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Sent via E-mail: NRCan.NEBModernization-ModernisationONE.RNCan@Canada.ca

National Energy Board Modernization Review Process
Natural Resources Canada
21st Floor, 580 Booth Street
Ottawa, ON K1A 0E4

Attention: NEB Modernization Secretariat

Dear Sir/Madam:

**Re: Ecojustice Comments on the Draft Terms of Reference for the National Energy Board
Modernization Expert Panel**

We thank you for the opportunity to comment on the draft Terms of Reference (“TOR”) for the Expert Panel (the “Panel”) being established by the Minister of Natural Resources Canada (the “Minister”) for National Energy Board (“NEB”) Modernization.

We are pleased that the federal government has made this a priority. Recent frustrations with the NEB, particularly in relation to the review of major pipeline proposals, have been compounded by 2012 legislative changes that warrant reconsideration. The Terms of Reference are an important component of the review as they effectively define the scope and content of this initiative.

It is important that the Terms of Reference be broad enough to allow the Panel to consider and review the range of issues that are relevant to the NEB now and into the future, which may include legislative reform and the inclusion of new areas of responsibility.

We offer the following comments on the draft Terms of Reference:

Panel Mandate:

In addition to recommendations to modernize the NEB, the review and the report should also identify issues that the Panel has not addressed. For example, the role of climate change is not identified as a component of the Panel’s deliberations. As discussed below, climate change should be expressly included in the Panel’s scope. It may well be that public or other input

identifies climate change or other issues and possible solutions that warrant consideration by government, if not by the Panel. Where the Panel opts not to consider issues that are raised, clear reasons should be provided, as well as an indication of whether and how the government will address these issues.

Scope of Review:

The Panel's mandate must expressly include climate change. Virtually every major energy project now has been subject to requests to consider both upstream and downstream emissions associated with energy infrastructure. The exclusion of climate change from pipeline review processes administered by the NEB has been problematic to date. While NEB Panels have scoped these factors out of their deliberations, it makes no sense to continue doing so, particularly if there is to be consideration of expanding the NEB's mandate to include the "transition to a low carbon economy". Further, given Canada's recognition of the urgent need to reduce carbon pollution, it is no longer sufficient for the energy regulator to "punt" this issue to other government agencies. Strategies for addressing climate change must be considered as part of this review. Indeed, directly addressing climate change within the review may allow for innovative strategies to emerge.

With respect to decision making, the Panel's mandate should also expressly acknowledge the role that the courts may ultimately play in assessing the adequacy of the decision making process. The Court's review of decision making by the NEB is a factor that should be considered by the Expert Panel. Additional clarity on the role and structure of NEB recommendatory and decision making functions may diminish the need to resort to the courts.

Complementary Mandates:

We are pleased that the work of this Expert Panel must take into account the activities of other mandated reviews. This is particularly important in relation to the review of the *Canadian Environmental Assessment Act, 2012*. Finding an effective solution to the challenges posed by the current interface between these two pieces of legislation is critical if the government is ensure robust oversight and restore public trust in relation to both laws. This is even more pronounced as a result of the 2012 omnibus bill changes that changed the way project reviews are undertaken under both laws. We wish to emphasize that ongoing coordination with the *Canadian Environmental Assessment Act, 2012* review process is critical.

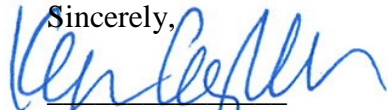
Instead of "reflecting" the principles outlined United Nations Declaration on the Rights of Indigenous Peoples ("UNDRIP"), the terms of reference should require that the Panel "implement" UNDRIP, consistent with the Prime Minister's mandate letter to the Minister of Indigenous and Northern Affairs.

Key Deliverables

We recommend that the report to the Minister also include the identification of any other issues that were raised by stakeholder and Indigenous peoples, and that are not addressed in the report, including reasons as to why those issues were not addressed.

We appreciate the opportunity to comment on the draft TOR. Please do not hesitate to contact us if you have any question regarding our submission. We look forward to contributing to this review.

Sincerely,



Karen Campbell
Staff Lawyer