017

The Panel heard an overarching comment that Indigenous considerations and concerns are everywhere, and not limited to special discussions or one-offs. For example, it was noted that Indigenous issues were woven into almost all of the discussion during the Panel’s public consultations on February 1st.

Participants raised concerns about NEB proceedings, and their exclusive nature. The Panel heard the experiences of individuals who were barred by police from attending hearings, or deemed not to have standing. This can create an oppositional environment where groups or individual with differing views are treated as obstacles, not as partners. Participants acknowledged the open nature of the Expert Panel on NEB Modernization’s consultation proceedings, and stated that including a blessing and ceremony from a local Elder is an example of how to put ideals of inclusivity into practice.

The Panel heard that the current definition of standing, limited to those directly affected,

does not adequately account for how Indigenous people view their lands and communities. Today, standing is defined largely on the basis of where people formally reside, rather than on the basis of connection and traditional use of larger territories. Participants cited examples of being informed that they did not have standing for a project review because that project was situated in a location far from a formal reserve boundary. The Panel heard that this limited definition fails to account for traditional Indigenous land use and treaty rights.

The Panel heard that there are many systemic barriers to Indigenous participation that must be addressed. Information about upcoming hearings is often limited or difficult to access. The physical location of public meetings can present barriers, especially for people in rural or remote areas, but also for people within cities who face challenges of limited mobility. Timing is critical for enabling real engagement. When events are announced a few days in advance, or when materials are presented on-site, participants have little time to prepare deep and thoughtful responses, and must instead engage on surface issues.

Participants suggested better use of existing media: radio, television, newspapers, and Facebook, as well as directly engaging and inviting Indigenous communities to participate in consultations, so as to ensure that a broad range of voices can be heard. A participant noted that the same small community of engaged leaders is consistently represented at public events, and a wider group would be beneficial.

The Panel also heard that it is important to allow for adequate time for decision-making within Indigenous communities. The approval of positions and submissions requires formal decision-making with communities, and this requires time which may not be budgeted for in the NEB's project timelines.

Participants raised the current, adversarial nature of NEB proceedings as an issue. This model was presented as problematic because of the requirement it creates to refute statements or characterizations by proponents, instead of working together to develop an agreed-upon set of baseline information upon which to base decisions. More than this, though, the adversarial system itself can create real barriers for Indigenous participation, because it is inherently legalistic and requires the participation of lawyers (often at great cost), not communities. The Panel heard the view expressed that the current system of reviews, consultations, and other activities serves the interests of lawyers more than the people and lands in question, and that those involved today have an inherent interest in perpetuating the design of that system. For communities this can mean exclusion from processes because of a lack of resource to pay legal fees.

THEME: Public Participation

Public Session – February 1, 2017

The Panel heard about several barriers to public participation: funding, access to expertise, and standing.

Regarding funding, participants stressed the importance of public funding to enable real participation in NEB proceedings. Without these funds the barriers around hiring experts and legal counsel would be simply too great for many organizations. In addition, the Panel heard that current practice will make a certain amount of resources available for groups, but that in instances of great demand that resource pool will be split amongst participating groups, thereby reducing amounts allotted by as much as fifty percent. This has the effect of making quality participation that more difficult on precisely those projects which attract the most attention and interest. Participants suggested that interested non-governmental organizations or First Nations could pool resources to mitigate against this (and some do today), but this is an imperfect solution that still leaves organizations to face difficult choices about which aspects of a project they wish to engage on fully, as a holistic review is simply not within financial resources.

Participants told the Panel that a major issue is the affordability and availability of experts to review technical aspects of project proposals. In its simplest form this is a resource issue, with simply not enough money available to procure scientific advice in a timely manner. More broadly, though, the Panel heard that access to expert advice and testimony can be challenging because so many experts are already employed by industry, or because certain experts do not wish to work for ENGO clients as they feel it may jeopardize more lucrative industry-funded opportunities. Participants suggested that this dynamic is the product of the current adversarial system that has project proponents present their own findings, and leaves intervenors to challenge these findings, rather than working from a more neutral set of established facts. The Panel also heard a suggestion that funding be established to support centres of independent expertise that could be called upon when needed.

Regarding standing, the Panel heard that the limitation on standing to those “directly affected” by a project is problematic. Participants suggested that this is too restrictive, and scopes out large classes of intervenors unnecessarily. Critically, not all parties may wish to attend formal hearings, and may instead wish to send a letter to the Board, or submit some form of evidence to the public record. The Panel heard that today these types of interaction are disallowed, and only those who meet the narrow definition of standing may participate in any way. Participants also raised questions around standing for projects already in operation, where the issue is not around project approval, but around ongoing issues through the lifecycle of a project that may have been approved thirty years prior. It was suggested that NEB public participation is currently geared toward project approval, and not reflective of the lifecycle management nature of the NEB’s mandate.

Participants hear that pre-registration for NEB hearings should be accessible to elders and

people with disabilities. In addition, written submissions should be accepted, and there were questions raised about the reliability of current web site technology in receiving those submissions.

The Ontario Energy Board was cited during the session as a potential model for public consultation including a wide array of affected and interested parties.

GENERAL COMMENT

In addition the Panel heard that the Expert Panel's own public engagement process entails some barriers, as locations may be difficult to access, public awareness is low, and timing is tight for preparation of both in-person and online participation. The Panel acknowledged this feedback and committed to examine its own practices to ensure that future sessions are publicized and accessible.