



March 31st, 2017

Re: Conservation Council of New Brunswick's submission to the Expert Panel on National Energy Board Modernization

Dear Members of the Expert Panel on National Energy Board Modernization,

Please find enclosed commentary complimentary to the Presentation we gave on March 21, 2017 during your Saint John Session.

We appreciate the opportunity to provide you with our perspective.

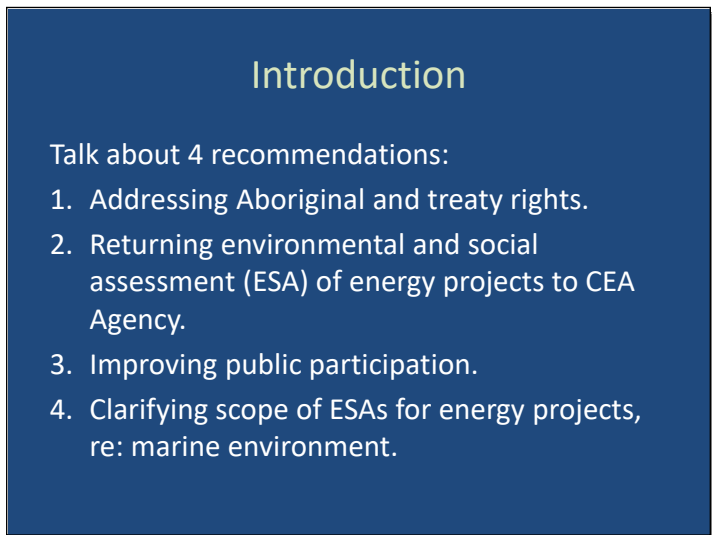
Best Regards,

Scott Kidd and Matthew Abbott

Conservation Council of New Brunswick

**Submission to National Energy Board Modernization Review – Expert Panel
Conservation Council of New Brunswick
March 31, 2017**

The Conservation Council of New Brunswick (CCNB) made a presentation to the Expert Panel on March 21, 2017 during the Saint John Session. During our presentation, we referred to PowerPoint slides. The PowerPoint presentation was left with the Expert Panel's coordination officer. For the Panel's convenience, we are re-submitting the slides, which are copied below. Most of the slides are self-explanatory. However, we have also added notes to clarify or elaborate on points we make in some slides. CCNB would appreciate the Panel taking both our slides and additional notes into consideration while they prepare their report for the Minister of Natural Resources regarding the modernization of the National Energy Board.



Being located in New Brunswick, the Conservation Council of New Brunswick (CCNB) has not had much need to be involved with the NEB, although we are an intervenor in the hearing for the Energy East pipeline and marine terminal. We have also participated in many environmental assessments. Given this, the bulk of the presentation and submission is focused on how NEB environmental and social assessments are presently conducted.

Introduction

- Conservation Council of New Brunswick (CCNB)
 - Largest provincial environmental organization.
 - Started in 1969.
 - Intervenor in NEB hearing for Energy East.
 - Participant in many EAs.
 - Recently, federal comprehensive study of Sisson Tungsten and Molybdenum mine (in central NB).
 - One of two participant funding recipients .

Recommendation #1

Governments complete all consultation for and accommodation of Aboriginal and treaty rights (“proven” and “unproven”) prior to the NEB beginning the review of a project Application and ESA.

- Apply the decision in *Tsilhqot'in Nation v. British Columbia*, 2014 SCC 44.

We recognize the NEB does not have control over government policy regarding the recognition of s.35 Aboriginal and treaty rights or how it interprets and applies the Supreme Court decision in *Tsilhqot'in Nation*. At the same time, CCNB strongly encourages the NEB Modernization Panel in its report to make the importance of our recommendation clear to the government. When consultation and accommodation negotiations take place during the review of projects, rather than beforehand, it treats Indigenous communities as stakeholders, rather than the rights holders that they are.

Recommendation #1

Failure to complete consultation and accommodation prior to start of NEB review:

- Is disrespectful of rights.
- Impedes reconciliation.
 - Hearing participants have to choose between respecting rights or being part of NEB review.
 - If project is approved but for completion of consultation/accommodation, Indigenous communities get blamed for “holding up project”.
- Potential waste of time, effort, and resources.

It is not proper for CCNB to speak about how Indigenous rights should be fulfilled; we are not an organization that represents Indigenous people. However, it is our view that from a non-indigenous perspective, the failure to complete consultation and accommodation prior to a hearing results in three things.

First, it is simply disrespectful of Indigenous rights. Second, it obstructs the reconciliation or bringing together of Indigenous and non-indigenous people in two main ways. Hearing participants such as CCNB who want to show respect for Indigenous rights don't want to participate in NEB hearings before proper consultation has taken place. But, at the same time, the NEB hearing for a large energy project such as Energy

East is the only game in town. If we don't participate, we lose our process opportunity to comment on the project. This puts us in a no-win position and when we do participate, our support for Indigenous rights looks hollow—we are not being brought closer to Indigenous peoples.

Further to the issue of reconciliation, when consultation and accommodation take place during an environmental assessment, what often happens is that the project is approved before these consultations are completed. This occurred recently with the Sisson Tungsten and Molybdenum mine in central Fredericton. Now the “approved” project can’t proceed until these consultations are done. It is our experience that what then occurs is Indigenous communities get blamed by project supporters for holding up the project—getting in the way of jobs and progress. This obviously does not equal reconciliation.

Recommendation #2

Assessment of environmental and social impacts of energy projects, e.g., pipelines, should be “returned” to Cdn. Env. Assessment Agency.

- NEB is not designed for ESAs.
 - Regulation (NEB) vs. planning (EA)
 - Adjudication (quasi-judicial) = private interests
 - Environmental assessment = public interest
- Impartiality of NEB when deciding on environmental and social impacts will always be questioned.

In his presentation to the Panel in Saint John, Mr. Edwards’ discussion of the history of the NEB made it clear its purpose was and is the regulation of pipelines (and other energy infrastructure). Properly done, environmental assessment is about planning for sustainability. These are two fundamentally different things. As long as the NEB remains a regulatory agency and NEB hearings of large energy projects are seen as a fulfillment of this regulatory duty, there will continue to be a disconnect between why and how it conducts ESAs for these projects and why and how they should be conducted.

Further to this, as a quasi-judicial body, the NEB is concerned about adjudicating between private interests, such as between a gas distributor and toll

payers, regarding issues such as tolls, access to product, and land rights. This requires a certain type of process. However, people who participate in ESAs are concerned about public interests; clean air, water, safety, etc. Quasi-judicial hearings are not meant for the determination of large scale public interests.

As well, the test for public convenience set out in s.52 of the NEB Act is not a substitute for public interests’ determinations made in EAs. All of the s.52 factors for determining public convenience are focused on financial matters or whether the project is a good use of a natural resource. The narrow foci of these questions are appropriate for determination by a regulatory, quasi-judicial board, while the broader, public issues that are the subject of a proper EA are not. Also, the s.52 test and factors are the same today as they were pre-2012 changes to the NEB Act and CEA Act—there has been no addition of an “environmental and social sustainability” factor. The NEB was designed to answer the pre-2012 public convenience test. There has been no change to its structure or public participation methods to address the needs of conducting a proper ESA.

Finally, the idea of “returning” the review of large energy projects to the CEA Agency needs some clarification. Prior to 2012, the NEB was a “responsible authority” (RA) under the CEA Act for screenings and comprehensive studies. However, the reviews of large energy projects were conducted under the CEA Act rules applicable to all CEA Act review panels. There was no separate panel review process for projects for which the NEB was the RA. So by “returning”, we mean there should be common rules for all ESA panel reviews conducted under the CEA Act, regardless of which department or agency/board is responsible for the regulation of the project.

Recommendation #2

If ESA of energy projects stays with NEB, then incorporate next-generation EA thinking:

- ESA process should be about operationalizing sustainability.
 - Learning, discussing, and choosing best option
- Roots of ESA process should be:
 - WCEL. 2016. Twelve Pillars of a Next-Generation Environmental Assessment Regime. <http://wcel.org/resources/environmental-law-alert/twelve-pillars-%E2%80%9Cnext-generation%E2%80%9D-canadian-environmental-assessment>.
 - Gibson, Doelle, Sinclair. 2016. Fulfilling the promise: Basic components of next generation environmental assessment. JELP 29: 251.
- Measure decisions against legislated sustainability criteria.
 - For example of criteria, see: Joint Review Panel. 2011. Lower Churchill Hydroelectric Generation Project. CEAA Reference No. 07-05-26178 at Appendix 8. http://publications.gc.ca/collections/collection_2011/ec/En106-101-2011-eng.pdf.

If the NEB continues to be responsible for conducting ESAs for large projects, then it should do so following best EA practices. EA today is moving towards assessing projects against the criteria of sustainability. West Coast Environmental Law describes the test for sustainability as being, “Will this proposal relative to other reasonable options make the best net contribution to lasting environmental, social and economic well-being without demanding trade-offs that entail significant adverse effects?”

Further, the NEB should be required to conduct EAs in the same manner other EAs will be conducted under an amended CEA Act, 2012. Having one set of rules for EAs for one type of project and another set for a different type of project makes no sense legislatively and

procedurally, and is confusing to the public.

West Coast Environmental Law’s (WCEL) Twelve Pillars of Next-Generation EA

1. Sustainability as a core objective
2. Integrated, tiered assessments starting at the strategic and regional levels
3. Cumulative effects done regionally
4. Collaboration and harmonization
5. Co-governance with Indigenous nations
6. Climate assessments to achieve Canada’s climate goals
7. Credibility, transparency and accountability throughout
8. Participation for the people
9. Transparent and accessible information flows
10. Ensuring sustainability after the assessment
11. Consideration of the best option from among a range of alternatives
12. Emphasis on learning

This slide details key points of next-generation EA. There were many substantial presentations and submissions made about this topic to the expert panel reviewing the *Canadian Environmental Assessment Act, 2012*.

Recommendation #3

Put the public into public participation.

- Recognizing what the public wants to discuss.
- Recognizing that all views are important.
- Promoting collaboration not conflict.
- Fulfilling the basics of public participation.

Recommendation #3

Public participation - Recognizing what the public wants to discuss.

Steps:

1. Large energy projects/GHG emissions = strategic environmental assessment (SEA)
2. Need for a project – does it fit with SEA and government policy?
3. Assess specifics of project.

acceptance of this policy, the next question would be how does the project fit within or fulfill this policy. If the project would take up 50 MT of Canada's carbon budget, would we be willing to give up 50 MT from somewhere else? Either yes or no, then the larger "public policy" questions have been answered. If yes, then the third step, the ESA of the project can address the specific impacts of the project.

Obviously, one of the problems with the present method of conducting ESAs for large energy projects is that these reviews have become the forum for the public examination of larger policy issues. The ESA of a project is not the proper forum for this and using them in the present manner creates confusion and frustration for everyone involved, be it the NEB, Cabinet, the proponent, the public, and other participants.

The following hypothetical will help illustrate the points made in this slide. The strategic environmental assessment (SEA) would address a proposed policy for Canada meeting its Paris Agreement target of reducing its emissions to 500 MT by 2030. (Essentially creating a carbon budget.) Assuming the SEA results in the

Recommendation #3

Public participation - Recognizing that all views are important.

- Participation cannot be limited to only those who are directly affected or who have relevant information and expertise.
 - Good EAs promote democracy.
 - Not part of CEA Agency assessments, why NEB?
 - Everyone's view is important.
- Allowing lots of meaningful participation takes time and resources.
 - Fact of life.

This slide is self-explanatory. Again though, why are there different participation rules for different projects when the purpose of the ESAs is the same?

There is also undue concern about how long it would take to properly conduct the public participation portion of an NEB ESA. While these reviews shouldn't be endless, fifteen months for the entire process is not adequate. Good public participation takes time, there is no getting around this. Abbreviating this process does not promote public acceptance of a project; rather the opposite. At the same time, timelines are acceptable for the rest of the review, such as requiring the panel's report in X months after public participation has been completed and the Cabinet's decision in Y months.

Recommendation #3

Public participation - Promoting collaboration not conflict.

- Why the focus on "evidence".
- NEB, proponent, and participants should be working together to come up with best information.
- Ontario Energy Board process for Energy East provides an interesting starting point.

Good EA public participation promotes mutual learning and collaboration. Again, the outcome of an EA should be a decision that best promotes sustainability. The present quasi-judicial format makes parties adversaries, each trying to convince the NEB they are "right", not collaborators. Focusing on "evidence" rather than gathering the best information forces the proponent and other participants to frame their submissions in the strongest light possible. The Energy East proponent's discussion of the fate of diluted bitumen in its Application is an excellent example of this. It states categorically that spilled diluted bitumen will float on water. However, a recent Royal Society report says this and many other questions regarding the fate of diluted bitumen still need to be studied. In a quasi-judicial

hearing, one of these positions/evidence has to be chosen without questioning whether there might be better information available.

One way this “best” information might be gathered during the review of a large energy project is through the use of multi-participant technical panels.

Recommendation #3

Public participation - Fulfilling the basics.

1. Providing participants with equal opportunity/resources to participate.
2. Providing fair information to all participants.
3. Allowing all participants the means to be heard.
4. All participants know they’ve been heard.
5. Honest opportunity to influence decision.

While CCNB does not want to be patronizing, this slide outlines Public Participation 101. There should be no question any NEB public participation effort needs to meet these criteria.

Further to point #1, all project applications made available to the public by the NEB need to be in both official languages. For the Energy East NEB hearing, many of the participants’ first language is French, particularly in Quebec and northern New Brunswick. The public already has a difficult time understanding the very technical language of an application. Having to do so in your second language, if you are bilingual, is very unfair.

Recommendation #3

Public participation - Fulfilling the basics.

- Case study of public participation in NEB review of Emera Brunswick Pipeline Project (2006).
 - NG pipeline from Saint John to US border.
 - NEB hearing was substituted for CEEA Review Panel.
 - What did “citizen” intervenors think of process.
 - Not much.
- See: A. John Sinclair, Gary Schneider & Lisa Mitchell (2012): Environmental impact assessment process substitution: experiences of public participants, *Impact Assessment and Project Appraisal*, 30:2, 85-93.

In 2005-2006, the NEB quasi-judicial hearing process was used as a substitute for the regular CEA Act review panel process. The hearing was for the approval of the Emera pipeline from Saint John to the Maine border. Several citizens from Saint John were granted intervenor status in the NEB hearings for the Emera pipeline. We describe these people as “citizen” intervenors. They were regular members of the public doing their intervention in their spare time. They were not professionals.

As an aside, the changes made to the NEB Act and CEA Act in 2012 operationalized the substitution done in 2005-2006 for the Emera pipeline hearing.

As discussed in the next slide, the case study revealed that many of these citizen participants did not find their intervention and participation to be a positive experience. A copy of the Sinclair, Schneider, and Mitchell’s 2012 paper has been included with CCNB’s submission.

Recommendation #3

Emera pipeline hearing

- Too formal
- Intimidating
- Confusing procedure favours proponent
- No legal assistance
- Lack of time
- Few resources
- Evidence
- Presence of security

Energy East “informal” panel sessions

- Still formal
- Lone presenter vs. many suits
- No help from Panel, re: procedure
- Presenters told not following “procedure”
- Still no public defender
- Questions of evidence and admissibility of statements
- \$6000/individual, \$40,000 group doesn’t go far
- Presence of security

But, some public intervenors want opportunity to cross-exam = challenge.

The left-hand column captures the difficulties the citizen intervenors in the NEB Emera pipeline hearing encountered. The right-hand column sets out the difficulties citizen intervenors had with the “informal” NEB Energy East panel session held in Saint John in August, 2016. Despite this informal panel session being portrayed as a “getting to know you” opportunity, it is clear the barriers to meaningful participation by citizen intervenors in NEB hearings still remains.

The sentiment after the Saint John panel session for many citizen intervenors was that if this was informal, they are scared of participating in the true hearings.

At the same time, CCNB recognizes some public interest intervenors like the opportunity to cross-examine the

proponent on portions of its ESA. We believe this is mostly a function of the NEB’s present quasi-judicial, adversarial approach to evaluating ESAs. If the process was more collaborative, the need for cross-examination would be greatly diminished or removed.

Recommendation #3

Put the public into public participation.

End of the day, “public” participation issues stem largely from quasi-judicial nature of NEB process.

- Focus of quasi-judicial is competing private interests
 - Evidence
 - Determining who is right or wrong
 - NEB mandate is focused on regulation
- Focus of environmental assessment is public interest
 - What is the best decision (in theory, not always practice)
 - Environmental assessment is about planning

At the end of the day, the NEB cannot act as both a quasi-judicial regulatory and promote meaningful public participation in the ESAs of large energy projects at the same time. From CCNB’s perspective, they are fundamentally entirely different processes to achieve entirely different objectives.

To conclude Recommendation #3, in broad strokes, the ESA of large energy projects should be:

- Conducted by a CEAA review panel (after the SEA discussed above is concluded).
- All who want to participate should be allowed to participate.
- Meetings, and other means, should be held to determine the issues to be investigated in the ESA.

- Once these issues are determined, “intervenors” who can capably represent segments of the public interest on the various issues should be chosen.
- These intervenors would work collaboratively with the review panel and the proponent to gather the best information for each issue.
- Public comment would be invited during this collaboration.
- The findings would be shared either as consensus statements or with fair representation of the differing interpretations of the information.
- More public review and comment.
- A draft report would be written.
- The review panel would hold public meetings to gather public input on the draft report.
- A final report would be written that assesses the project’s impacts against a list of sustainability criteria. These criteria could be legislated or determined through the review panel process.
- A Cabinet decision made regarding the project.

Recommendation #4

Clarify the process for the assessment of the social and environmental impacts of marine shipping that is needed for a project.

- What is NEB's responsibility for this assessment?
- Problem with existing reviews, re: TERMPOL.

The process for assessing the impacts of marine shipping was an issue in the NEB hearing for the Trans-Mountain Expansion Project (TMEP) and again is at issue in the NEB hearing for Energy East. Unless resolved, it will be a problem for future NEB (or CEA Agency) reviews of large energy projects that include a marine terminal and/or shipping.

Recommendation #4

Example of problem from Energy East NEB list of issues:

7. The potential environmental and socio-economic effects of the Project, including the environmental effects of accidents or malfunctions that may occur in connection with the project, and any cumulative effects that are likely to result from the Project, as considered under the [Canadian Environmental Assessment Act, 2012](#).

8. The potential environmental and socio-economic effects of increased marine shipping.

Marine shipping is not part of the project.

As was the case in the TMEP hearing, marine shipping for the Energy East project, although necessary for the project, is not part of the scoped project and its impacts are not considered to be cumulative impacts of the project. At the NEB Panels Sessions for Energy East this proved a point of consternation for many participants. Increases in tanker traffic associated with projects under NEB review, such as Energy East, are a significant potential source of environmental impact as well as economic impact on existing activities such as fishing, whale watching and other marine tourism ventures. Understandably, several intervenors chose to comment on the potential impacts of increased marine traffic only to be challenged by counsel for the proponent. (This highlights the issues regarding the formality and

judiciousness of this "informal" NEB panel session discussed above). As discussed below, there is no other public venue for intervenors to discuss the impact of increased marine traffic.

Recommendation #4

We recognize that marine shipment of products once loaded onto tankers is:

- Not directly managed by the pipeline project proponent.
- Not regulated by NEB.
- That "marine shipping" is not a listed physical activity under CEAA.

Lack of clarity creates confusion:

- Why is NEB responsible?
- If not NEB, who?
- Is there the same standard of review for marine impacts as for CEAA physical activities?

This problem needs to be addressed.

At present, there seems to be no legislative basis for the assessment of the impacts of marine shipping when they are functionally an integral part of a large energy project. What is the legal standard to determine whether the ESA of marine shipping has been done correctly?

Recommendation #4

Clarify use of TERMPOL reviews

- Transport Canada – “Technical Review Process of Marine Terminal Systems and Transshipment Sites”
- Voluntary, initiated by proponent.
- For Energy East, the TERMPOL review process includes studies such as a *Fisheries Review Survey*, and an *Origin, Destination and Marine Traffic Volume Survey* as well as 16 other studies on various topics.

Many of the TERMPOL studies are of interest to CCNB and other intervenors. Unlike the rest of the proponent’s Application, however, we have not been allowed access to TERMPOL content. The TERMPOL process is such that the proponent submits studies to Transport Canada for review and, after some back and forth with Transport Canada, the studies are released publicly once they are finalized. Transport Canada has confirmed that the proponent is at liberty to release their studies at any time but is not bound to do so. The project proponent, then, gets to determine when the public has access to information critical to determining the risks associated with the project, leading to a lower level of transparency for marine issues associated with the project.

Recommendation #4

Clarify use of TERMPOL reviews

- Not open to the public (or stakeholders).
- TERMPOL process relied on by Energy East proponent in its Application and ESA as mitigation for project’s impacts on marine environment/social components.
 - Not part of Application, no indication when it will be available to participants.
- Reliance on the TERMPOL process represents a lower level of transparency and, in effect, allows less public scrutiny of marine export aspects of a project.

Conclusion

- Thank you for your time.