

July 20, 2016

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Natural Resources Canada
580 Booth Street
Ottawa, ON
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Attention: The Honourable James Gordon Carr, P.C., M.P.
Minister of Natural Resources Canada

Dear Minister Carr:

We write to provide the City of Vancouver's comments on the National Energy Board ("NEB") Modernization Expert Panel ("Panel") draft *Terms of Reference* launched by the Government of Canada on June 20, 2016.

The City of Vancouver has committed to becoming the greenest city in the world by 2020 and in pursuit of that goal, continues to undertake a wide range of initiatives. Vancouver has the fastest growing and most diverse economy in Canada, averaging three per cent growth annually, and is forecasted to be the fastest growing economy in Canada for the next five years. Vancouver's economic growth is driven by technology, digital, entertainment and interactive and the green economy sectors. Vancouver also leads the country in green economy jobs, growing six per cent each year - five times the growth rate across all sectors in BC. 25 per cent of Canada's clean tech companies are based in Vancouver and our brand as a green, clean, and sustainable city, valued at \$31 billion US, benefits all of Canada. With the right leadership, these trends are replicable across Canada.

The City of Vancouver was also an Intervenor in the hearing that was before the NEB concerning the application by Trans Mountain Pipeline ULC (Trans Mountain) for a Certificate of Public Convenience and Necessity in respect to the proposed Trans Mountain Expansion Project (TMEP). The City filed extensive written evidence and presented written and oral arguments in that hearing, opposing the application.

In this letter, we do not intend to repeat all of the evidence or the issues of concern raised by the City of Vancouver in the TMEP hearing before the NEB. We do encourage the Panel to review evidence provided by all Intervenors, as many raised issues and concerns related to the NEB and its decision making processes. Instead, this letter will focus on our recommendations for the NEB Modernization Panel draft *Terms of Reference* and related themes on the NEB's structure, role and mandate pursuant to the *National Energy Board Act* ("NEB Act").

We are encouraged by Natural Resources Canada's ("NRCan") commitment to Canadians to modernize the NEB and to position the Board to serve the interests of all Canadians into the future with a renewed sense of collaboration and transparency. We are looking forward to engaging with the Panel on this topic over the coming months.

Scope of Review

The City of Vancouver is looking to the NEB of the future to ensure that the energy Canada produces, manufacturers, transports and uses in local and global markets has minimal social and environmental harm. This can be done if all benefits and costs are included in the NEB's deliberations and decisions are made in the context of Canadian Energy, Climate and Greenhouse Gas (GHG) Emission Strategies.

We believe the future of the NEB is in protecting public interest and facilitating a sustainable energy sector. A sector that remains a source of jobs, prosperity and opportunity for many generations, but one that needs to evolve in the context of a world that faces climate change and increasingly values sustainable practices, and low carbon and renewable solutions.

To position the NEB as a modern, efficient and effective regulator and to regain public trust, we recommend the Panel's scope of review be amended and expanded to consider the following:

1. Governance:

The Board's composition should not only be diverse and have sufficient expertise in relevant fields, but also display no conflicts of interest and reflect Canadians, from a local, provincial, territorial, and national perspective.

Composition and expertise of the Board:

- The Panel should consider fulfilling the Government of Canada's commitment to transparent, merit-based appointments, to ensure gender parity and that Indigenous Canadians and minority groups are better reflected in the Board. We ask that a qualified Board reflect the Canadians it serves and the diversity of our energy sector with a diverse Panel and a selection process that is fair and equitable and values knowledge and experience of other perspectives and groups.
- The majority of Board members and the Chair have expertise in fields related to the broader energy sector, but also at least half of the members should have expertise outside the bounds of the private sector, such as in environmental science, risk assessment and management, public health and safety, community development, Indigenous traditional knowledge, local government and the low carbon economy.
- The Panel should eliminate the requirement in the NEB Act for Board members to reside in or near Calgary, Alberta given that projects, including TMEP, often cross provincial and territorial boundaries and Board decisions must reflect the public interest of all Canadians, not those solely in Alberta.

Reduction of any conflicts of interest and enhancement of the objectivity of the Board and NEB staff:

- The Panel could consider protocols to ensure that all Board members and their respective decisions avoid any real, perceived or potential conflicts of interests. The values and beliefs of honesty, integrity, fairness and impartiality must be an integral part of the Board and NEB staff members work.
- For example, the Panel should consider prohibiting NEB staff (prior to or following their appointment) from working in a regulated private company for a set period of time to prevent “revolving door” regulatory capture. This has been a challenge in the past when the NEB’s former Chief Conservation Officer and Business Unit Leader for Regulatory Applications left the NEB to work for Kinder Morgan Canada while the NEB was considering a major application from Kinder Morgan Canada. Similarly, the Government of Canada’s appointment of Steven Kelly, who was previously hired by Kinder Morgan to testify on their behalf, as a full time member of the NEB raised concerns by the public of the impartiality of the Board.

2. Mandate:

Potential to clarify and expand the NEB’s mandate with respect to its role in the energy sector:

- The Panel should support the Government of Canada developing a Canadian Energy and GHG Strategy to modernize Canada’s energy system. Prior to allowing any new projects to proceed, the Government of Canada should complete a comprehensive national emissions strategy to determine how our global commitments to tackling climate change will be met. Only then can we evaluate and account for the full costs of any new proposed projects relative to the significant reduction programs required as Canada transitions to a low carbon economy.
- The Panel should consider providing clarity on what role the NEB will play in our future energy sector, as a regulator of pipelines, federal energy development, federal energy trade and the electricity industry or as a protector of public interest.
- If the Board is required to assess interests that change as society’s values and preferences evolve over time, the Panel should consider modernizing the Board by re-evaluating its position on fossil fuels, fossil fuel infrastructure and clean energy. Canadians’ values towards fossil fuels have shifted, in light of both the global markets and Canada’s leadership on climate change, and will continue to do so as we increasingly experience the effects of climate change and take action to reduce carbon pollution.

Potential to clarify and expand the NEB’s mandate with respect to collecting and disseminating energy data, information and analysis:

- The Panel should consider expanding the NEB’s mandate to collect general energy data, information and analysis, as well as low carbon and renewable energy data, information and analysis and GHG emissions information related to Canada’s energy sources.

3. Decision-making roles:

- The Panel should consider whether it is appropriate for the NEB to function as an energy regulator for all three public interests -- economic, social and environmental. Other jurisdictions have separate regulatory agencies to ensure that public health, safety and the environment are protected independently of economic decisions. In the

United Kingdom, the economic regulatory agency is separate from the public health and safety regulatory agency to ensure independent energy assessments. With both roles combined in the NEB, there is a risk decisions are made with economic benefits in mind at the expense of social and environmental interests. For example, the NEB's recommendation to approve TMEP was based in large part on potential national economic benefits at the expense of potential local harms to people and the environment through increased tanker traffic, risks of oil spills, increased carbon pollution, increased air pollution and implications to Indigenous rights and title.

- The NEB Act currently allows project applications that have been rejected by the Board to proceed to the Governor in Council for consideration. The Panel should consider reviewing the NEB Act and its decision-making processes so that only positive recommendations are put before the Governor in Council.

4. Decision-making processes:

- The City of Vancouver has filed with the Federal Court of Appeal an application for a judicial review of the NEB decision to conditionally recommend TMEP, citing that it is both invalid and unlawful. Throughout the NEB review process, we and many other intervenors raised concerns about the NEB's flawed process which excluded any opportunities for oral cross-examination of experts and evidence, provided inadequate information sharing and failed to properly consult affected communities along the pipeline and tanker route. We recommend that the Panel's review be directed at ensuring that projects are subject to robust, thorough, transparent and democratic processes. For example, limiting the number of commenters or intervenors in a hearing process for a major application is inappropriate, and oral cross examination is a key component of the public hearing process.
- Furthermore, the City of Vancouver raised serious concerns about NEB's failure to include project-related tanker activities in its assessment of TMEP, including the environmental and social effects of accidents or malfunctions and cumulative effects of tanker activities. We are of the view that the NEB's decision making processes need to be robust and thorough and look to upstream, midstream and downstream project related activities and effects.
- The Panel should consider protocols for the NEB to assess, review and report on the effectiveness of its decision-making to date. This will allow the NEB to evaluate the accuracy of its decisions and assess the success of any conditions placed during the life of a project. This will also allow the NEB to better align future decisions with projects Canadians want and need.

5. Legislative Tools for Lifecycle Regulation:

We recommend addressing the following tools:

- Lifecycle oversight and public engagement tools. The NEB needs effective tools throughout planning, construction, operation and abandonment of a project. For example, decommissioning of projects should be part of the lifetime regulation of a project. This could include industry funding arrangements to ensure that once a project is no longer needed local communities are not left with any negative legacies.
- Safety and emergency preparedness tools. The NEB needs effective and accurate risk assessment tools, compliance monitoring and enforcement legislative tools, safety standards and emergency response requirements.

- Polluter pays tools. The NEB could consider working with the Government of Canada on polluter pays tools and opportunities for strict liability or insurance coverage of a project, based on predicted harms. While the City of Vancouver recommends strict and unlimited liability on a polluter, other risk transfer schemes might be considered. In the TMEP hearing, the City of Vancouver retained Karen MacWilliams, a risk management and insurance analysis specialist, to assess possible risk transfer mechanisms that could be purchased by Trans Mountain to provide compensation for the economic impacts of a tanker spill that would not be otherwise covered under the compensation regime identified in their application due to the nature or dollar amount of those impacts. Karen MacWilliams recommended a catastrophe bond to provide risk financing to properly and fully compensate local municipalities' and their residents' costs and losses. This is just one of many risk transfer mechanisms that support the polluter pays principle and could be explored by the Panel.

6. Public participation:

The City of Vancouver has raised concerns regarding the nature and process of stakeholder participation in all aspects of the NEB's activities, including hearing processes, in developing emergency response plans and in overseeing the construction, operation and abandonment of energy projects. We recommend addressing the following areas:

- Identifying legislative changes to support greater stakeholder and public participation in various NEB activities (hearings, developing emergency response plans etc.).
- Enhancing the role of Indigenous communities in monitoring pipeline development and operations and in developing emergency response plans.
- How the interests of Indigenous peoples are balanced against many and varied societal interests in decision-making.
- Enhancing the role of municipal governments in participating in various NEB activities and providing adequate access and funding to participate in these activities.

The Panel

To ensure public trust in the Panel and its final recommendations, the Panel's composition should be diverse, have diverse and related expertise in environmental science, community development and Indigenous traditional knowledge, display no conflicts of interest and reflect national and local public interests. Therefore, we ask that you add to the *Terms of Reference* the Panel's selection process and clear criteria for appointment and invite the public to make comments on this selection process. The *Terms of Reference* should also identify whether the Panel is acting in an advisory capacity or a decision-making capacity.

The NEB Modernization Secretariat

We ask that the Panel's *Terms of Reference* provide clarity on the roles and responsibilities of the Secretariat, including the relationship between the Secretariat and Panel, who will be leading the stakeholder engagement and the extent of decision making authority. In addition to NRCan and NEB officials, we ask that the Government of Canada consider adding Environment and Climate Change Canada and Department of Finance Canada officials to the Secretariat, given that the future of the NEB and Canada's energy sector will depend on Canada's leadership on climate change and strong and sustainable economic and financial policies and programs.

Stakeholder Engagement

We are encouraged by the Minister’s directive to the Panel to prepare a Public Engagement Plan outlining how and when it will conduct in-person and online engagement with diverse groups to modernize the NEB. Public engagement is a key component of open and transparent governance.

We ask that the Panel provide clarity on its definition of “public” and consider preparing a Local Government Engagement Plan that considers the unique dynamics and engagement techniques needed for local governments and the public they represent.

As the closest level of government to our citizens, local governments are essential to creating healthy, sustainable communities. Cities are the places where residents access the energy they need to power their homes, businesses and the way they move around. We ask that the Panel work with local governments in the planning and hosting of in-person events to reflect our unique jurisdictions, and our role as advocates for the public we represent. As noted by the Federation of Canadian Municipalities, the *Terms of Reference* should also be expanded to explicitly include a role for municipalities.

Expert Advice

In addition to retaining the services of independent non-government experts, we recommend that the Panel create an independent and external Advisory Committee to advise on any findings and recommendations put forward to the Government of Canada. The Advisory Committee could consist of local and global experts from academia and the non-profit sector with diverse expertise in fields such as policy planning, regulation, risk assessment, environmental science, clean energy, public engagement, community health and wellbeing, Indigenous traditional culture and intergovernmental affairs, from the national to local level.

We are grateful to have this opportunity to comment on the NEB Modernization Expert Panel’s draft *Terms of Reference*. We look forward to participating in the Panel’s engagement process from September 2016 to December 2016 and together we will work to modernize the NEB.

Yours sincerely,

[Redacted signature and contact information]