

July 20, 2016

Sent via email

National Energy Board
517 Tenth Avenue SW
Calgary, Alberta, T2R 0A8
NRCan.NEBModernization-ModernisationONE.RNCan@Canada.ca

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

To whom it may concern:

The Pembina Institute is pleased to provide comments on the draft Terms of Reference for the Expert Panel (herein referenced as ‘the Panel’) to be established by the Minister of Natural Resources to advance the federal government’s commitment to modernize the National Energy Board.

The federal government was elected in October 2015 with a majority mandate to advance a significant and ambitious agenda on climate change, environmental assessments and natural resource management. The federal government has committed to re-evaluate and improve Canada’s environmental assessment laws, to modernize the National Energy Board, and to ensure environmental assessments include an analysis of upstream greenhouse gas emissions stemming from projects under review.¹ In January 2016, the government took a step towards these changes when Minister McKenna and Minister Carr jointly announced five interim principles to improve federal reviews of major oil and gas projects.²

To complement this announcement, ECCC produced a two-pronged GHG methodology to improve the evaluation of climate impacts associated with proposed oil and gas projects. While this is outside the direct scope of the NEB modernization process, we would like to remind the government that this methodology has been applied to numerous project reviews without amendment or response to stakeholder comments, despite a number of ENGOs, academics and other experts having submitting advice to ECCC for consideration. A credible upstream GHG methodology will have bearing on many elements of the government’s energy and environmental policy agenda – and we therefore expect the government to produce a finalized methodology as soon as possible.

Comments on Panel Mandate and Scope of Review

The draft Terms of Reference indicates that the panel will “conduct a targeted review of the NEB’s structure, role, and mandate pursuant to the National Energy Board Act (NEB Act)”. Throughout the review process, we encourage the Panel to be broaden its interpretation of the Terms of Reference, and to seek advice, research, and support from Canadians and other international experts on energy regulation. Below, we include specific comments and suggested amendments to the Terms of Reference, for consideration by the Minister prior to striking the Panel:

¹ Liberal Party of Canada, *Real Change: A New Plan for a Strong Middle Class, Chapter Three: A Clean Environment and a Clean Economy*, page 42.

² <http://news.gc.ca/web/article-en.do?nid=1029999>

Governance

Reform the Board's adjudicative functions: We encourage the Panel to expressly evaluate scenarios in which the adjudicative portions of the NEB's mandate is transferred to another institution or body, and scenarios in which the NEB maintains its operational functions and expands its role in data, modeling and analysis. We recommend the Panel examine governance models that would minimize the NEB's role in project-specific reviews and approvals and also allow for an expanded role in energy data and analysis. The Panel should look to the U.S. Energy Information Agency as a potential model for production and communication of energy statistics and analysis

Mandate

Improve data collection and dissemination: In our view, expanding the NEB's role in collecting and disseminating climate and energy information has the ability to fill an important gap in Canada's public policy debate. In assessing the expected growth of resource production in Canada, we encourage the Panel to consider ensuring the NEB evaluates global fossil fuel demand under a scenario that limits climate change to well below 2°C. Credible sources suggest that, under these conditions, demand for fossil fuels will decline from current reference levels, with a proportionally larger decrease for the more carbon intensive fuels. Therefore, the Panel should determine the ways in which the NEB is equipped to employ economic analysis that considers progressively more stringent domestic and international climate action (consistent with both the 1.5°C and 2°C temperature limits in the Paris Agreement) and the related economic implications for domestic and global rates of fossil fuel production.

Global demand forecasts from the IEA's World Energy Outlook (WEO) 450ppm scenario can be used as an initial guide in the discussion regarding implications to international demand for Canadian fossil fuel products, recognizing that the IEA and the IPCC will soon need to produce additional scenarios consistent with the Paris Agreement. In addition to the WEO, we would encourage the Panel to ensure the NEB evaluates and includes other studies that model fossil fuel supply and demand scenarios in 2050 and beyond mid-century in its assessment.

Evaluate energy supply and demand scenarios in relation to national and sub-national policy objectives: Nationally, emissions in 2020 and 2030 are projected to be 3% and 9% higher than 2005 levels, rather than the targeted 17% and 30% below. With a promise of more ambitious climate action, Canada's first ministers issued the Vancouver Declaration to work together to meet or exceed Canada's international climate targets outlined in the Paris Agreement. Currently, the federal government is working with the provinces to develop a pan-Canadian framework to reduce GHG emissions. In our view, the NEB's long-term energy analysis should include discussion of Canada's national and provincial climate change strategies – namely the Copenhagen Accord, Canada's Intended Nationally Determined Contribution (INDC) for 2030, and provincial climate change strategies – and the impact of various rates of energy production on its ability to meet or exceed those commitments. As such, the Panel's review should consider whether the NEB has sufficient expertise in climate change science and greenhouse gas modeling to incorporate domestic and global carbon pollution scenarios into existing long-term energy analysis.

Define and fairly apply the public interest: The “public interest” is a critical, yet poorly defined, element of the Terms of Reference. Credible decision-making across all policy areas hinges on an understanding of public interest – and yet governments infrequently define the concept prior to its application.

From a climate change perspective, the public interest must include, at a minimum, the likely social and economic costs and benefits in Canada from action to limit the effects of climate change. The public interest should also include a science-based assessment of how new sources of GHG emissions affect the federal government's 2020 and 2030 emissions reduction goals and its commitments vis-à-vis the Paris Agreement. Further, the public interest should take stock of the role of individual projects and sector-specific outcomes in the ability for a provincial or territorial government to achieve its climate change commitments.

In addition to the above climate-related points, it is likely and appropriate that the Panel will take a broader view in its definition of the public interest. This could include consideration of possible economic and social development outcomes enhanced by specific types of energy projects; short, medium and long-term opportunities to grow national and sub-national economies; and improving Canada's relationship with Indigenous peoples. Other principles to guide the interpretation of public interest could include:

- Distribution of benefits, impacts, risks and uncertainties across geographies, generations and socio-economic lines, with special regard to disadvantaged, marginalized and vulnerable populations;
- Maximum net environmental, economic and social benefits and integration of those benefits without compromising one for another;
- Support from Indigenous communities and ability to advance federal commitments to the Truth and Reconciliation Commission (TRC) outcomes and the UN Declaration on the Rights of Indigenous Peoples (UNDRIP).

Decision-making Roles

Consider the impact of political interference on the credibility of energy decision-making: As the Panel considers potential recommendations on whether to maintain or review the current decision-making responsibilities, we suggest the Panel consider the appropriate role of Cabinet, and of the Governor in Council function, in project-specific reviews. To accomplish this task, the Panel could produce case studies that examine a range of social, economic and environmental factors of project reviews that occurred under phases of the NEB's decision-making powers. The Panel should also consider whether a pre-determined and fixed set of decision-making criteria would be useful to guide future decision-making at the NEB and at Cabinet.

Indigenous Engagement

Align NEB modernization with other goals, including TRC and UNDRIP: Major energy projects could play an important role in furthering TRC recommendations and the government's commitments to implement UNDRIP. Specifically, the Terms of Reference should require nation-to-nation dialogue with First Nations, Métis and Inuit communities impacted by the existing or future role of the NEB, consistent with the government's commitment to pursue a renewed relationship with Canada's first peoples.

Public Participation

Equip stakeholders with the resources required for meaningful participation: As the Panel considers potential legislative changes to support greater stakeholder and public participation in various NEB activities, it should ensure full and fair financial resources are made available to all individuals, organizations and governments that seek to participate in these processes. We urge the Panel to include financial compensation and access to information as key pillars of meaningful, ongoing public participation. As such, we suggest the Panel should evaluate and propose specific changes in those areas when it reports to the Minister in 2017.

Other items

The Pembina Institute would like to acknowledge our support of the West Coast Environmental Law (WCEL)'s submitted comments to the Terms of References for the government's review of the Canadian Environmental Assessment Act, 2012. In particular, we echo the need for strategic-level environmental assessments, including for greenhouse gas emissions, be conducted by a credible environmental agency. Such reviews must occur for all projects that currently fall under the NEB's purview – including inter-provincial and international pipelines and transmission lines.

As these expert review panels move their work forward over the next few months, we urge the government to assess both the appropriate legislative changes to restore public confidence in environmental assessment and energy regulation, but also the appropriate structures through which through these changes should be enacted. As WCEL states in its submission: “[...] the Scope of Review section appears to limit Panel consideration to “how” environmental assessment processes are conducted by the three responsible authorities under CEAA 2012, without asking the essential and preliminary question “whether” agencies like the Canadian Nuclear Safety Commission or the National Energy Board are the appropriate bodies for this role.” As per our recommendations regarding the adjudicating function of the Board, we urge the expert panels to consider how to create best-in-class regulatory structures that allow for strategic-level environmental assessments to occur, without undue political interference. We also urge the Panel to consider how Canada can ensure NEB modernization improves the integrity of its regulatory bodies in matters of day-to-day operations, including compliance and enforcement.

To that end, we recommend the Terms of Reference be amended to comment more specifically on how the expert panels will share information across their reviews and, to propose an additional forum through which the various panels meet to grapple with holistic, cross-mandate questions. Further, we recommend the Terms of Reference include an express requirement for the Panel to report on how it considers comments received, and to establish a 30-day public review and comment period on the draft Panel report. Further, in the spirit of public trust and transparency, following the release of the Panel's report, the federal government should outline the ways in which it intends to act on its advice. In order for the many review processes to accomplish their objectives around restoring public trust, it should be clear to all stakeholders, at the conclusion of each process, how the expert findings will be utilized and the extent to which they will have bearing on other review processes.

We commend the government for reviewing multiple pieces of environmental legislation at the same time – like others involved in the process, we hope this results in holistic reforms that genuinely serve Canada's long-term interests. However, there is a risk that these processes become piecemeal and

disjointed. We urge the government to take stock of each review process, after panels have produced their recommendations, and outline the legislative pathway the government hopes to follow to ensure all changes are captured and the ultimate vision is achieved.

Conclusion

We appreciate the opportunity to provide comments on the draft Terms of Reference for the Panel soon to be established to advance the federal government's commitment to modernize the National Energy Board. We appreciate your consideration of the above points as the Minister works to produce a final Terms of Reference for the expert panel.

Yours sincerely,

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Pembina Institute