



Briefing Note

NATIONAL ENERGY BOARD REFORM

A. Background

The National Energy Board (“NEB”) is in a crisis as a result of the loss of public confidence in its review and approval of major projects. Arrests of citizens protesting NEB decisions, the approval of pipelines across First Nations’ traditional territories despite their strong opposition and a litany of legal actions against pipeline approvals are the visible symptoms of this crisis.

In 2012, the omnibus *Jobs, Growth and Long-term Prosperity Act* (“JGLP Act”) made significant changes to the *National Energy Board Act* (“NEB Act”). The *JGLP Act* also repealed the existing *Canadian Environmental Assessment Act* and replaced it with the *Canadian Environmental Assessment Act, 2012* (“CEAA, 2012”). Together, these changes significantly changed the role of the NEB and the process for reviewing and approving proposed interprovincial pipeline projects.¹

The changes made by the *JGLP Act* were the federal government’s response to what it perceived as inordinate delays in pipeline approval processes. In particular, increasing public interest in pipeline issues, as demonstrated by over 4,000 people registering to comment at the public hearings into the proposed Northern Gateway pipeline, resulted in the government attempting to “streamline” the approval process for major pipelines. However, the changes have undermined public confidence in the pipeline review and approval process to the detriment of the public, industry and government. This Ecojustice paper outlines the detrimental effects of the 2012 changes and proposes steps to enhance the legitimacy of and public confidence in federal energy-related decisions, whether made by the NEB or Cabinet.²

B. Changes to the NEB Review and Approval Processes

1. Time limits for NEB pipeline hearings

¹ See Ecojustice’s backgrounder on the *NEB Act* and the 2012 amendments at http://www.ecojustice.ca/wp-content/uploads/2015/03/SEPT-2012_FINAL_NEBA-backgrounder.pdf

² This paper does not to address important potential improvements related to federal (NEB) and federal-provincial (CNLOPB and CNSOPB) offshore petroleum decision-making. We would be happy to discuss this issue and our ideas for legislative and policy improvements if requested.

Under the 2012 amendments to the *NEB Act*, the NEB now has a maximum of 15 months from the time the NEB deems a pipeline application to be complete until the NEB must make its final report and recommendation to the Minister of Natural Resources.³ Prior to 2012, the NEB could determine the appropriate timeline for the review and approval of projects.

The 15-month time limit has resulted in a number of consequences:

- The NEB has foregone holding informal community hearings along the proposed pipeline route for major pipelines. This has removed the opportunity for those who are most impacted by the proposed pipeline to speak directly to the NEB. Community members wishing to comment on a proposed pipeline can now only do so in writing after receiving the permission of the NEB.
- The NEB has foregone holding formal technical hearings with oral questioning for major pipelines. Interveners in these processes are limited to asking questions by way of written information requests. Lawyers and courts have long recognized that oral questioning is the most effective way to test evidence.
- Timelines for interveners to review pipeline application and environmental assessment documents have been shortened. In the Enbridge Northern Gateway Joint Review Panel Process, which was commenced prior to the 2012 amendments, interveners had 112 days to review the company's application and submit written information requests. Following the 2012 changes to the *NEB Act*, interveners had only 30 days (subsequently increased to 40 days) to review the 15,000 page application and prepare their written questions for the proponent in the Kinder Morgan Trans Mountain Expansion Project hearing process.
- Timelines for project proponents to respond to written information requests have been shortened. In the Kinder Morgan Trans Mountain Expansion Project hearing process, the proponent asked for a 23-day extension to properly respond to the information requests and was only granted 14 additional days by the NEB in order to meet the prescribed time limits.

The compressed timelines have eroded public confidence in the NEB process as communities are not consulted and the quality of the written information requests, the responses and the testing of the evidence are all being undermined by the time limits. The compressed timelines have resulted in a steady stream of motions questioning the fairness, transparency and completeness of the hearing processes and which may ultimately lead to further legal challenges.

Paradoxically, for smaller, non-controversial pipelines where few parties apply to intervene, the NEB will still hold community hearings, hold oral hearings with cross-examination and allow

³ *NEB Act*, s 52(4).

more time for review and questioning on the application because it can achieve this within the 15-month time limit. The larger and more controversial the pipeline and the more parties that apply to intervene, the less likely that the pipeline application will be subject to community hearings and formal oral hearings with cross-examination.

2. Restricting who can participate in the NEB hearing process

The 2012 amendments to the *NEB Act* restricted who can participate in NEB pipeline approval hearings. Prior to 2012, any interested member of the public could participate in an NEB hearing process. The NEB now requires anyone wishing to participate in an NEB pipeline hearing or to write a letter of concern to the NEB to first complete a multi-page application explaining how they are directly affected or have relevant information or expertise. Following the 2012 amendments, the NEB *must* consider the representations of any person who, in the NEB's opinion, is *directly affected* by the proposed pipeline and *may* consider the representations of any person who has relevant information or expertise.⁴

Therefore, rather than simplifying or streamlining the hearing process, the amendments have in fact added an additional step to the process. This added step has made it significantly more difficult for Canadians to engage in the NEB process and added more work for the Board with no apparent added value to the hearing process. Further, the NEB's decisions on who may participate can be challenged in court, again adding the possibility of further complication and delay in the process.

3. Removing the NEB's decision making powers

Prior to 2012, the NEB could, following a hearing, decide to approve a pipeline project. The NEB's decision was then subject to the approval of the Governor in Council (federal Cabinet). If the NEB decided to not approve a pipeline, that decision was final and could not be overturned by the federal Cabinet. Under the 2012 amendments, the NEB now only recommends to the Minister of Natural Resources as to whether the pipeline should be approved or not. The decision to approve or not approve now lies with the federal Cabinet.⁵

This amendment has changed the pipeline approval process from an independent regulatory process under the expertise of the NEB to a political decision of the federal Cabinet. This has again eroded public confidence in the NEB as an independent expert regulator.

4. Enhancing the diversity of NEB member backgrounds

Without impugning the qualifications of existing Board members, the NEB needs to ensure the appointment of more members with experience in community engagement and natural

⁴ *NEB Act*, s 55.2

⁵ *NEB Act*, s 52(1).

resource development, members with expertise in the non-profit sector, and members with Aboriginal background or experience working with Aboriginal communities.

5. Other factors

In a number of recent pipeline hearings, members of the public have attempted to raise questions about the greenhouse gas implications of the production and use of the products to be transported through the proposed pipelines. Large-scale projects, such as these, which materially enable upstream and/or downstream regional GHG emissions will necessarily be debated on the basis of climate change impacts. This is normal and appropriate. Many public interest organizations and municipalities maintain that, despite the Board's assertions to the contrary, the NEB does possess the legal jurisdiction, pursuant to both the *NEB Act* and the *CEAA, 2012* to examine upstream and downstream GHG emissions. These attempts to bring greenhouse gas emissions within the scope of the NEB hearings reflect the lack of any other forum for the public to raise its concerns with the Government of Canada's inaction on global greenhouse gas issues, even as the effects of climate change are being increasingly experienced first-hand by Canadian residents. For the NEB to consider projects such as pipelines, upgraders, refineries or Arctic offshore installations without regard to the broader context of the development (and accompanying GHG emissions) is an unfortunate dereliction of federal responsibility. This is particularly true because the GHG impacts are interjurisdictional in nature.

C. Rebuilding the *NEB Act*

In order to rebuild public confidence in the NEB as an independent energy regulator, to the benefit of the public, industry and government, Ecojustice recommends that the following amendments to restore and strengthen the *NEB Act*.

1. Establish timelines and hearing processes based on the potential environmental significance of the project

As discussed above, the NEB's one-size-fits-all approach to pipeline approval processes creates the paradox that small, non-controversial pipeline projects may have community hearings and oral questioning, while complex projects with high potential for environmental impacts will not. Ecojustice recommends that pipeline projects be subject to an initial screening that determines the complexity and potential environmental significance of the project. Approval processes and timelines can then be tailored to the potential significance.⁶

The table found in Appendix 1 offers a simplified model of how such a system might work, with expanded hearing processes and extended timelines for more complex projects. The development of initial screening criteria and possible resulting hearing processes would require

⁶ This approach is taken in the pipeline approval process in the state of South Australia, Australia. See Petroleum and Geothermal Group, *Guidelines for pipeline licensing and approvals in South Australia*, South Australia, Department of Primary Industries and Resources, Department Book 2005/5 (March 2006) at 9-11.

additional research.⁷ Further, the power should be restored to the NEB to adjust hearing processes and timelines as circumstances warrant.

2. Restoring participation in the hearing process

Narrow approaches to standing result in increased litigation and an inability to truly determine if a project is in the public interest.⁸ Given that the mandate of the NEB is to determine if a proposed pipeline is in the Canadian public interest, any resident of Canada should have the opportunity to comment in writing on any proposed pipeline. Similarly, any resident within reasonable proximity of the proposed pipeline should have an opportunity submit a written comment or to make a time-limited oral statement at a community hearing. Further, community groups and organizations with knowledge and perspective on relevant issues should have an opportunity to present their perspectives to the NEB.

Ecojustice notes that the number of parties wishing to participate more fully in hearings as interveners is somewhat self-limiting. Very few parties have the ability to fully participate as interveners because of the resources required to review large applications, prepare written information requests, prepare and submit written evidence, answer written information requests, attend at oral hearings, prepare for cross examination and make final argument.

3. Returning decision making power to the NEB

Ecojustice recommends that decision-making power with respect to pipelines and major projects be returned to the NEB, an expert, independent regulatory authority, as it existed prior to the 2012 amendments. Approval and regulation of pipelines should not vary based on the whims of the current government.

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⁷ See for example, Government of South Australia, *Criteria for classifying the level of environmental impact of regulated activities: requirement under Part 12 of the Petroleum and Geothermal Energy Act 2000*, Department for Manufacturing, Innovation, Trade, Resources and Energy (June 2013).

⁸ Environmental Law Centre, "Submission of the Environmental Law Centre to the Alberta Utilities Commission re: Regulatory Process for Hydroelectric Power Generation Development, Application No. 1606021", (Edmonton: 14 July 2010).

APPENDIX 1: PROPOSED NEB HEARING PROCESSES BASED ON POTENTIAL ENVIRONMENTAL SIGNIFICANCE

Pipeline Characteristics	Proposed Hearing Processes
<p>Low:</p> <ul style="list-style-type: none"> • Pipelines less than 40 kilometres in length and less than 12 inch outside diameter that do not cross protected areas (e.g. National and Provincial parks), designated environmentally sensitive areas (“ESAs”), significant watercourses or urban areas 	<ul style="list-style-type: none"> • Public notification and written comment period • NEB decision within 12 months of complete project application
<p>Medium:</p> <ul style="list-style-type: none"> • Pipelines 40 kilometres or more in length but less than 500 kilometres; or • Pipelines less than 40 kilometres in length but with an outside diameter of 12 inches or greater; or • Pipelines less than 200 kilometres in length that cross protected areas, ESAs, significant watercourses or urban areas. 	<ul style="list-style-type: none"> • Public notification and written comment period • Minimum of two months for interveners to prepare written information requests • Community hearings and oral technical hearings at NEB discretion • NEB decision within 18 months of complete project application
<p>High:</p> <ul style="list-style-type: none"> • Pipelines 500 kilometres or greater in length; or • Pipelines with an outside diameter of 18 inches or greater; • Pipelines of 200 kilometres or more in length that cross protected areas, ESAs, significant watercourses or urban areas. 	<ul style="list-style-type: none"> • Public notification and written comment period • Two rounds written information requests with a minimum of three months for interveners to prepare initial information requests • Community hearings at locations to be determined by the NEB • Technical hearings with oral cross examination • NEB decision within 30 months of complete project application