



Mispec Beach, New Brunswick: Location of the planned terminus for TransCanada Corp.'s Energy East pipeline

Comments in Response to the Report of the Expert Panel on the Modernization of the National Energy Board

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Introduction

The Canadian Environmental Law Association (“CELA”) and Environmental Defence Canada (“EDC”) thank the Expert Panel on the Modernization of the National Energy Board (herein, the Expert Panel) for their engagement with Canadians and this opportunity to help build a 21st century energy regulator.¹ We commend the Expert Panel members’ strong attempt to restore public trust in the NEB and the decision-making process for pipeline approvals and permitting.

In keeping with the Expert Panel’s recommendation that groups with shared interests coordinate their activities to avoid duplication and maximize resources², EDC and CELA submit this joint comment in response to the Expert Panel’s report.

I. Environmental Law Reform Next Steps and Existing NEB Pipeline Reviews

We thank the Expert Panel for acknowledging that the NEB suffers from a ‘crisis of confidence’ and that it has fundamentally lost the confidence of many Canadians.³ It is crucial that the federal government now take the time and prudence to reconcile the recommendations in the Expert Panel’s report with the near-parallel review of Canada’s environmental assessment (EA) laws and processes and report by the Expert Panel for the Review of Environmental Assessment Reform (herein, EA Panel Report).⁴

The federal government acknowledges that the existing NEB energy project review lacks public confidence and EDC and CELA submit that the NEB review of Energy East be postponed until the processes to modernize the NEB Modernization and reform Canada’s EA laws and processes are complete. Energy East is the largest and longest pipeline ever proposed in North America and its review should not be undertaken by the NEB – a regulator that may not even exist once these reforms are complete.

¹ “Forward, Together: Enabling Canada’s Clean, Safe, and Secure Energy Future,” Report of the Expert Panel on the Modernization of the National Energy Board, available online: <https://www.nrcan.gc.ca/sites/www.nrcan.gc.ca/files/pdf/NEB-Modernization-Report-EN-WebReady.pdf> (NEB Report)

² NEB Report, p 72

³ NEB Report, p 7

⁴ *Building Common Ground: A New Vision for Impact Assessment in Canada*, Available online: <https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/environmental-assessment-processes/building-common-ground.html> (EA Panel Report)

If the purpose of NEB Modernization was to restore public confidence in environmental reviews and energy project decision-making, then the five interim principles and outdated Energy East hearing process should not be used for this controversial project. Continuing with the Energy East review using an old process by the existing NEB will certainly have the effect of undermining the credibility and legitimacy of the pipeline review by the Canadian public.

II. Specific Comments on the Expert Panel’s Recommendations

1. The National Interest Determination

Recommendations 1.4.1 and 3.1.1

Recommendations 1.4.1⁵ and 3.1.1⁶ provide the Governor in Council with the authority to make a final, national interest determination (NID). EDC and CELA submit there are several gaps in the material, analysis, and recommendations provided by the Expert Panel regarding the NID, specifically:

- The Expert Panel has not provided a satisfactory definition of national interest;
- There is a lack of detail regarding the factors and trade-offs which may be weighed in deciding how or why the government would reach a NID. For instance, to what extent and upon what basis will considerations of Indigenous rights, direct and indirect (upstream and downstream) greenhouse gas (GHG) emissions, national and subnational climate policies, economic impacts, and environmental risks be weighed?
- It is unclear as to how the NID would gather and use public input or align with Canada’s commitments to Indigenous Reconciliation and the United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP); and
- It is unclear how information from the proposed Canadian Energy Information Agency (CEIA) would be used by the proposed Canadian Energy Transmission Commission (CETC) during its energy project review. For instance, if a GHG assessment of a

⁵ See NEB Report, p 37: “**1.4.1** The enabling legislation of the CETC be amended to provide for the Minister of Natural Resources – based on advice from a whole-of-government perspective – to make a public recommendation to the Governor in Council of whether a preliminary major project proposal is in the national interest, on the basis of Consultation with Indigenous peoples (supported by a new Indigenous Major Projects Office described in Theme 2, below), strategic-level assessment, and engagement with stakeholders. The Governor in Council would have authority for the final national interest determination.”

⁶ See NEB Report, p 57: “**3.1.1** Authority should be enshrined in legislation for the Governor in Council to make the determination of whether or not a major project is in the national interest, based on a public report and recommendation from the Minister of Natural Resources. Furthermore this phase, from preliminary project filing to Governor in Council Decision, should typically happen within 12 months, with three months for GIC decision. The purpose of this phase of the process would be to determine whether a major project may proceed to a detailed project review.”

proposed project demonstrates that it would not fit within Canada’s GHG emissions reduction targets, would the project be rejected? CELA and EDC submit that major energy and industrial projects must be subject to a climate test—that is, aligned with Canada’s climate commitments (e.g., 2030 GHG emission reduction target, 2050 GHG emission reduction target) and economically viable in global oil demand and scenarios consistent with the Paris Agreement’s “well below 2°C” global action plan.

(a) Governor in Council national interest determination

EDC and CELA take exception to the Expert Panel’s recommendation that a NID should be a political decision. Recommendation 1.4.1 states that the Minister of Natural Resources would make a “public recommendation” to the Governor in Council as to whether the project was in the national interests and the Governor in Council would have the authority for the final NID. A NID by Cabinet would be subject to Cabinet confidentiality, would lack the full information of a technical review and EA, and could be kept hidden from the public.

The Expert Panel has posited an ideal of “national interest” which is inherently political rather than one, unfortunately, based on transparent, publicly-determined criteria. The Expert Panel has also not clearly communicated how the “national interest” differs from the interests and consent of Indigenous Peoples on a nation-to-nation basis with the federal government.

It is imperative that sustainability principles⁷ and the consideration of cultural, social, health and long-term economic factors direct the preliminary review, instead of a politicized NID. A determination of whether an energy project is in the national interest should weigh all potential impacts and benefits of a project against legislated sustainability criteria and be guided by regional and strategic assessments of the kind recommended by the EA Review Panel’s report.

(b) Timing of strategic environmental assessment

To determine a project’s alignment with the national interest, the Expert Panel states that ‘strategic and regional impact assessments’ will be considered. EDC and CELA submit that in fulfilling this objective, NIDs and impact assessments must require:

- An accountability mechanism for discretionary decision-making and right of appeal;

⁷ It is recommended that principles be defined in the legislation and reference factors like the equitable distribution of benefits, risks and impacts, maximizing benefits while minimizing harms and ensuring no significant harm.

- Assurance that the decision is occurring outside of the regulator and instead with the proposed new impact assessment agency as recommended by the EA Reform Expert Panel; and
- A demonstration that Indigenous rights, public input and all of the Expert Panel's 'factors to be considered in making a NID'⁸ have been included in decision-making deliberations.

As described by the NEB Expert Panel, the NID would also occur before the scientific scrutiny, study and collection of facts required by a technical review and project-level EA. This is greatly problematic and an NID should not be made before a project-level EA or technical evaluation. Instead, an EA conducted during the early planning phase (as recommended by in the EA Panel Report) could identify whether a project is inconsistent with the outcomes of a strategic EA or policy, or otherwise should be rejected at the outset.

EDC and CELA submit that a comprehensive, strategic EA and an analysis of the project's alignment with Canada's climate commitments must serve as prerequisites to a NID. While recommendation 1.4.1 contemplates strategic-level assessment informing the Minister of Natural Resources NID recommendation to the Governor in Council, this level of analytical rigour is not expressly required for the final NID made by Cabinet.

Without a complete understanding of a project's benefits, risks and impacts, Cabinet will not have a benchmark from which to reject a project because it will not have the data necessary to make this decision. Therefore, Cabinet's decision would be based on a limited record. The Expert Panel's recommended timeline of 12 months is also problematic and absent technical data, this is much too short a timeframe for such a foundational decision that must consider public opinion and obtain the consent of Indigenous Peoples on a nation-to-nation basis.

(c) Discord between national interest determination and CETC review

Should a proposed project pass the NID by Governor in Council and proceed to the CETC, the Expert Panel states that the CETC would "not re-argue whether or not a project is in the national interest."⁹ Since the Expert Panel recommends that the CETC would have the authority to grant or deny a project licence, it is plausible that a project could be denied by the Commission despite being found to be within the national interest by Cabinet. Such a project denial would be in direct opposition to Cabinet's NID.

⁸ See NEB Report, p 22

⁹ NEB Report, p 24

EDC and CELA question whether the CETC has the authority to quash a project and upon what basis it would have the jurisdiction to deny a project formerly held to be in the national interest. Such a scenario was not discussed by the Expert Panel and therefore it remains unclear how such a rejection at this second-stage of review by the CETC would occur.

(d) Alternative to the national interest determination

In place of the national interest determination by Governor in Council, EDC and CELA recommend the following process:

1. A planning process that includes regional and strategic environmental assessment, inclusive of climate impacts and cumulative effects, in line with that recommended by the EA Reform Expert Panel, which results in policy and project-level direction that would identify “no go” projects (ie. projects that do not pass an impact assessment by a reformed IA Agency and that would make the achievement of Canada’s GHG reduction goals impossible);
2. For those projects that do not immediately obviate from climate goals, a meaningful, thorough, sustainability-based environmental assessment (aligned with the EA Panel Report’s sustainability-guided impact assessment by an agency or commission that is independent from the regulator and oversees all projects federally); and
3. Meaningful integration of the EA outcomes within regulatory permitting such that the EA outcomes guide regulatory permits and conditions, and the results of monitoring, condition compliance and adaptive management feed back into the EA registry.

2. CETC – CEAA Joint Panel and Environmental Assessment

Recommendations 3.2.1 and 3.2.2

EDC and CELA find the Expert Panel’s recommendation 3.2.1¹⁰ to be problematic as it (1) contradicts the EA Reform Expert Panel’s finding that a single authority should conduct and decide EAs on behalf of the federal government and (2) does not meet the evidence-based standards of impact assessment articulated in the EA Reform Expert Panel’s report.¹¹

¹⁰ See NEB Report, p 60: “**3.2.1** The enabling legislation of the Canadian Energy Transmission Commission should establish it as an independent, quasi-judicial body, with full authority to approve or deny major projects - based on technical criteria, detailed environmental assessment and project-specific conditions including social, economic, lands, and municipal interests - that have passed a Governor in Council review. We further recommend that detailed project reviews of major projects typically be concluded within 2 years from time of filing, to allow adequate time for meaningful Consultation and engagement.”

¹¹ EA Panel Report, p 4

EDC and CELA again reiterate that, as contemplated in recommendation 3.2.2, the CETC should not retain the authority to conduct EAs. Pipelines should not have an EA process distinct from every other natural resource or energy projects under federal jurisdiction. A fragmented approach to EAs will not facilitate clarity, continuity or reconciliation of economic, social and environmental commitments.

EDC and CELA also submit that the NEB Modernization Expert Panel's went beyond the review mandate articulated by Minister Carr¹² by commenting on the NEB's current authority to conduct EAs. Therefore, we recommend the EA Panel Report's finding - that a single authority should have the mandate to conduct and decide upon EAs on behalf of the federal government¹³ - should be applied to energy transmission and pipeline projects.

3. The Canadian Energy Transmission Commission

Recommendation 3.2.1

(a) Timeframe for review

Recommendation 3.2.1 envisions that the Canadian Energy Transmission Commission review of projects will typically be concluded within two years, from the time of filing until a decision is rendered.¹⁴ EDC and CELA do not support this timeline as it is potentially too short for complex and large-scale projects and does not provide sufficient time to accomplish the objectives contemplated by the Expert Panel. For instance, the Expert Panel describes a decision-making process which is responsive to "mass participation"¹⁵ and a hearing body that facilitates "robust consultation." Within this two-year timeframe, the Expert Panel also states the CETC would issue a clear, public decision "explaining its judgment."¹⁶ As CELA recommended in its report, *Modernizing the NEB: Using International Best Practices as a Benchmark for Regulator Reform* (herein *Modernizing the NEB*) to the Expert Panel, the hearing body must be responsive to the public interest and its written decision must reference how it factored the public's input into its reasoning and analysis.¹⁷

While laudable, the tenets of public decision-making envisioned by the Expert Panel cannot be adequately accomplished within a two-year window. Instead, EDC and CELA recommend

¹² NEB Report, p 3

¹³ EA Panel Report, p 5

¹⁴ NEB Report, p 60

¹⁵ NEB Report, p 69

¹⁶ NEB Report, p 25

¹⁷ Available online: <http://www.cela.ca/Modernizing-the-NEB>

that the length of process should be commensurate to the size, complexity and level of public interest in the project.

(b) Order of review

During the CETC review, the Expert Panel notes “specific engineering details of a project, or a comprehensive project-level environmental assessment” will occur. First, EDC and CELA submit that while the CETC should be assessing specific engineering details, it should not be carrying out the EA.

Secondly, the EA and technical assessment should come before the Cabinet NID so that the Governor in Council is able to weigh all of the evidence. EDC and CELA submit that a project proposal should face the greatest scrutiny and review upfront, before it can move to the hearing and review stage.

Lastly, the Expert Panel contemplates that during the CETC’s review, the Commission will be guided by engagement with environmental organizations, Indigenous peoples, academics, landowners and municipalities and individual citizens. To merit the capacity and resource burden placed on these stakeholders during the review of a transmission and pipeline project, it is paramount that the project EA and technical aspects of the projects be reviewed prior to Cabinet’s NID.

4. The Canadian Energy Information Agency

Recommendation 1.3.1

EDC and CELA support recommendation 1.3.1¹⁸ and the creation of a new energy information agency and its proposed ability to offer researchers a ‘one stop shop’ for energy data. Additionally, EDC and CELA recommend that analysis and information gathered by the Canadian Energy Information Agency (CEIA) feed in to the EA process. It remains unclear how and when analysis provided by CEIA will affect a decision on a project. Crucially, CEIA should produce global oil and demand and supply forecasts that are aligned with the successful implementation of the Paris Agreement to limit global warming to well below 2 degrees Celsius. The CEIA and CETC should then feed this information as one input into to the project-level EA conducted by the proposed IA agency.

¹⁸ See NEB Report, p 36: “**1.3.1** The government establish an independent Canadian Energy Information Agency, reporting to the Minister of Natural Resources, whose mandate would include collection and dissemination of energy data, as well as the production of an annual public report on Canada’s energy system, and quantitative analysis of the ‘alignment with Canadian energy strategy goals.”

EDC and CELA also recommend that CEIA have the capacity to accept study or data requests and produce independent, impartial research, in response to uncertainties and gaps in technical and economic information identified by organizations or individuals interested in a project review process. This would assist in alleviating the burden on participants to retain their own experts and assist in ‘levelling the playing field’ between proponents and concerned parties.

5. Public Participation

Recommendations 4.1.1, 4.1.2, 4.2.1, 4.3.1 and 4.2.2

EDC and CELA applaud the Expert Panel’s recommendations 4.1.1, 4.1.2, 4.2.1, 4.3.1 and 4.2.2.¹⁹ We echo the Expert Panel’s belief that “every Canadian has a right to be and feel heard.”²⁰ We strongly support the recommendation to remove the NEB’s standing test that limits public participation in pipeline reviews to those “directly affected” by a project. However, we do caution that the report is ambiguous as to whether the public would have the ability to say “no” to a project, rather than simply be consulted on a project and the mitigation of its impacts.

As CELA noted in its previous report to the Expert Panel, public participation and opportunities for public comment must be accessible, open to all interested parties and involve the public in designing the participation program.²¹ We reiterate our position that the reformed NEB should adopt international law principles and conventions, such as the United Nations Convention on Access to Information, Public Participation in Decision-Making and Access to Justice in Environmental Matters (herein, Aarhus Convention).

We commend the Expert Panel for finding that “processes and practices can be designed and adapted to permit mass participation while respecting the integrity of the inclusive hearing process.”²² As the current NEB process severely lacks this ability we again affirm our position that all existing crude oil pipeline reviews must be paused until the federal government makes comprehensive legislative and policy changes after the completion of NEB modernization and the review of EA laws and processes.

Lastly, the Expert Panel has suggested that the Major Projects Management Office (MPMO) assist in making a determination of national interest through its ability to offer proponents a ‘single window’ into government and integrate policy and regulatory consideration at the

¹⁹ NEB Report, p 69 – 72

²⁰ NEB Report, p 70

²¹ See *Modernizing the NEB: Using International Best Practices as a Benchmark for Regulator Reform*, available online: <http://www.cela.ca/Modernizing-the-NEB> at p 24

²² NEB Report, p 69

highest levels of public service. We caution against relying on the MPMO and while the Expert Panel recognizes that the MPMO “is not perfect today,” it is unclear to EDC and CELA whether the MPMO is equipped to lead the public engagement processes envisioned by the Expert Panel. As the Expert Panel does not provide elaboration on this crucial aspect, we remain unsure of the MPMO’s ability to undertake meaningful public participation.

6. Indigenous Reconciliation

Recommendations 2.2.2, 2.3.1, 2.4.1 and 2.5.1

EDC and CELA support the Expert Panel’s recommendations of 2.2.2, 2.3.1, 2.4.1 and 2.5.1. Engagement with Indigenous communities must take place at every stage of a project, from conception to review to operation to decommissioning, on a nation-to-nation basis in line with UNDRIP and in the spirit of Indigenous reconciliation. The new CETC, and enabling legislation, must clearly define the processes, guidelines and accountabilities for formal consultation of Indigenous Peoples. The creation and funding of an Indigenous Major Projects Office under the governance of Indigenous Peoples is a sensible recommendation, but it should be determined by and accountable to Indigenous Peoples affected by a project.

The Expert Panel notes that they “conceive of the national interest consisting of both the typical public interest determination (informed by clear policy and assessed through extensive study and engagement with all stakeholders) and a specific determination of the impact of a project on Indigenous peoples based on nation-to-nation formal Consultation.”²³

EDC and CELA note that this statement is not consistent with Indigenous reconciliation and a determination of the national or public interest cannot be equated with obtaining consent of First Nations on a nation-to-nation basis (in line with UNDRIP and its requirement for free, prior and informed consent). This statement also conflates the national interest with the public interest and we submit that these are distinct determinations – especially within the framework envisioned by the Expert Panel where a NID ultimately rests with a political body.

7. Climate Change Considerations

We echo the Expert Panel’s recommendation that the “National Energy Board must align itself to the government’s environment (particularly climate change)...policy goals.”²⁴ In response to the Expert Panel’s report, we ask that the final iteration of members’ recommendations use less ambiguous language. For instance, in the list of factors to be considered in making a NID, the Expert Panel lists ‘cumulative effects’ and ‘climate test.’ These, among other factors,

²³ NEB Report, p 36

²⁴ NEB Report, p 12

should be situated within the legislation and its regulations to ensure a level of accountability and consistency. Other listed factors, such as ‘any other showstoppers’ must be expressly defined and principles such as ‘sustainability’ or ‘Indigenous reconciliation’ - both of which are prominent principles of international law – explicitly enumerated.

Lastly, and perhaps most importantly, the Expert Panel’s listing of ‘climate test’ is not explicit. There needs to be clarity that a project will be rejected if it fails the climate test. A climate test would ensure a project’s expected carbon emissions, including upstream emissions, against Canada’s commitments to reduce carbon pollution. A climate test would also assess the project’s economic viability in a carbon-constrained future.²⁵

The lack of an overarching integrated Canadian energy and climate change strategy is a key barrier to ensuring provinces and the federal government are aligned on climate policies, and as recognized by the Expert Panel “Canadians feel forced to use NEB project reviews as the venue for resolving policy questions about climate change because of an absence of any better alternative.”²⁶

8. Governance of the Commission

(a) Location of CETC

EDC and CELA would like to note their support for recommendation 3.3.2²⁷ and 3.4.2 which would relocate the CETC’s headquarters and Board to Ottawa and remove the requirement that Board members be from the Calgary region.

(b) Expertise of members

EDC submits that the CETC board be diversified to better reflect Canadian society and the rapid pace of change in the energy sector, including board members with expertise in climate change, climate science, community development, emerging energy technologies, emissions modelling, electricity markets, Indigenous law, governance, environmental monitoring and consultation,

²⁵ Environmental Defence, *The Climate Test: Can Canada Build New Pipelines and Meet Its Climate Commitments?* Available online: <http://environmentaldefence.ca/2017/04/24/climate-test-can-canada-build-new-pipelines-meet-climate-commitments/>

²⁶ NEB Report, p 7

²⁷ See NEB Report, p 62: “**3.3.2** We further recommend that the Commission be managed by a Chief Executive Officer who is neither a board member nor a Hearing Commissioner, nor the Chair of the Board (with relevant amendments to the current *NEB Act* as required). Also, the *CETC Act* should ensure that neither the Chair nor the CEO has the discretion to interfere with the independent work of hearing panels, such as removal of commissioners dealing with an application.”

renewable energy, sustainable buildings, and understandings of public interest and public participation. CETC Board members assigned to the hearing panels of specific energy projects should also come from the regions affected by the project.

EDC and CELA also support recommendation 3.4.3 which would enshrine the current NEB conflict of interest rules in the new *CETC Act*. People with expertise and experience in the oil and gas industry should still be eligible for Board membership, but need to be clearly disconnected from conflicts of interest.

Conclusion

In EDC and CELA's view, a review of the NEB and Canada's approach to energy regulation was long overdue. The outpouring of comments and participation during the Expert Panel's cross-country tour is indicative of the level of change Canadians seek, in regard to their country's energy future and fundamental challenges faced in light of climate change.

In response to the insights collected and recommendations made by the Expert Panel, EDC and CELA reiterate the following:

- Prior to any determination of national interest, strategic and regional impact assessments must occur. The CETC's technical review must also occur prior to any Cabinet determination of national interest. To ensure the integrity of the process, Cabinet's decision must include a right to appeal;
- The NEB (or CETC) should not retain authority for conducting EAs and we recommend that the EA Panel's Report be followed in this regard;
- A climate test must be explicit in the CETC's enabling legislation. There needs to be clarity that a project will be rejected if it fails the climate test, as well as other 'dealbreakers' such as Indigenous reconciliation; and
- The Expert Panel's vision for a "regulatory system that aligns with a clearly defined and coherent national strategy to realize energy, economic, social, and environmental policy objectives"²⁸ must be in place before any Ministry or Cabinet is given the authority to make a determination of national interest.

All of which is respectfully submitted this 14th day of June, 2017:

²⁸ NEB Report, p 4

A handwritten signature in blue ink that reads "Kerrie Blaise". The signature is written in a cursive style with a large initial 'K'.

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A handwritten signature in blue ink that reads "Patrick DeRochie". The signature is written in a cursive style with a large initial 'P'.

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