

May 5, 2017

Let's Talk Environmental Assessment

Environment and Climate Change Canada

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Canada

Sent via email: CEAA.EARReview-ExamenEE.ACEE@ceaa-acee.gc.ca

Re: Pembina Institute comments on Report from the Expert Panel on the Review of Environmental Assessment Processes

To whom it may concern:

The Pembina Institute is grateful for the opportunity to provide comments on the Report from the Expert Panel on the Review of Environmental Assessment Processes (herein referred to as 'the EA Panel'). We commend the Government of Canada for initiating a review of this important component of Canada's environmental law and planning regime, and for providing an opportunity for public comment on the Expert Panel's report.

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, with a commitment to re-evaluate and improve the bodies responsible for federal environmental assessment and energy regulation. As such, the Government of Canada has also initiated a review of the National Energy Board ('NEB'), the Fisheries Act, and the Navigation Protection Act. Taken together, these reviews have immense potential to equip Canada's federal agencies, departments and regulators to respond to the challenges of the 21st century and to the expectations of Canadians with respect to government transparency, environmental protection and economic development.

The Pembina Institute has actively participated in the NEB modernization process. In fall 2016, we conducted 23 interviews with a wide range of experts to gather ideas and understand the challenges presented by NEB modernization. We published a discussion paper¹ in January 2017 and participated in three engagement sessions with the Expert Panel on NEB modernization (herein referred to as 'the NEB Panel') in Saskatoon, Toronto, and Edmonton. In March 2017, with financial support from Natural Resources Canada through the Public Input Funding Program, we published a summary report² detailing the findings of our research and presenting our final recommendations to the NEB Panel.

To ensure optimal outcomes, it is crucial that the Government of Canada consider the recommended changes to each of the four regimes under review. In this letter, we present our review of the EA Panel report, which we have conducted with a view to how the recommendations therein support the recommendations that we have provided on NEB Modernization. We look forward to reviewing and commenting the NEB Panel's report and recommendations when they become available.

¹ Pembina Institute, Good governance in the era of low carbon: A vision for a modernized National Energy Board. (2017). <https://www.pembina.org/reports/vision-for-neb-modernization-final.pdf>

² Pembina Institute, Good governance in the era of low carbon: Final submission to the Expert Panel on National Energy Board Modernization. (2017). <https://www.pembina.org/reports/neb-panel-submission-final..pdf>

We write to you today to outline our support for the EA Panel report, and further to underscore that its proposed reform package, if implemented, would significantly advance the government's other environmental law reform objectives — particularly as it relates to the NEB.

The vision outlined in the EA Panel report is commendable and demonstrates that the EA Panel heard the views and concerns of Canadians. But further, its recommended reforms are also workable and present a clear path forward for the Government of Canada.

Some elements of the EA Panel's recommendations require further details and clarifications to ensure their intent is fully understood and upheld. However, once those efforts are made and a reform pathway is clearly sketched, those recommendations will allow the federal government to live up to its commitment to Canadians across a number of files, including NEB modernization.

Section 2: Developing the vision

We have conducted a review of the EA Panel report with a view to how the recommendations contained therein support our own recommendations for NEB modernization as per our submission to the NEB Panel.³ Below, we provide our comments relating to the purpose of assessment, the governance model, indigenous considerations, public participation, data and Strategic/Regional EA. Please see our full submission to the NEB Panel for further detail, and citations from experts, on each of these aspects.

2.1 The Purpose of Federal Impact Assessment

2.1.1 From significance to sustainability

The EA Panel recommends that the name of the federal assessment process be changed from 'Environmental Assessment' to 'Impact Assessment' (or 'IA'). We strongly support the significant "shift in thinking" that this renaming would reflect: namely, that federal assessments would consider factors "beyond the bio-physical environment to encompass all impacts likely to result from a project, both positive and negative."⁴ In our view, this shift is integral to ensure improved real-world outcomes stemming from the Government of Canada's EA review process, and is aligned with the pursuit of a "next-generation environmental assessment"⁵ regime for Canada.

The shift to 'Impact Assessment,' and the recognition of IA as a planning tool, reflects one of the most fundamental and important recommendations of the EA Panel: that "federal IA [should] decide whether a project should proceed based on that project's **contribution to sustainability**."⁶ This recommendation was a central proposal in our submission to the NEB Panel, and has been further underscored by many other submissions to the EA expert panel over the course of its consultation.

As the EA Panel report underlines, the current approach to environmental assessment focuses on making proposed projects less harmful, rather than seeking to maximize long-term benefits for Canadians.⁷ Due to

³ Pembina Institute, Good governance in the era of low carbon: Final submission to the Expert Panel on National Energy Board Modernization. (2017). <https://www.pembina.org/reports/neb-panel-submission-final..pdf>

⁴ Expert Panel for the Review of Environmental Assessment Processes, "Building Common Ground: A New Vision for Impact Assessment in Canada," 13.

⁵ Robert B. Gibson, Meinhard Doelle and A. John Sinclair, "Fulfilling the Promise: Basic Components of Next Generation Environmental Assessment," *Journal of Environmental Law & Practice* 29 (2015), 253. https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2670009

⁶ *Building Common Ground*, 3.

⁷ *Fulfilling the Promise*.

the focus on individual projects and their incremental impacts, it has been difficult to control for negative cumulative effects to the environment and communities.⁸ A test for contribution to sustainability is therefore a stronger, more credible and more modern approach to determine the public interest. And, as the EA Panel recognizes, some project review panels in Canada have already chosen to employ this approach in response to the current lack of definition around what constitutes the public interest.

We would like to emphasize that climate considerations — whether a project supports or hinders Canada’s ability to achieve its domestic and international commitment — should be explicitly recognized as part of this improved sustainability framework.

2.1.2 Impact Assessment as a planning tool

The EA Panel recognizes in its report that IA (project, regional and strategic level) must be understood as a planning tool, not a regulatory exercise — a recognition we also share and believe to be crucial to the overall credibility of the federal government’s EA improvement exercise.

As discussed in more detail below, Strategic and Regional IA are a tool to study, discuss and use a sustainability-based approach to establish needs and goals for given industry sectors or geographical regions. They should be used to set baseline impact thresholds with respect to impacts on water, air, land, species, community health and well-being, etc. Using a “tiered” approach as recommended by the EA Panel, these plans and baselines can flow through to project IA, measuring proposed projects against established goals and objectives for regions and economic sectors. In our submission to the NEB Panel, we highlighted that the NEB is not equipped to play this planning role, despite the fact that it is currently responsible for conducting project EAs.⁹

2.3 Indigenous considerations

We commend the EA Panel for recognizing in its recommendations the rights of Indigenous peoples to self-determination (and thus to be directly involved in decision-making) as well as the need to rethink how impacts to Aboriginal and treaty rights are assessed, and how Indigenous knowledge is incorporated into both project-specific and regional reviews.

In our submission to the NEB Panel, we highlighted that environmental decision-making in Canada must be conducted in the spirit of reconciliation with Indigenous peoples and with a view to upholding the principles and obligations of the United Nations Declaration on the Rights of Indigenous Peoples and to supporting the rapid implementation of the Calls to Action from the Truth and Reconciliation Commission of Canada. In our view, the recommendations from the EA Panel report would represent a meaningful step forward in Canada’s journey to reconcile with Indigenous peoples.

2.4 Public Participation in Impact Assessment

2.4.1. Meaningful participation

In our submission to the NEB Panel, we underscored that public trust in institutions is linked to the ways in which those institutions facilitate participation and deal with the feedback received from the public and experts. Currently, limitations on who can participate in project reviews are a barrier to the credibility and

⁸ Peter N. Duinker, L.A. Greig, “The impotence of cumulative effects assessment in Canada: ailments and ideas for redeployment,” *Environmental Management* 37 (2006), 153. <https://www.ncbi.nlm.nih.gov/pubmed/16362488>

⁹ Although the test for the project EA is outlined in the Canadian Environmental Assessment Act, the NEB is the responsible authority for applying this test to interprovincial pipeline and designated power line projects.

the perception of independence of Canada’s regulators. Public and stakeholder input is a crucial component of developing the best energy projects in Canada and in holding the review process accountable.

For this reason, we support the EA Panel report in its direct condemnation of the current definition of “interested parties” in the *Canadian Environmental Assessment Act* as well as the “standing test” applied under the *National Energy Board Act*. Both of these rules limit participation in federally-regulated energy project decisions and should be removed.

We support the Panel’s endorsement of the IAP2 Public Participation Spectrum as a framework for designing and communicating opportunities for participation in IA processes. Taking this one step further, we note that this framework must be enshrined in the legislation. In our submission to the NEB Panel, we also suggested that there could be official, more detailed guidelines on how regulatory and planning bodies engage stakeholders and the public in order to provide greater certainty for participants, proponents, and review panel members.

We support the EA Panel’s observations that (1) participants must see how their input has affected a decision, and (2) various types of participation opportunities should be made available to stakeholders and members of the public with different levels of interest. With regards to these two observations, notwithstanding that formal hearings are a fundamental part of the project review process, we encourage the Government of Canada to explore the myriad opportunities that exist to facilitate broader participation, for example by livestreaming hearings, providing opportunities to submit comments, improving online platforms and offering drop-in centres. In the case of the NEB, we believe that the approach to fairly engaging, working with and compensating landowners in particular requires attention.

2.4.2 Capacity for participation

In line with the observations of the EA Panel, participants in our expert interviews made it clear to us that the current level and method of financial support offered to participants, particularly at the NEB but also at the CEAA, is inadequate to support meaningful intervention by third parties. As such, the Pembina Institute fully supports the EA Panel’s recommendation that “the participant funding program for IA be commensurate with the costs associated with meaningful participation in all phases of IA, including monitoring and follow-up.”¹⁰ Again, we would recommend that this direction be enshrined in the legislation in order to provide clear direction to regulators and certainty to communities and other interested parties. Given the new Planning Phase that is proposed for IA, we note that funding will be required to support involvement in this earlier phase of review as well.

2.4.3 Informed participation

We are also pleased to see that the EA Panel report discusses the lack of navigability and transparency of project information. In our submission to the NEB Panel, we highlighted that project applications and environmental impact statements — often tens of thousands of pages long — are not only costly for participants to navigate, but are often poorly organized and difficult to navigate online, presenting an additional barrier to participation. We therefore support the EA Panel’s recommendation that “IA legislation require that IA information be easily accessible, and permanently and publicly available.”¹¹ We emphasize that this should include project monitoring and operational data.

¹⁰ *Building Common Ground*, 4.

¹¹ *Ibid.*

2.5 Evidence-Based Impact Assessments

2.5.1 Incorporating science in impact assessments

Improved and more accessible data will fundamentally increase the potential for informed participation at all stages of project reviews and monitoring, and will support strong, evidence-based decision making. In our view, there is an immense opportunity to improve and harmonize data collection, production, and dissemination at the federal level — particularly in the area of energy and climate (for example: future projections and scenarios, operations and monitoring data for existing projects). Over the course of our expert interviews last year, we often heard that the data produced by the NEB needs to be improved and better coordinated with agencies and departments in order to be useful and reliable for researchers and other stakeholders. In the spirit of coordination and efficiency, we believe that a modernized NEB could play an expanded role in the collection, harmonization and dissemination of energy and climate data — working in close collaboration with the ECCC and CEAA — which would continue to produce emissions data.

As such, we fully support the EA Panel’s recommendation for “the development of a central, consolidated and publicly available federal government database to house all baseline and monitoring data collected for IA purposes.” There is an urgent need to establish a one-stop shop for reliable public energy and environment data in Canada. This data should be as granular as possible, enabling broad employment and analysis across government and civil society.

We also support the EA Panel’s recommendation that “IA legislation provide any IA authority with power to compel expertise from federal scientists, and to retain external scientists to provide technical expertise as required” and that “any IA authority have the statutory authority to verify the adequacy of IA studies across all pillars of sustainability.” We heard in our expert interviews that there are indeed concerns about the quality, accuracy and independence of environmental impact studies. However, we also heard that finding independent external scientists and experts to verify information from a proponent can be difficult in an environment where many businesses in that sector work closely with industry. In our submission to the NEB, we recommended the establishment of permanent centres of excellence at universities, with funding dedicated to maintaining pools of subject experts who can be called upon by participants and hearing panels alike to give independent input.

2.5.3 Developing unbiased Impact Statements

The EA Panel’s report also recommends that an IA authority lead the development of the impact statement, and not the proponent. While we did not call for this change in our submission to the NEB Panel, we support this recommendation insofar as it is intended to improve trust, improve the quality and increase data consistency across projects. We recognize that this shift would represent a significant change in how things are done in the Canadian approvals landscape. A close examination of the requisite expertise within the IA authority across all five sustainability pillars, as well as sufficient funding, would be crucial to making this new arrangement work.

2.5.4 Making evidence-based decisions

In our submission to the NEB, we highlighted that the public does not currently receive sufficient reasoning and justification to be able to scrutinize, or even understand, final decisions made by their elected officials.

The EA Panel recommends that “IA decisions reference the key supporting evidence they rely upon, including the criteria and trade-offs used to achieve sustainability outcomes.” We support this recommendation, and further propose that provisions be in place so as to require that detailed decision

statements be released publicly following the final determination on a project, regardless of which body makes this decision.

It is important to note that the final decision is one crucial point, though by no means the only, at which nation-to-nation collaboration and decision-making with Indigenous nations must occur.

Section 3: Implementing the recommendations: challenges and opportunities

3.1 Governance model

Under current legislation, the NEB is responsible for conducting environmental assessments for projects under its jurisdiction (which includes interprovincial pipelines and designated powerlines). Following reforms in 2010, this makes the NEB (along with the Canadian Nuclear Safety Commission) an anomaly — all other federal environmental assessments are conducted by the CEAA.

The EA Panel report identifies a number of key concerns about the current arrangement. In our expert interviews on NEB modernization, we heard very similar concerns, namely, that (1) there is a risk of reduced consistency and predictability when there are multiple responsible agencies for environmental assessment, (2) there are concerns about the perceived lack of independence at the NEB with respect to the industry it regulates, and (3) while the NEB has technical expertise related to pipeline construction and operation, it does not have a mandate or capacity to conduct longer range planning exercises, which are in fact the very nature of IA. For these reasons, we recommended to the NEB Panel that the centralization of the responsibility for environmental assessment (or IA), begun in 2010, be carried to its conclusion: that project IA for energy projects under the jurisdiction of the NEB also be led by the federal IA body. We are very pleased to see this recommendation reflected in the EA Panel report and strongly encourage the federal government to prioritize this reform as it charts its path forward over the coming months.

It is important to note that the NEB currently applies two tests when reviewing proposed pipeline projects under its jurisdiction. One is the project EA, and the other is the test of public convenience and necessity as outlined in Section 52(2) of the NEB Act. When reviewing projects, the NEB conducts these two tests simultaneously. In a governance model where the IA body is responsible for conducting the IA for energy projects, we have proposed that the NEB should retain a role in providing technical input based on its core expertise on energy issues in line with the criteria outlined in Section 52(2). This would be a technical, not an adjudicative, role.

In our view, integrating the NEB's technical and economic analysis into one coordinated and streamlined review, led by the proposed IA body, would address concerns related to disjointed accountability while also ensuring consistent application of EA law, predictability, and public participation. Further, it would significantly advance the government's priority outcome — namely, improved transparency and public trust in decision-making.

3.2 Project impact assessment

The EA Panel recommends a number of important changes with respect to the procedure of project IA, many of which support our submission to the NEB Panel. In particular, we support the following procedural recommendations from the EA Panel report:

- The instatement of a Planning Phase, which would allow for greater participation in the task of scoping the study and review, and provide greater predictability to proponents. We heard from

our interview participants that there is an untapped opportunity for input during the scoping stage when the list of issues is being drafted. Stakeholder participation in setting the scope a project IA could lessen conflict later in the process and provide much greater certainty for proponents.

- The production of an Impact Statement by independent experts in the Study Phase.
- The instatement of a Decision Phase, which would include nation-to-nation consultation with Indigenous groups (on the decision and any conditions) and would result in the production of a decision statement. We have recommended that this decision statement provide sufficient detail to allow scrutiny and promote public understanding.

We understand that these steps would apply to Project IA, but also Regional and Strategic IA (see below).

3.5 Regional impact assessment

Strategic and Regional EA (or IA) are planning tools, currently available to federal government agencies, that are critically underused.¹² Strategic and Regional IA can provide a forum for Canadian governments, Indigenous peoples and the public to study, discuss and use a sustainability-based approach to establish needs and goals for given industry sectors or geographical regions. Used effectively, Strategic and Regional IA can accommodate the policy debates for which project EA have currently become a proxy. In our view, if managed appropriately, this could have the effect of reducing the number of groups that apply for intervenor status within project IA.

We are pleased to see the EA Panel recognize the “major role” that Regional IA can play in the environmental management landscape, particularly with respect to managing cumulative effects. As recognized by the EA Panel, it is clear that interjurisdictional cooperation, including with Indigenous groups, will be a fundamental part of Regional IA.

The EA Panel suggests that Regional IA be required (not discretionary) in two cases: when projects occur on federal lands or marine areas, or where there is a potential for, or existing, cumulative impacts on many federal interests. While we support these recommendations in principle, in our view the federal government would need to further clarify and codify (preferably via its new legislation) when a Regional IA would be required.

3.6 Strategic impact assessment

Through the Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals, the Government of Canada has called for government departments and agencies to conduct Strategic EA of a policy, plan or program proposal whenever the following two conditions are met: “(1) the proposal is submitted to an individual minister or Cabinet for approval; and (2) implementation of the proposal may result in important environmental effects, either positive or negative.”¹³ Despite this directive, there is no

¹² Office of the Auditor General of Canada, *2015 Fall Reports of the Commissioner of the Environment and Sustainable Development*, Report 3—Departmental Progress in Implementing Sustainable Development Strategies. http://www.oag-bvg.gc.ca/internet/English/parl_cesd_201601_03_e_41017.html

¹³ Government of Canada, “The Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals.” <https://www.canada.ca/en/environmental-assessment-agency/programs/strategic-environmental-assessment/cabinet-directive-environmental-assessment-policy-plan-program-proposals.html>

legislative requirement for Strategic EA at the federal level and this directive is not being applied or reported upon.¹⁴

We commend the Expert Panel for recognizing the immense opportunity to conduct Strategic IA to link new federal policies to proposed projects, including on climate change. However, it is our view that Strategic IA can do even more than this: it can also be used to identify policy gaps and respond to emerging science.¹⁵ By recommending no change to the Directive mentioned above, we believe that the EA Panel has overlooked an opportunity to support sustainability-oriented planning in an important way.

3.7 Climate change and impact assessment

A crucial component of the test for contribution to sustainability will be to consider the impact of a proposed project on Canada's ability to achieve its climate change mitigation objectives. In our submission to the NEB Panel, we recommended that incremental upstream and direct GHG emissions must be assessed within project IA and considered relative to Canada's national and sub-national climate objectives. We recommended that a "climate test" of this nature should be an explicit requirement (i.e. not discretionary) within the reformed *Canadian Environmental Assessment Act*, and that guidance on how to carry out such an assessment be provided.

Project-specific GHG impacts are complex to integrate into environmental assessments because the impacts are global, intergenerational, and cumulative — and the damages borne by society cannot easily be traced back to individual projects.¹⁶ As such, we highlighted that Regional and Strategic IA offer an opportunity to study and set goals for the energy system at a higher level than the individual project.

The EA Panel report rightly identifies the significance of climate change as an urgent threat to Canadian well-being and also recognizes the need to provide clear direction on how to achieve greenhouse gas (GHG) emissions reductions in line with the Pan-Canadian Framework on Clean Growth and Climate Change. While the EA Panel acknowledges Canada's target to reduce GHG emissions by 30 per cent below 2005 levels before 2030, we emphasize that Canada has also committed to ratchet up ambition with time, in accordance with the ambitious outlined in the Paris Agreement. Canada's own Mid-Century Long-Term Low Greenhouse Gas Development Strategy recognizes this will require at least an 80% reduction from 2005 levels by 2050.

The EA Panel report recognizes that project-level IA, even with the 2016 interim principles requiring the assessment of upstream GHG emissions for certain projects, is insufficient to plan for climate change mitigation (and adaptation) across regions and sectors. There is also a lack of clarity and consistency on how to assess climate change. The EA Panel therefore calls upon Canada to "lead a federal strategic IA or similar co-operative and collaborative mechanism on the Pan-Canadian Framework on Clean Growth and Climate Change (PCF) to provide direction on how to implement this Framework and related initiatives in future federal project and regional IAs,"¹⁷ a recommendation that we fully support. At the same time, the EA Panel report recognizes the jurisdictional challenges that this effort would present. However, as proven by the successful culmination of the PCF, the federal government has significant convening power

¹⁴ Office of the Auditor General of Canada, *2015 Fall Reports of the Commissioner of the Environment and Sustainable Development*, Report 3—Departmental Progress in Implementing Sustainable Development Strategies. http://www.oag-bvg.gc.ca/internet/English/parl_cesd_201601_03_e_41017.html

¹⁵ Doelle, Meinhard and Sinclair, A. John (2017). EA Expert Panel Report: Reflections on Canada's Proposed Next Generation Assessment Process <https://ssrn.com/abstract=2959453>

¹⁶ Meinhard Doelle, *Integrating Climate Change into EA: Thoughts on Federal Law Reform* (2016), 1. <https://ssrn.com/abstract=2854522>

¹⁷ *Building Common Ground*, 7.

on climate change and environmental questions. Canada enjoys an unprecedented level of consensus across federal, provincial and territorial governments on the urgent need to reduce emissions and spur clean economic growth. We therefore find it likely that the First Ministers could deliver a plan to ensure Canada conducts its first ever strategic IA on climate change. In light of the commitment ongoing collaborative action contained within the PCF, we suggest the issue of a national strategic IA on climate change — and more generally the connection between environmental assessment and climate action goals — be tabled at the next First Ministers Meeting on climate change.

Conclusion

We appreciate the opportunity to provide comments on the EA Panel's report with a view to how they support NEB Modernization. Thank you for your consideration of the above points as the Government of Canada works toward seizing this once-in-a-generation opportunity to reform these extremely important institutions in Canada. Should you have any follow up questions, please feel free to reach me directly at +1-587-581-1701 or by email at ErinF@pembina.org.

Yours sincerely,

A handwritten signature in blue ink that reads "Erin Flanagan". The signature is written in a cursive style and is positioned above a thin horizontal line.

Erin Flanagan
Program Director, Federal Policy
Pembina Institute