

National Energy Board (NEB) Modernization Expert Panel: Draft Terms of Reference

Context

The National Energy Board (the Board or NEB) is an independent federal, quasi-judicial regulator of pipelines, energy development and trade, with three key roles: adjudicating energy projects, supporting the safety of Canadians and the environment through oversight, and engaging Canadians on energy information. The Board regulates pipelines and electricity transmission lines that cross inter-provincial or international borders, which often involves multiple jurisdictions.

The Board has a legislated mandate to regulate in the Canadian public interest. This means that it must factor economic, environmental and social considerations into its decision-making process. The NEB also regulates over the complete lifecycle of a pipeline project (from design through to abandonment) using a wide variety of enforcement tools and activities. This provides one-window for industry and stakeholders, and allows for effective and consistent regulatory approaches at all stages of a project.

The Government has signaled a commitment to modernize the NEB, which was reflected in the Minister of Natural Resources (NRCan Minister) mandate letter where he was directed to: “Modernize the National Energy Board to ensure that its composition reflects regional views and has sufficient expertise in fields such as environmental science, community development, and Indigenous traditional knowledge” and to work with Ministerial colleagues on a review of federal environmental assessment processes.

Panel Mandate

The NRCan Minister will establish an Expert Panel (the Panel) to conduct a targeted review of the NEB's structure, role, and mandate pursuant to the *National Energy Board Act* (NEB Act). Specifically, the Panel shall:

- Enable public participation and input on key themes related to the review by ensuring this information is available on the Panel's website;
- Provide opportunities for engagement, including meetings with key stakeholders (e.g., industry associations, and environmental organizations)

- and the general public to enable the participation of interested Canadians;
- Engage national ~~and~~ regional and local Indigenous organizations, groups, and communities (including First Nations and Métis) to enable their participation at regional and local levels;
 - Work with regional Indigenous organizations in the planning and hosting of Indigenous in-person engagement events; and,
 - Prepare a report with respect to the review of the NEB's mandate that includes:
 - the approach employed to carry out its Mandate including but not limited to: the provision pre-engagement materials; the timeframes provided to interested stakeholders for input; and the methodology for engagement, consultation and consideration of input. The Panel will append the Engagement Plans developed to its report to the Minister.
 - the Panel's findings and recommendations to modernize the NEB which would include potential legislative amendments
 - ~~and~~ a summary of the input received from the public, Indigenous peoples and any other interested group or organization.

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Scope of Review

Efforts to modernize the NEB will deal with a focused set of issues related to the Board's structure, role, and mandate pursuant to the NEB Act. Specifically, these efforts will aim to position the NEB as modern, efficient, and effective energy regulator and regain public trust.

NEB Modernization will involve engaging Canadians on reforms to the NEB Act to position the Board to serve the interests of all Canadians into the future. Targeted engagement activities will focus on key areas where there may be opportunities to strengthen the NEB. For example, the Panel shall review the structure, role, and mandate of other regulators (e.g., Alberta Energy Regulator) to identify potential best practices as well as challenges and guide its review. The review may also validate areas of strength within the NEB and confirm that actions underway (e.g., the *Pipeline Safety Act*) are sufficiently robust. The focus of NEB Modernization shall include:

- 1 **Governance:** the mandate letter to the Minister of Natural Resources instructs him to ensure the Board's composition is diverse and has sufficient expertise in relevant fields. Therefore, potential outcomes

could include findings and recommendations in the following areas:

- Composition and expertise of Board members;
- Governance and division of the NEB's operational and adjudicative functions, including the roles of the Board's Chief Executive Officer and Chair;
- Role of the NEB in implementing Government policies and priorities, including mechanisms for policy direction; and
- Delegation of authorities to Board members and senior NEB staff.

2 **Mandate:** Canada's energy sector has undergone significant changes in recent years due to technological innovations and shifting global dynamics. Therefore, potential outcomes could include findings and recommendations in the following areas:

- Defining and measuring public interest (e.g., consideration of national, regional, and local interests as well as environmental, economic, ~~and~~ social and cultural factors);
- Potential to clarify and expand the NEB's mandate with respect to collecting and disseminating energy data, information, and analysis; and
- Potential to expand the NEB's mandate (i.e., in emerging areas such as offshore renewables and to support the transition to a low carbon economy).

3 **Decision-making Roles:** Some stakeholders have expressed differing views regarding the appropriate decision-making roles for the NEB, Minister, and the Governor in Council regarding projects, licences, and compensation disputes. Therefore, potential outcomes could include findings and recommendations on whether to maintain or revise the current approach.

4 **Legislative Tools for Lifecycle Regulation:** To ensure that the NEB is a modern, efficient, and effective energy regulator, its legislative tools for lifecycle regulation must be comprehensive and robust. To date, there have been significant efforts to optimize these legislative tools (e.g., coming into force of the *Pipeline Safety Act*). Potential outcomes could include findings and recommendations regarding whether additional actions are needed in the following areas:

- Lifecycle oversight and public engagement tools (e.g., effective legislative tools throughout project planning, construction and operation and abandonment and clear, effective and efficient

- mechanisms for public engagement and Indigenous engagement and consultation);
 - Safety and emergency preparedness tools (e.g., effective compliance monitoring and enforcement legislative tools; safety standards and emergency response requirements); and
 - Land acquisition matters and related negotiation proceedings.
- 5 **Indigenous Engagement:** Some Indigenous groups have raised concerns regarding the nature and process of their participation in all aspects of a pipeline's lifecycle. Therefore, potential outcomes could include findings and recommendations in the following areas:
- Early engagement to ensure energy and pipeline projects can identify (and hence avoid or mitigate) issues related to siting, sensitive areas and important traditional and cultural use areas;
 - Defining the role of indigenous knowledge as well as the role of science;
 - Enhancing the role of Indigenous communities in monitoring pipeline development and operations and in developing emergency response and reclamation/restoration plans; and
 - How the interests of Indigenous peoples are balanced against many and varied societal interests in decision-making.
- 6 **Public Participation:** Stakeholders) have expressed increased interest in the NEB's activities, including hearing processes and in developing emergency response plans. Potential outcomes could include findings and recommendations in the following areas:
- Identifying legislative changes to support greater stakeholder and public participation in various NEB activities (e.g., hearings, developing emergency response plans, etc.).

The Panel shall explicitly and broadly seek input into these considerations, in addition to the form and content of the applicable legislation

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Complementary Mandates

In addition to Natural Resources Canada's efforts to modernize the National Energy Board, Environment and Climate Change Canada is working to review environmental assessment processes under the *Canadian Environmental Assessment Act, 2012*. Also, the Departments of Fisheries, Oceans and the

Canadian Coast Guard and Transport are working together to review changes to the *Fisheries Act* and *Navigable Waters Protection Act*, restore lost protections, and incorporate modern safeguards. In preparing for and undertaking the review, the Panel will take into account the activities associated with the other mandated reviews, with the objective of sharing information received during the respective reviews, where relevant, and coordinating review activities, to the extent possible. If issues arise that fall beyond the scope of NEB Modernization but are related to the other mandate reviews, the Panel will forward the matter to the appropriate secretariat or department supporting the mandated review.

In assessing NEB activities the Panel shall consider the relationship between processes and the aboriginal and treaty rights of Indigenous peoples and reflect the principles outlined in the United Nations Declaration on the Rights of Indigenous Peoples.

The Review Process

The Panel

The Minister's selection of Panel members will be guided by the mandate letter commitment related to the Board's composition. Therefore, in addition to having background in energy regulation, Panel members should have sufficient expertise in fields such as environmental science, community development, and Indigenous traditional knowledge. The Panel will be free of any conflict of interest relative to the review process or its outcomes.

The Minister may consider candidate names put forward by Indigenous Groups or members of the public.

The Panel will consist of at least three members, including one Chairperson. In the event that a Panel member resigns or is unable to continue to work, the remaining members shall constitute the Panel unless the Minister determines otherwise. In such circumstances the Minister may choose to replace the Panel member to ensure balance and timeliness.

By way of letter from the Chairperson, the Panel may request clarification of its Terms of Reference from the Minister. The Panel shall continue with its review to the extent possible while waiting for a response in order to comply with the

timelines of these Terms of Reference.

By way of letter from the Chairperson, the Panel may request an amendment to its Terms of Reference from the Minister. The Panel shall continue with its review to the extent possible while waiting for a response from the Minister in order to comply with the timelines of these Terms of Reference.

The Panel shall issue a notice to the public regarding any clarifications or amendments to its Terms of Reference and shall make those clarifications and amendments available on its website within 2 business days of receipt from the Minister.

The NEB Modernization Secretariat

A Secretariat consisting of NRCan and NEB officials will provide administrative, technical, and procedural support to the Panel. The Secretariat will work closely with their counterparts in departments and agencies conducting other mandated reviews to share information and ensure a coordinated approach to communications and Indigenous engagement. Members of the Secretariat shall be guided in their work and professional conduct by the Values and Ethics Code for the Public Service.

Public Access to Information

The Panel shall create and maintain a website which makes public the information it receives during the course of the review.

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The Panel Secretariat shall be responsible for maintaining the website beyond the completion of the Panel's term, including to register any and all submissions by interested Parties to the Panel Report and leading up to any Ministerial decisions to fulfill the Ministers' mandate letter with regard to the Scope of Review as detailed above.

Stakeholder Engagement

In collaboration with the Secretariat, the Panel will develop a robust Engagement Plans that encompasses a wide-range of stakeholders interested in providing input in the review.

Public Engagement

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The Panel shall communicate directly with a broad cross-section of interested groups, organizations and individuals during its review to gain an understanding of issues and opportunities related to modernizing the NEB

The Panel will prepare a Public Engagement Plan outlining how and when it will conduct public in-person events and receive written submissions. In preparing the Plan, the Panel will take into account the activities associated with the other mandated reviews. This Plan will be posted on the Panel's website.;

The Panel shall also include any procedures necessary for the timely and efficient conduct of the events. The procedures will allow for the events to be open to the public and be conducted in a manner that offers all participants an opportunity to participate. The Panel shall ensure that a record of any in-person engagement event is created and posted on the Panel's website.

The Panel shall, where practicable, hold in-person engagement events in regions or communities where major energy developments within the mandate of the NEB including pipelines have occurred or are reasonably expected to occur, where project environmental assessments have been recently conducted or where interest has been expressed in the review.

The Panel shall take into account the timing of traditional activities in the local regions and communities when setting the time and location of in-person engagement events.

The Panel shall also conduct online engagement with Canadians and provide procedures for sending in submissions. Any submissions received shall be posted on the Panel's website.

The Panel will allow 30 days for comment on the Public Engagement Plan before it is finalized. Any feedback received will be considered and posted on the Panel's website. The results of stakeholder engagement activities will be made available on the Panel's website.

Indigenous Engagement and Consultation

The Panel will conduct its review in a manner that will facilitate the meaningful participation of Indigenous Groups and in particular, those Indigenous groups where major energy developments within the mandate of the NEB including pipelines have occurred or are reasonably expected to occur, where project environmental assessments have been recently conducted or where interest has been expressed in the review.

The Panel shall directly engage and consult with Indigenous organizations, groups, communities and individuals during its review in order to gain an understanding of issues and opportunities related to NEB activities.

The Panel shall prepare an Indigenous Engagement and Consultation Plan, outlining how and when it will conduct Indigenous in-person consultation activities and receive written submissions. The Panel shall meet with the leadership of National Indigenous Organizations or their duly appointed representatives in the preparation of the Plan. In preparing the Plan, the Panel shall take into account the activities associated with the other mandated reviews. This Plan shall be posted on the Panel's website. The Panel shall work with regional and/or local Indigenous organizations in the planning and hosting of Indigenous in-person consultation activities.

The Panel shall also include any procedures necessary for the timely and efficient conduct of these activities. The procedures will allow for the events to be open and to be conducted in a manner that offers all participants an opportunity to participate. The Panel shall ensure that a record of any Indigenous in-person engagement event is created and posted on the Panel's website.

The Panel shall, where practicable, hold Indigenous in-person consultation activities in regions or communities where major energy developments within the mandate of the NEB including pipelines have occurred or are reasonably expected to occur, where project environmental assessments have been recently conducted or where communities have expressed interest in the review.

The Panel shall take into account the timing of traditional activities in the local regions and communities when setting the time and location of Indigenous in-person consultation activities.

The Panel shall also conduct online engagement with Indigenous Groups and provide procedures for sending in submissions. Any submissions received shall be posted on the Panel's website.

The Panel will allow 30 days for comment on the Indigenous Engagement and Consultation Plan before it is finalized. Any feedback received will be considered and posted on the Panel's website.

Expert Advice

The Panel may retain the services of independent non-government experts to provide advice on certain subjects within its mandate. Any advice provided to the Panel will be posted on the Panel's website. The Panel will include a summary of the subject for which advice was sought and of any advice provided in its Report.

Key Deliverables

The Panel shall provide a report to the Minister of Natural Resources that includes the following components:

- An executive summary;
- A description of the approach employed to carry out its Mandate including but not limited to: the provision pre-engagement materials; the timeframes provided to interested stakeholders for input; and the methodology for engagement, consultation and consideration of input. The Panel will append the Engagement Plans developed to its report to the Minister.
- The findings, conclusions and recommendations of the Panel with respect to the relevant issues within the mandate provided to the Panel; and
- A summary of any comments received.
- The Report shall reflect the views of each member of the Panel.

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Upon receiving the report of the Panel, the Minister will make the report available to the public.

Timeline

The Panel shall conduct consultations commencing in September August 2016 and ending by December 2016. The Panel shall report to the Minister on or before January 31, 2017.

The report shall be made available by the Minister on Panel website within 2 business days of receipt of the report.

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Outcome

The results of this work will enable the development of potential legislative changes related to modernizing the NEB. The Prime Minister's approval would be sought for proposals that engage his prerogative for the machinery of government.

Participant Funding

The NEB, or Ministry of Natural Resources, will offer participant funding to Indigenous organizations, groups, communities and individuals to support their participation in the review.

This funding will be made available for all phases of the review including up to any Ministerial decisions to fulfill the Ministers' mandate letter with regard to the Scope of Review as detailed above.

Official Languages

The final report and any other documents produced by the Panel for public dissemination must be produced and made publicly available in English and French. Documents provided to the Panel will be made publicly available in the language they were received.

Confidentiality

All information gathered by the Panel in the course of its work is subject to the provisions of the *Access to Information Act* and the *Privacy Act*.