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**WWF-Canada Submission
on the
Terms of Reference for the National Energy Board Review Process**

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WWF-Canada is encouraged by the Government of Canada's initiative to establish an Expert Panel to review the structure, role, and mandate of the National Energy Board. We appreciate the opportunity to comment on the Panel's Draft Terms of Reference.

Overview

The Draft Terms of Reference identify important issues created by prior legislative changes, ambiguities with respect to the purpose of public and Aboriginal participation in quasi-judicial proceedings and more. Reviewing these matters and proposing legislative solutions to resolve them will help to clarify the NEB's mandate and how it can best be accomplished. We offer what we hope are constructive suggestions on these matters below.

Beyond these, there is an historic need and opportunity to equip Canada's energy regulator with the capacity to assume responsibilities that were not heretofore understood to be essential to the sustainable management of public resources. Canada needs to develop an energy regulatory and environmental protection system designed for the coming years during which we must decarbonize energy production and consumption. The NEB, which sits at the nexus of energy regulation and environmental protection, could play a critical role in this transition, if it is given a clear mandate. The Draft Terms of Reference identify this matter by raising the potential to expand the NEB's mandate.

This raises a host of questions about the appropriate respective roles of government departments and the NEB within the broader system of energy regulation and environmental protection. The NEB Modernization Panel has not been asked to address these broader questions. It has been asked to make recommendations about the structure, role and mandate of a modernized NEB. Yet, the Panel cannot very well propose changes to the design of its part (the NEB) without articulating how it is intended to function within the context of the whole. The Panel must also accomplish this task without the benefit of an overarching system design, and indeed while other parts of the system are being retooled. Beyond the Complementary



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Mandates listed in the Draft Terms of Reference, the review of northern environmental assessment processes and the *Canada Petroleum Resources Act* review currently underway are germane to this review.

The Panel's report and recommendations will ultimately be considered in the context of proposals from the other legislative reviews. This makes the Panel's job of explaining its rationale for recommendations on the structure, role and mandate of a modernized NEB in the context of the roles of other government entities the more critical.

With its expertise, the NEB could assume a role in providing energy-sector carbon data and advice to government on the compatibility of categories of energy development with Canada's carbon reduction plan. This could be harmonized with the department of Environment and Climate Change, which could collect and analyze data of other sectors of the economy.

The NEB currently regulates oil and gas development in frontier areas, but plays no role in licensing access to resources, a function that is fulfilled by the department of Indigenous and Northern Affairs. The current system does not restrict prospective energy developments that are incompatible with combatting global climate change. A new system of energy regulation and environmental protection will have to bring energy development in line with public policy on climate. This could be done in a number of ways, some of which could involve the NEB. If the government chooses to signal restrictions on the licensing of resources directly, the NEB could play a role in policy development by prioritizing cost-effective and carbon-effective developments. Alternatively, the energy regulator could be given the authority to refuse to authorize developments incompatible with achieving Canada's carbon reduction plan.

Recommendations:

- 1. Complementary Mandates.** The Panel should have regard for the review of the *Canada Petroleum Resources Act*, the review (where applicable) of northern environmental assessment, as well as other relevant legislation such as the *Canada Oil and Gas Operations Act*. The Panel should forward appropriate information to Indigenous and Northern Affairs, in addition to the reviews listed under Complementary Mandates.
- 2. Mandate.** Potential to expand the NEB's mandate to provide energy sector carbon intensity data and analysis, and advise government about the compatibility of categories of energy development with Canada's carbon reduction plan.
- 3. Mandate.** Potential to expand the NEB's mandate to limit authorizations to energy development options compatible with Canada's carbon reduction plan.



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Social License

The mandate letter received by Environment and Climate Change Minister Catherine McKenna from the Prime Minister directs her to “immediately review Canada’s environmental assessment processes to regain public trust and help get resources to market.” We are pleased to see the government’s recognition that trust, or social license, was dramatically undermined by changes to the overall environmental assessment process in 2012.

The review of the National Energy Board Modernization conducted for Minister of Natural Resources James Carr must complement the review of *Canadian Environmental Assessment Act (CEAA) 2012* primarily because the NEB adjudicates reviews of transboundary energy projects such as pipelines and powerlines that were formerly undertaken by CEAA. The NEB review must align with the CEAA review because regaining trust in the NEB should be an objective as well.

Minister Carr was directed in his mandate letter from the Prime Minister to “(m)odernize 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.” Altering the composition of the Board could be part of the solution to achieve social license. As noted, it may also be necessary to modify the NEB’s governance structure to separate the adjudicative and regulatory functions. However, what does not appear to be a subject for discussion by the Draft Terms of Reference is the option of reversing the previous government’s decision to invest the NEB with the adjudicative role it received when CEAA 2012 was enacted. Arguments could, and should, be put forward for and against restoring CEAA’s responsibility for assessments of projects currently reviewable by the NEB. A fulsome discussion of the two options in the context of the overlap between CEAA and the NEB is clearly needed to avoid rushing to the conclusion that changes to the composition and governance of the NEB will be sufficient to restore trust in the review process.

Recommendation

- 4. Mandate: Potential to remove the NEB’s mandate to review projects formerly reviewed by CEAA and restore the former system in which that agency was responsible for the review of such projects.**



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Aboriginal Involvement

WWF-Canada applauds the focus on improving Aboriginal engagement in NEB processes. The Expert Panel, which will include someone with Indigenous traditional knowledge, is directed to consult with national and regional Aboriginal organizations and to establish an '*Indigenous Engagement Plan*.'

We are however concerned that the wording of the Scope of Review with respect to Indigenous engagement is too narrowly focused and may not deal with an issue of great importance to Indigenous peoples: the meaning and purpose of Aboriginal involvement in NEB or CEEA reviews within the context of Canada's duty to consult. What needs to be clarified is whether the NEB has the mandate and the capacity to entertain and weigh First Nations' value judgements in its decisions or alternatively, that the EA process does not encompass these matters, in which case they must be raised in 'nation to nation' discussions.

Recommendation

- 5. Clarify the purpose and potential consequences of Aboriginal participation in the Environmental Assessment review process in addition to Aboriginal consultation by the federal government.**