



National Energy  
Board

Office national  
de l'énergie

# Deck 2: Overview of the National Energy Board's Current Structure, Role and Mandate

Presentation to the Expert Panel Conducting the  
NEB Modernization Review  
29 November 2016



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# 1. Mandate and Role of the NEB

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- The NEB is Canada's national energy regulator.
- The NEB was established by Parliament to, among other things, make regulatory decisions and recommendations to the Governor in Council (GIC) and provide information and advice on energy matters.
- There have been significant changes in the public context since the National Energy Board Act (NEB Act) was first enacted (e.g., emergence of policy issues, such as climate change, Indigenous issues, and heightened public awareness of energy issues).
- Recent years have seen a number of changes to the NEB Act to address specific issues; however there has never been a holistic review.

# 1. Mandate and Role of the NEB (cont'd)

- The NEB has four core responsibilities:
  1. *Energy Adjudication* - Making decisions or recommendations to the Governor in Council on applications, which include environmental assessments, using processes that are fair, transparent, timely and accessible. These applications pertain to pipelines and related facilities, international power lines, tolls and tariffs, energy exports and imports, and oil and gas exploration and drilling in certain northern and offshore areas of Canada.
  2. *Safety and Environment Oversight* - Setting and enforcing regulatory expectations for National Energy Board-regulated companies over the full lifecycle -- construction, operation and abandonment -- of energy-related activities. These activities pertain to pipelines and related facilities, international power lines, tolls and tariffs, energy exports and imports, and oil and gas exploration and drilling in certain northern and offshore areas of Canada.
  3. *Energy Information* - Collecting, monitoring, analyzing and publishing information on energy markets and supply, sources of energy, and the safety and security of pipelines and international power lines.
  4. *Engagement* - Engaging with stakeholders and Indigenous Peoples on topics within the National Energy Board's mandate and role, beyond engagement on specific projects.

## 2. Key Legislation

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- The NEB's primary functions fall under two key Acts:
  - *National Energy Board Act* (NEB Act) – the NEB regulates construction, operation and abandonment of interprovincial and international pipelines; construction, operation and abandonment of international or designated inter-provincial powerlines; imports of natural gas and exports of crude oil, natural gas liquids, natural gas, refined petroleum products and electricity.
  - *Canadian Environmental Assessment Act, 2012* (CEAA, 2012) – as a responsible authority, the NEB carries out environmental assessments for certain designated projects, including new NEB Act-regulated pipelines over 40 km in length.

## 2. Key Legislation (cont'd)

- Legislative changes in 2012 made changes to the NEB Act and introduced CEAA, 2012.
  - Governor in Council (GIC) final go/no-go decision on all major pipeline projects.
  - 18 month time limits for major project reviews (NEB: 15 months, GIC: 3 months).
  - Environmental assessment responsibility consolidated with either the NEB, the Canadian Nuclear Safety Commission and the Canadian Environmental Assessment Agency.
  - NEB's enforcement and compliance tools enhanced (e.g. new administrative monetary penalties).
  - Participation in NEB project reviews limited to those “directly affected” or “with relevant information or expertise”.
- More recently, the Pipeline Safety Act made legislative amendments to the NEB Act to strengthen our tool-kit to regulate pipelines in the areas of financial requirements for releases, abandonment, and damage prevention.
- However, the basic framework of the NEB remains unchanged.

### 3. Review Terms of Reference

*Since 2015, the NEB has embarked on a transformative agenda. Examples of this work, which align to the specific areas in the Terms of Reference, are noted on the slides.*

# 3.1 Governance

- **The NEB reports to Parliament through the Minister of Natural Resources.**
- **Composition and expertise of Board Members**
  - The NEB Act provides for up to 9 permanent Board Members appointed by the GIC for a period of 7 years (eligible to be re-appointed for an additional term of up to 7 years). Permanent Board Members must reside in, or near, Calgary.
  - The GIC can appoint an unlimited number of temporary Board Members, on such terms and conditions that the GIC may prescribe.
  - The Board is currently comprised of 8 permanent Board Members, including the Chair and Vice-Chair, and 10 temporary Board Members (as of November 2016).
  - Board Members are supported by 450 expert staff representing various disciplines (e.g., environment, finance, markets, engagement, law).
- **NEB's operational and adjudicative functions**
  - The GIC designates one Board Member to be the Chair, who is also required to be the chief executive officer (CEO), or Deputy Head, of the Board (i.e., two very different roles).

# 3.1 Governance (cont'd)

- **Role of the Chair/CEO/Deputy Head**
  - The Chair is responsible for apportioning work among members, deciding whether the Board sits in a Panel, and assigning members to Panels including a presiding member.
  - The Chair may delegate specific authorities to Board Members, through section 14 or 15 of the NEB Act, but not to staff (see Annex for details).
  - The CEO has supervision over and direction of the work of staff (see Annex for examples of different governance models).
  - The CEO is also the Deputy Head under certain statutes such as the Financial Administration Act. The Deputy Head has accountabilities for overall performance of the agency, financial, and human resource matters.
- **Role of the NEB in implementing Government policies and priorities**
  - The NEB's role is to implement – not set – policies affirmed by federal legislation.
  - The NEB Act does not have a mechanism for the Government to provide policy direction to the NEB, or Chair/CEO.
  - The NEB Act does have a mechanism for the NEB to provide advice to the Minister on energy issues, when requested.

*The NEB has been improving its internal governance structure, which allows for the transparent reporting of critical performance (e.g., NEB Results Framework and the Management Systems Manual).*

## 3.2 Determining Public Interest

- In its adjudicative role, the NEB must decide or recommend if a project is in the Canadian public interest.
  - Throughout the lifecycle, the NEB holds those it regulates accountable so that Canadians and the environment are protected.
- The NEB Act does not explicitly define the Canadian public interest, however it does provide direction about certain relevant factors in subsection 52(2).
- The NEB has described the public interest in the following terms:

*“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. As a regulator, the Board must estimate the overall public good a project may create and its potential negative aspects, weigh its various impacts, and make a decision.”*

***Given the broad nature of the NEB Act, the NEB has the discretion to consider factors other than those expressly listed in it, based on the facts of a project application, including environmental and socio-economic effects that are directly related to a project.***

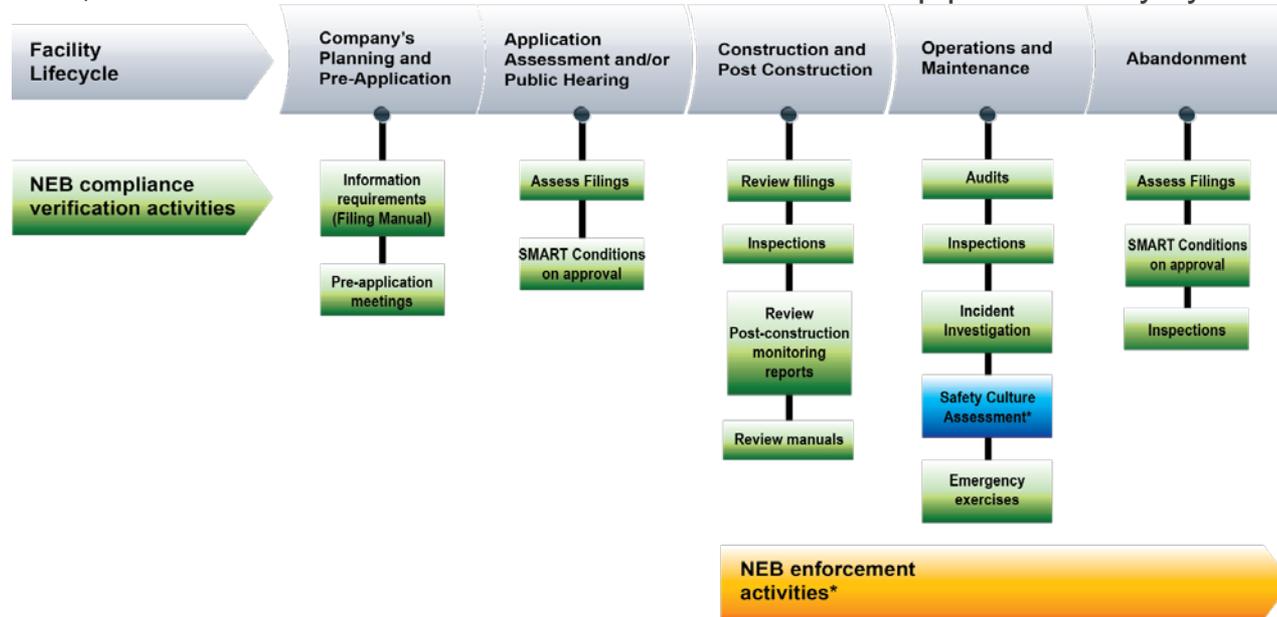
## 3.3 Decision-making Roles

- **Pipeline projects greater than 40 km in length** (see Annex for details)
  - Under the NEB Act, the **NEB makes a recommendation** on whether the project is in the present and future public convenience and necessity and should be approved. **GIC makes the decision.**
  - Under CEEA 2012, the **NEB makes a recommendation** on whether the project is likely to cause significant adverse environmental effects and whether those effects can be justified. **GIC makes the decision.**
- The **NEB makes the decision** on whether **pipeline projects 40 km in length or less, and pipeline facilities**, should be approved.
- The **NEB makes the decision** on whether a **power line certificate** should be granted. The decision is subject to **GIC approval.**
- The NEB has no jurisdiction over **land compensation disputes**; these issues are within Natural Resources Canada's (NRCan) purview. NRCan oversees the appointment of a negotiator or arbitration committee and the **Committee makes the decision.**

*As the NEB Act does not clarify governance, the NEB has been improving its internal decision making roles to provide clarity on who is responsible for making what decisions in the organization, within the current legislative framework. Therefore, some key governance issues remain to be addressed.*

# 3.4 Overview of Lifecycle Regulation

- The NEB holds those it regulates accountable so Canadians and the environment are protected throughout the lifecycle of the project, from application to abandonment. Because it is a lifecycle regulator, the NEB could be considered “the steward of the pipeline safety system”.



*The NEB is working to increase the understanding of its lifecycle role and expectations of companies to adhere to its regulations.*

## 3.5 Environmental Assessment

- The NEB always conducts an environment assessment (EA) for projects, regardless of whether CEAA 2012 applies, as a part of its public interest mandate.
  - In circumstances when CEAA 2012 applies, the environmental assessment is conducted in accordance with the requirements of CEAA 2012.
- The Board has decades of experience in taking a science-based approach to consider potential environmental effects when making regulatory decisions.
- All of the Board's environmental assessments examine key issues which include physical and meteorological environment; wetlands; water quality, and quantity; traditional land and resource use; and human health, aesthetics, and noise.

***The NEB continues to improve its EA processes, for example updating the Filing Manual to better specify the environmental and socio-economic information required by the Board to assess energy infrastructure projects.***

## 3.6 Condition Compliance

- If a project is approved, the company must comply with all conditions as set out in the certificates, orders, and any other regulatory instruments. Orders issued during operations phase (such as those issued pursuant to reactivation, deactivation, decommissioning applications) may also set out conditions.
- Conditions are legal requirements, designed to protect the public and the environment by reducing possible risks.
- The Board verifies and enforces compliance with all of the conditions through assessment of condition-related filings and compliance verification activities.
  - Where non-compliances with requirements are identified, the NEB carries out appropriate enforcement actions.
  - Some conditions require that Board approval be received prior to proceeding with related activities.

***The NEB proactively posts condition compliance information online, and has started posting additional information, such as inspection reports, relating to compliance verification activities.***

## 3.7 Lifecycle Oversight Tools

- In addition to complying with conditions, companies must comply with the Onshore Pipeline Regulations, Damage Prevention Regulations, Processing Plant Regulations, and all other applicable regulatory requirements.
- The NEB evaluates regulated companies, their facilities and activities on an ongoing basis to determine appropriate compliance oversight.
  - This risk-informed approach analyzes and considers incident data, compliance history, industry trends, complexity of activities, and safety and environmental impacts in order to focus on areas of the highest priority when planning compliance verification activities.
  - Compliance verification activities include: inspections, audits, emergency exercises, emergency procedures manual reviews, compliance meetings, etc.
- When non-compliances are identified, the NEB uses its enforcement tools to obtain compliance, deter future non-compliance, and prevent harm. These tools include, for example, Safety Orders, Administrative Monetary Penalties, revoking authorizations to operate and prosecutions.

***The NEB will always take all necessary enforcement actions.***

## 3.8 Land Matters

- Once a Certificate has been issued, the NEB must decide a **detailed route** for the pipeline. Companies must apply to the NEB with a plan, profile and book of reference setting out the route and must also notify landowners and the public.
  - If a person owning or having an interest in lands affected by the proposed route opposes it, a hearing is held. The NEB makes the determination on the best possible detailed route of the pipeline and the most appropriate method and timing of construction.
- Once a detailed route has been determined, the company may need to acquire lands for a pipeline. The NEB Act sets out the requirements for **land acquisition agreements** which includes compensation for the acquisition of lands and damages caused by the company's operations.
- The Board has the authority to grant immediate **right of entry** for any lands on specified terms and conditions.

*The NEB has identified opportunities for the Land Matters Group to provide feedback on strategic matters, early advice and input into the energy development discussion.*

## 3.9 Indigenous Engagement

- Meaningful Indigenous engagement is a critical component of NEB activities.
- The Crown relies on the NEB process to the extent possible to meet its duty to consult.
  - Federal departments undertake any additional consultation necessary on matters outside the NEB's mandate.
  - The NEB process is shaped by Indigenous consultation requirements in federal legislation (see Annex for details).
- For pipeline applications:
  - The NEB requires the proponent to undertake consultation with Indigenous peoples early in the design phase, providing information and opportunities to discuss the project, and identify concerns, potential impacts and mitigation measures.
  - Through the NEB's Enhanced Aboriginal Engagement, the NEB proactively contacts potentially impacted Indigenous peoples that may be affected by an application requiring a public hearing to provide information about the NEB and how to participate.

## 3.9 Indigenous Engagement (cont'd)

- For pipeline applications (cont'd):
  - The NEB's process is an open and transparent forum designed to obtain as much relevant evidence as possible on Indigenous concerns about the project, potential impacts on Indigenous interests, and possible mitigation measures. Efforts are made to make hearing processes accessible to Indigenous peoples.
  - The Board assesses all of the information provided to it, including information on the consultation undertaken with Indigenous groups, the views of Indigenous groups, Project impacts on Indigenous interests and proposed mitigation measures.
  - The Board applies its technical expertise and regulatory experience to determine the residual impacts on Indigenous interests and balances those with the other societal interests at play when assessing a project. This is documented in the NEB recommendation report.

## 3.9 Indigenous Engagement (cont'd)

- The NEB recognizes the importance of strengthening relationships with Indigenous peoples.
- With this in mind, and coming out of the Chair's National Engagement Initiative, the Board made three commitments:
  1. Use regional presence to build stronger relationships with Indigenous peoples to develop and deliver consistent point of contact for lifecycle regulatory information;
  2. Engage Indigenous peoples to deliver workshops on the lifecycle of energy infrastructure, energy literacy, safety and environmental protection, and the NEB's role in these areas; and
  3. Continue a proactive dialogue with Indigenous peoples on their unique viewpoints, needs and requirements for lifecycle regulatory information, and develop the NEB's Indigenous engagement programs to provide sustained and consistent interaction.

***The NEB has work underway to implement the commitments noted above including, for example, developing an Indigenous Engagement Strategy.***

## 3.10 Public Participation

- The NEB Act specifically requires that for pipeline and powerline applications, the NEB must hear from those who are directly affected and may hear from those who have relevant information or expertise.
  - There can be tension between more public input versus qualified expert input, in meeting the requirements of the Act (e.g. time limits).
- In addition to the hearing process, the Board believes that it is essential to engage with a wide variety of external groups as part of its ongoing oversight of energy facilities and regulated activities.
- The NEB's active engagement, both within and outside the hearing process, helps the NEB to:
  - Ensure the NEB is operating in the public interest;
  - Collaborate on the most effective means to help ensure that energy facilities are safe for the public, workers and the environment;
  - Proactively identify and respond to emerging issues; and
  - Effectively regulate facilities under the NEB's jurisdiction over their lifecycle.

***The NEB is focused on providing more opportunities for Canadians to meaningfully participate in NEB public hearing processes (e.g., increased public input into the process).***

# 3.11 Energy Information

- The Board monitors energy markets, and assesses Canadian energy requirements and trends of oil and natural gas discovery.
  - This supports the NEB's responsibilities under Part VI of the NEB Act (imports and exports).
  - The Board periodically publishes assessments of Canadian energy supply, demand and markets (e.g., NEB's Energy Futures Report).
  - These assessments address various aspects of energy markets in Canada.
- Part II of the Act states that the Board shall study and keep under review energy matters over which Parliament has jurisdiction, and provide the Minister with such advice as the Minister may request.
  - For example, in February 2015 the NEB received a Ministerial request to study and develop a report on the application of "best available technologies" used in federally-regulated pipeline projects. This request was amended in April 2016 to include environmental considerations and submitted to the Minister on 30 September.

***The NEB has been leveraging its existing energy information and advisory capacity to provide comprehensive energy information and data to Canadians (e.g. data visualization, pipeline map, conditions table, inspection reports on the web).***

# 4. Conclusion

- The NEB recognizes that rebuilding public trust is critical. We have embarked on an ambitious transformation agenda to help achieve this objective.
  - This work is underway within the existing legislative framework.
- The NEB's role is to implement – not set – policies affirmed by federal legislation.
  - As it has done with previous legislative changes, the NEB will faithfully implement any future changes to the NEB Act and CEEA 2012.
- Changes to and actions by the NEB alone will not be sufficient. It is important to understand that the NEB is only one part of the broader energy system in Canada.
  - There are other issues outside of the NEB's mandate that are also very important to the public, for example climate change and the rights of Indigenous peoples.
- The NEB takes its responsibilities seriously, and Board Members and staff are talented and dedicated professionals who work hard to help to ensure the safety of Canadians and the protection of the environment.

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National Energy Board	Canadian Nuclear Safety Commission	Alberta Energy Regulator	Ontario Energy Board
<ul style="list-style-type: none"> <li>• Established as a Board</li> <li>• No division of administrative and adjudicative functions</li> <li>• Chair is CEO</li> <li>• Chair, Vice Chair, seven other permanent Members, currently (29 Nov 2016) ten temporary Members (appointed by GIC)</li> <li>• Chair apportions work among Members; has direction/control over staff</li> <li>• Chair, Vice-Chair, Members make quasi-judicial decisions and recommendations</li> </ul>	<ul style="list-style-type: none"> <li>• Established as a corporation</li> <li>• No division of administrative and adjudicative functions</li> <li>• President is CEO</li> <li>• Only President is full time, four part-time Members, three temporary (appointed by GIC)</li> <li>• President apportions work among Members; has direction over staff</li> <li>• Members, including President, make quasi-judicial decisions under the NSCA</li> </ul>	<ul style="list-style-type: none"> <li>• Established as a corporation</li> <li>• Division of corporate, operational, adjudicative functions</li> <li>• <u>Corporate</u>: board of directors (Chair, two directors; appointed by Lieutenant GIC): <ul style="list-style-type: none"> <li>- Supported by committees (e.g., regulatory review committee;</li> <li>- Sets general business direction; approves regulatory change</li> <li>- Not involved in day-to-day operations</li> <li>- Appoints CEO, subject to Minister’s approval (cannot be Chair or other director)</li> </ul> </li> <li>• <u>Operational</u>: CEO is accountable for day-to-day operations, including hearings. Reports to Chair.</li> <li>• <u>Adjudicative</u>: Chief Hearing Commissioner; five other full-time; five part-time <ul style="list-style-type: none"> <li>- Only commissioners do hearings (not staff); involved in developing practice and procedure; do ADR</li> <li>- Cannot be Chair, director, CEO</li> </ul> </li> </ul>	<ul style="list-style-type: none"> <li>• Established as a corporation</li> <li>• No division of administrative and adjudicative functions</li> <li>• Chair is CEO</li> <li>• Chair, two Vice-Chairs, one full-time Member, seven part-time Members (appointed by Lieutenant GIC)</li> <li>• Chair, Vice-Chairs sit on Management committee: <ul style="list-style-type: none"> <li>- Manages activities of OEB, including delegating Board powers to employees.</li> <li>- Develops practice and procedure, by-laws about, for e.g., administration and management of OEB</li> </ul> </li> <li>• Statutorily required MOU between Minister and OEB about, for e.g., accountability relationships.</li> <li>• Chair, Vice-Chairs, Members, delegated staff make quasi-judicial decisions.</li> </ul>

# 5. Annex – Delegation of Authority

- Section 14 allows the Chair to authorize one or more members to exercise the Board's powers or perform Board's duties or functions for certain matters.
  - Members cannot be authorized under this section for some applications under Part III (construction and operation of pipelines and power lines), Part IV (traffic, tolls and tariffs), Part VI (exports and imports), Part VII (interprovincial oil and gas trade) and Part IX (administrative monetary penalties).
- Section 15 allows the Chair to authorize one or more members to report to the Board (full Board or Panel), with recommendations on a matter before the Board.
  - The Board doesn't hear the evidence directly, but considers the report and makes the actual decision.

# 5. Annex – Decision Making Roles

Pipeline projects greater than 40 km in length

- Under the NEB Act, the **NEB makes a recommendation** on whether it is in the present and future public convenience and necessity and should be approved.
  - To consider the present and future public convenience and necessity, the Board must consider the public interest.
  - The Board prepares and submits to GIC a report that includes its recommendation on whether a certificate should be issued and its reasons, and setting out the terms and conditions that the Board considers necessary or desirable in the public interest, regardless of the recommendation.
- Under the NEB Act, **GIC makes the decision**.
  - GIC can 1) direct the Board to issue a certificate; 2) direct the Board to dismiss the application; or 3) refer the report back to the Board for reconsideration of the recommendation and/or a term or condition.
- Under CEAA 2012, the **NEB makes a recommendation** on whether it will cause significant adverse environmental effects and whether those effects can be justified. **GIC makes the decision** (or GIC can refer the report back to the Board for reconsideration).

# 5. Annex – Indigenous Consultation

The NEB process is shaped by Indigenous consultation requirements in, for example:

- The *Constitution Act, 1982* (section 35(1)),
- The NEB Act (e.g., s.55.2 standing test, s.52(2) consideration of all relevant issues and the public interest),
- The CEAA 2012 (e.g., s.5 definition of environmental effects, s.19 factors to be considered),
- The NEB's Filing Manual (e.g., expectations for consultation by the proponent).

# 5. Annex: Activities by Numbers - 2015

<b>APPLICATIONS RECEIVED</b>	
Section 52 certificates (pipeline greater than 40 km)	2
Section 58 orders (pipelines 40 km or less)	52
Part VI Import/Export	526
Traffic, Tolls and Tariffs	22
Abandonment	1
<b>COMPLIANCE ACTIVITIES</b>	
Inspections	142
Emergency Exercises	20
Emergency Procedures Manual Review	13
Compliance Meetings	137
Audits	6
Report Reviews	30
<b>ENFORCEMENT ACTIVITIES UNDERTAKEN</b>	
Notices of Non-Compliance and Assurances of Voluntary Compliance	143
Inspection Officer Orders	4
Safety Orders (original and amended)	8
Administrative Monetary Penalties	12
Notices of Non-Compliance and Assurances of Voluntary Compliance	143
Source: 2015 Annual Report to Parliament	