

June 14, 2017

*NEB Modernization Secretariat*

Natural Resources Canada

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Ottawa, ON

Sent via email <NRCan.NEBModernization-ModernisationONE.RNCan@Canada.ca>

**Re: Pembina Institute comments on Report from the Expert Panel on the National Energy Board Modernization**

To whom it may concern:

The Pembina Institute is grateful for the opportunity to provide comments on the Report from the Expert Panel on National Energy Board Modernization (herein referred to as ‘the NEB Panel’). We commend the Government of Canada for initiating this important review of Canada’s energy and environmental laws, and for providing an opportunity to comment on the Expert Panel’s report to Minister Carr.

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 Federal Environmental Assessment processes, 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 21<sup>st</sup> century and to the expectations of Canadians with respect to government transparency, environmental protection (particularly climate change) and clean economic development.

The Pembina Institute has actively participated in the National Energy Board (‘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 paper<sup>1</sup> 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 report<sup>2</sup> detailing the findings of our research and presenting our final recommendations to the NEB Panel.

Efforts to date, across various orders of government and civil society, have laid the groundwork for significant improvements to Canada’s energy project review and planning landscape. At this stage, it is essential that the Government of Canada synthesize across its reviews to chart a coherent, ambitious and effective path forward. To ensure optimal outcomes, it is crucial that the Government of Canada consider the recommended changes to each of the four regimes under review, and to advance reforms that are mutually reinforcing across its four legislative reform processes.

In particular, Canada’s environmental assessment (EA) regime is highly interlinked with proposed NEB modernization reforms. Recognizing this, in May 2017, we provided comments to Environment and

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<sup>1</sup> 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>

<sup>2</sup> 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>

Climate Change Canada on the report from the Expert Panel on Federal Environmental Assessment Processes (herein referred to as ‘the EA Panel’) with a view to how the recommendations therein support the recommendations that we have provided on NEB Modernization.<sup>3</sup> Overall, we believe that the direction, workability and level of ambition of the EA Panel report are commendable. In particular we are pleased to see the report’s focus on evaluating a proposed project’s contributions to sustainability, and its recommendation to create one centralized agency responsible for all assessments.

Further, we support proposals from both expert panels to ensure any reformed energy regulation regime should enable nation-to-nation relationships with Indigenous peoples in Canada. This is a precondition 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 this letter, we present our review of the NEB Panel report, which we have reviewed with a view to how to integrate across environmental law reform priorities. Further we have taken a view as to how the recommendations from the EA Panel can provide further or clearer direction to the Government of Canada as it relates to the environmental assessment of projects typically under jurisdiction of the NEB. In our view, this is a case where the sum can truly be greater than the parts: the government’s next steps will determine whether Canada seizes this once-in-a-generation opportunity to restore trust in federal institutions, and establish a project review process aligned with the challenges of the 21st century.

## Overall comments

We agree with the Panel in its statement that there is “a larger gap that affects the overall operation of the National Energy Board and creates a tension that cannot be resolved through more modest reforms.” It is clear that the Panel carefully considered feedback received from stakeholders from all sectors and regions of Canada over the course of its public engagement.

We wholeheartedly support the five principles outlined by the NEB Panel as underlying their recommendations. In several key areas, we strongly support the specific recommendations that the NEB Panel has put forth in their report. In particular:

1. The recommendation to create more **independent, harmonized and robust energy data and forecasting** in Canada, supported by a new, independent Canadian Energy Information Agency.
2. The recommendation to remove limitations on participation in project assessments and **provide new mechanisms for supporting meaningful participation**, including: the establishment of a Public Outreach Office within the CETC, an independent Public Intervenor Office, and Regional Multi-Stakeholder Committees to oversee operations. We think that these mechanisms are particularly important to support the engagement of Indigenous peoples and landowners.
3. The recommendation to ensure **the independence and competency of Hearing Commissioners** by shifting to a “Trustee model” and introducing a more rigorous competency matrix.

However, we are concerned that some fundamental aspects of the NEB Panel’s recommendations are the wrong solution to the identified report’s problems, and will guide Canada’s environment and energy regime in the wrong direction. Specifically:

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<sup>3</sup> Pembina Institute, Submission on the expert panel report on the review of environmental assessment processes. (2017). <https://www.pembina.org/pub/ea-panel-report-comments>

1. We are highly concerned by the NEB Panel’s proposal for a two-part project assessment that begins with a **national interest determination (NID)** by the Governor in Council (GIC). We understand the motivations for this recommendation, namely (1) reducing uncertainty for project proponents entering into major project reviews, and (2) screening out projects that are not aligned with existing policy. However, we believe that this proposal is the wrong solution to these concerns. It is incompatible with evidence-based, quality decision making and will add to, not reduce, the perceived lack of transparency around project reviews. In essence this solution is an up-front politicization of a process that is already unduly polarized.
2. We commend the NEB Panel’s call, like many before them, for the development of a **Canadian energy strategy** in partnership with Indigenous peoples, provinces, and territories. However, the NEB Panel’s report does not address the means for bringing such a strategy about (particularly in light of the existing Canadian Energy Strategy, finalized in July 2015). Further, it makes little reference to the potential for Strategic and Regional Impact Assessments<sup>4</sup> (IAs) to fill this overarching climate and energy planning informational gap. Therefore, while we support the ongoing development of the Canadian Energy Strategy and other federal-provincial-territorial initiatives, we are concerned about the absence of discussion regarding other tools at the government’s disposal to ensure proposed projects are evaluated within a coherent energy, economic and environmental policy environment. In our view Strategic and Regional IAs are a crucial next step for the Government of Canada and are the instrument best positioned to provide clarity to regulators as they evaluate project-specific impacts.

In the sections that follow, we elaborate on each of these areas of consideration and propose pathways forward for the government to reconcile the recommendations of the NEB Panel and the EA Panel and chart a strong, workable path forward for energy regulation and decision-making in Canada.

## 1. Policy and leadership

### Reconciling Canadian climate and energy policy using Regional and Strategic IAs

The NEB Expert Panel, like many before it, has recommended that federal, provincial, territorial and Indigenous governments collaborate to produce a coherent and clearly defined national energy strategy. The NEB Panel further remarks that “there are no pre-determined criteria or set of rules that can satisfactorily adjudicate the types of tough decisions involved in major project approvals.” We agree, and we believe that, in addition to implementing all existing climate and energy policy commitments, governments should undertake Regional and Strategic IAs to fill this informational gap.

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. In this sense, the NEB Panel considers it to be “unreasonable and unfair to expect any regulatory agency to make or interpret such policies [such as climate policies] in the absence of guidance.” While the solution to this challenge, in the NEB Panel’s view, could be a fulsome Canadian energy strategy, we believe that Regional and Strategic IAs offer an opportunity to study and set goals for the energy system at a higher level than the individual project.

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<sup>4</sup> Strategic Environmental Assessments, as defined by the Canadian Environmental Assessment Agency, could be materially more limited in scope than Strategic Impact Assessments as defined by the EA Panel. We therefore will use “IA” instead of “EA” throughout much of this submission to allude to the need to consider factors beyond the environment, including health, economic outcomes and other sustainability criteria.

Strategic and Regional assessments are planning tools, currently available to federal government agencies, and are critically underused.<sup>5</sup> Strategic and Regional IAs provide a forum for Canadian governments, Indigenous peoples and the public to establish needs and goals for given industry sectors or geographical regions. They can be used to set baseline impact thresholds with respect to impacts on water, air, land, species, and/or community health and well-being. Used effectively, Strategic and Regional IAs could accommodate the policy debates for which project EAs have currently become a proxy. The NEB Panel report does not focus on these tools, though importantly, it does recognize that projects should be tested against the results of Strategic and Regional EA.

Notwithstanding the jurisdictional challenges that this will present, the EA Panel 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.”

The EA Panel report recognizes that all levels of IA must be understood as planning tools—a recognition that we believe to be crucial—and provides detailed thinking on how Strategic and Regional EA can address many of the concerns in the existing regime. The EA Panel recognizes the immense opportunity to use Strategic IA to link new federal policies to proposed projects, including on climate change. **We believe that sections 3.6.1-2 of the EA Panel report present a strong starting point for building a framework for Strategic IA.** In addition, we propose that there is an opportunity to establish a clearer directive for when Regional and Strategic IA would be required, and to entrench this directive in reformed NEB / EA legislation.

**We fully support the call for a Strategic IA on climate change** and offer the following reflections on how to move forward with this on the near term:

- At COP22 in Marrakech, Morocco, Canada released its Mid-Century Long-Term Low Greenhouse Gas Development Strategy. While a commendable first step, Canada has yet to articulate a link between its 2030 approach (via the PCF) and its longer-term obligations to achieve decarbonization. Further, the Mid-Century Strategy did not contain policy prescriptions for key sectors or regions, or discuss how federal, provincial and territorial governments could build on their existing climate and energy policy architecture to align with the 2050 reduction goals articulated in existing literature.
- In light of the commitment to 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.
- While the EA Panel recommends a strategic climate IA on the PCF, we are concerned that this is neither the most urgent nor value-added anchor point. Instead, we encourage the Government of Canada to scope its strategic climate EA around its mid-century obligations. This is strategic for a number of reasons: (1) it is more likely to align with the long-term investment and operational scale of major energy projects; (2) it would produce critical information to support Canada’s implementation of the Paris Agreement (and would act as preparation for the 2018 Facilitative Dialogue<sup>6</sup> process) in ways that the PCF, by nature of its 2030 timescale, cannot; (3) it would reduce long-term ambiguity for industry, minimize the likelihood of stranded assets, and support evidence-based policy and planning over a sufficiently useful timeframe.

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<sup>5</sup> 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](http://www.oag-bvg.gc.ca/internet/English/parl_cesd_201601_03_e_41017.html)

<sup>6</sup> In 2018, the first stock-taking exercise under the Paris Agreement, referred to as a “Facilitative Dialogue,” will occur. This is an essential opportunity to encourage countries to enhance their NDCS in order to close the emissions gap and secure successful implementation of the Paris Agreement.

In today's world, an energy strategy must be a climate strategy — and vice versa. Merging the EA Panel's recommendation on Strategic and Regional IA with the NEB Panel's clear desire to reduce the policy-related burden on individual project proposals presents a clear and practical opportunity for the Government of Canada to modernize federal energy project review landscape and align it with the country's broader climate and energy objectives.

## 2. Mandate

### National Interest Determination

The NEB Panel has recommended replacing the current NEB with a modern Canadian Energy Transmission Commission (CETC). This body would have a narrower mandate that is more explicitly focused on regulation and not on policy or data: it would have the “mandate and authority for the licensing of transboundary pipeline and transmission line projects, including the imposition of specific conditions on project proponents.”

However, as per the NEB Panel's proposal, the CETC would not have a mandate to consider whether or not a proposed project is in the public interest as part of its assessment leading to a licensing decision. Instead, the review process will be split into two, beginning with a national interest determination (NID) by the Governor in Council (GIC). As proposed by the NEB Panel, the NID would involve a high-level assessment of “national policy/strategy, general route proposal, Strategic and Regional Impact Assessments, effect on Indigenous rights, Aboriginal treaty rights and title, and significant land use.” This assessment, conducted by federal departments, would result in a recommendation by the Minister of Natural Resources and a subsequent decision by the GIC as to whether or not a major project aligns with the national interest. This assessment would not involve the CETC or the EA/IA body.

**We do not believe the two-part test involving a GIC decision before a project assessment to be a workable solution.** It is incompatible with evidence-based, quality decision making and will add to, not reduce, the perceived lack of transparency (and therefore the unforeseen delays) around project reviews.

One motivation for the NEB Panel's proposed NID is to ensure that proposed projects are tested against overarching federal energy policy and strategies. This is a worthy goal. However, the NID is not the right mechanism for this test. Without the results of a project EA, the government will not have before it the information it would need to determine the impact of a project on the aspects that are meant to be considered, including Aboriginal treaty rights and title, land use, or anticipated upstream and direct GHG emissions (required to assess the project against federal climate policy). When we speak of EA as a planning tool, we mean that it is the place where a fulsome analysis on costs, benefits and impacts is conducted on the basis of all necessary evidence. In our view the proposed NID does not support the NEB Panel's own stated intent of basing policy on “sound facts, evidence and analysis” and avoiding the “risk of fragmentation between assessment and regulatory oversight.” In fact, the NID is a prime example of ‘putting the cart before the horse’ and would unduly politicize energy decision-making at a time when governments are attempting to move the public discourse in the opposite direction.

A second motivation for the proposal is to reduce the uncertainty for proponents when they invest significant sums of money in support of a proposed project. However, we are concerned that by further reducing the transparency and increasing the politicized nature of the process, the pre-screening by the GIC will entrench the current patterns of mistrust and result in further delays, while simultaneously reducing the credibility of the joint CETC-EA body assessment that would follow a positive determination.

**Instead of pursuing a National Interest Determination or similar practice, we instead recommend the Government of Canada institute a sustainability-based project test as proposed by the EA Panel.**

## Project-specific assessments

The NEB Panel has recommended that the CETC be “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.”

Thus, in the NEB Panel’s proposal, the CETC partially retains the responsibility currently held by the NEB as the responsible authority for environmental assessments (EAs) on proposed energy projects under its jurisdiction. However, in the case of “projects of national consequence” and “projects of significance” (differentiated from a third class of “smaller activities”), this review would be conducted by a Joint Review Panel (JRP) comprised of two Hearing Commissioners appointed by the new CETC, two appointed by the reformed EA body, and one independent.

Following reforms in 2010, the NEB and the Canadian Nuclear Safety Commission are the only federal agencies who conduct their own EAs —all other federal EAs are conducted by the Canadian Environmental Assessment Agency (CEAA). In our submission to the NEB Panel, we highlighted a number of key concerns with this arrangement, which were echoed in the EA Panel report. These concerns are summarized as follows: (1) there is a risk of reduced consistency and predictability when there are multiple responsible agencies for EAs; (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 EAs.

For these reasons, we recommended to the NEB Panel that the centralization of the responsibility for EAs, begun in 2010, be carried to its conclusion —that assessments under the jurisdiction of the NEB be transferred to a reformed 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 essential NEB reform.

Importantly, our recommendations did not exclude a reformed NEB from participation in project EAs. In fact, we recommended that proposed energy projects under federal jurisdiction undergo a streamlined project review process, led by the reformed federal EA body, with technical contributions from the modernized NEB.<sup>7</sup> Recognizing that the NEB has core expertise in the design, operation and economic aspects of energy projects, we also recommended that within this streamlined review process, the NEB should retain a technical (not adjudicative) role by providing input to the EA process. This “technical and economic viability assessment” would incorporate the criteria set out in the current test of public convenience and necessity as outlined in Section 52(2) of the NEB Act.

Together, this EA body-led review process could credibly and effectively test the technical and economic viability, as well as contributions to sustainability, of proposed projects.

**In that spirit, we do not oppose the proposal for a joint CETC-EA body review process, should the following conditions be in place:**

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<sup>7</sup> See a schematic diagram for proposed NEB / CEAA process flow here: <http://www.pembina.org/reports/neb-paper-structure-top-logo.pdf>

- That, irrespective of the final governance arrangement, proposed energy projects are subject to a fulsome impact assessment, in accordance with the reformed EA law, and in the same way that other major projects are reviewed – as opposed to a more limited regulatory review.
- On all fronts, that the review process follow the process outlined in the new EA legislation which would be applicable to all major projects under federal jurisdiction, including with respect to the stages of the review, the tests applied to the project, the opportunities and support for participation, and the process of engaging with Indigenous peoples.
- That the arrangement is leveraged as a way to harness the core competencies of both organizations, recognizing that the EA body has core competencies with respect to environmental and social impacts and should therefore lead the IA process.

## Final decision

The NEB Panel also remarks that “there are no pre-determined criteria or set of rules that can satisfactorily adjudicate the types of tough decisions involved in major project approvals” and thus arrived at the “inescapable conclusion that the Governor in Council must make the ultimate determination of whether or not a project is in the national interest after Indigenous Consultation and public engagement.” **While we agree that the current regime lacks decision-making criteria and tradeoff rules to guide decision making, we do not agree that this is a natural state of affairs.** Indeed, by developing clear guidelines for implementing existing federal policy (as the NEB Panel calls for), these criteria and rules could be in place. **A Strategic IA must be, in our view, the first step on the path to setting this framework.**

We do, however, agree with the NEB Panel that some aspects of energy decision-making may be difficult to foresee in policies and strategies, and as such, **we do not oppose the GIC having a role in final decision**; however, it is unworkable to have a GIC determination precede the project’s assessment.

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. To address this concern, 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 detailed decision statements, including discussion of trade off rules considered, be released** 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. We would therefore expect some discussion about the views and considerations of impacted nations to be present in the final decision statement.

## 3. Project review

### Determining the need for a review: triggers and project lists

The NEB Panel’s report stresses that under its proposal, “every regulated activity is reviewed commensurate with its scale and impact, without exemption.” It suggests three categories of projects as shown in Table 1 below:

Table 1. Levels of assessment as proposed by NEB Panel

Scale of project	Review process
Projects of national consequence	NID by GIC, and detailed assessment by joint CETC-EA body panel
Projects of significance	Detailed assessment by joint CETC-EA body panel
Smaller activities	Assessment by CETC

However, the NEB Panel unfortunately does not clarify what would constitute consequence or significance. In order to advance the NEB Panel’s recommendation, the Government of Canada can look to the EA Panel’s thinking on triggers. To determine whether projects should undergo an EA, the EA Panel has proposed the development of a revised Project List in addition to two new possible triggers that would apply to projects not on the list. The first of these criteria would serve to require an EA for projects that have the potential to impact present and future generations in a way that is consequential. We support this direction but submit that definitions of significance and consequential must still be developed.

The NEB Panel envisions detailed project reviews occurring under the joint purview of the CETC and the EA body. The Panel emphasizes the importance of the EA and the licensing considerations (e.g. technical, economic aspects) to be assessed in an integrated way, which we fully support.

The NEB Panel does not, however, recognize that the nature of these existing tests (EA and licensing) need to be improved. In our submission to the NEB Panel, we outlined the need for a shift to a sustainability approach to decision-making on energy projects, in contrast to the current approach which focuses on the “significance” of impacts. The EA Panel report also recognized that the current approach to environmental assessment focuses on making proposed projects less harmful, rather than seeking to maximize long-term benefits.<sup>8</sup> A test for contribution to sustainability is a stronger method to determine the public interest. In fact, as the EA Panel recognizes, some project review panels in Canada have chosen to employ this approach as a response to the lack of definition of the public interest in existing legislation.

**The EA Panel recommends a full shift to a sustainability-based assessment framework,** recommending that the name of the federal assessment process be changed from ‘Environmental Assessment’ to ‘Impact Assessment’ and that federal assessments consider factors “beyond the bio-physical environment to encompass all impacts likely to result from a project, both positive and negative.” This shift is reflective of a move toward “next-generation environmental assessment,”<sup>9</sup> which we strongly support.

We emphasize that climate considerations—whether a project supports or hinders Canada’s ability to respect its commitment to the Paris Agreement—should be explicitly recognized as part of this sustainability framework. To this end, we note that the EA Panel recognizes “greenhouse gas emissions of national significance” as being under of federal jurisdiction.

As it relates to climate change and incremental GHG impacts, we suggest beginning the work to improve the climate change mitigation element of project reviews with a two-part process:

- First, conducting a Strategic IA on climate would help to establish thresholds and objectives for sectors and regions that would serve to clarify the triggers that could be developed.

<sup>8</sup> 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](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2670009)

<sup>9</sup> *Fulfilling the Promise*.



- Second, incorporating into the new EA and NEB legislation a dual project list and trigger system that ensures projects with material climate impacts (in addition to triggers on other sustainability-related issues) be assessed relative to the thresholds and objectives as determined through the Strategic IA on climate change.

## 4. Governance

### Roles, responsibilities and requirements of Hearing Commissioners

In our submission to the NEB Panel, we supported the elimination of the current expectation that Board Members play the dual role of Hearing Commissioner and Director of the regulator. By proposing a move to a Trustee model, the NEB Panel has made recommendations in this direction, which we fully support. We also support the proposal to have a larger pool of Hearing Commissioners, from which individuals with the right mix of expertise can be selected for a given project.

Further, we highlighted that an understanding of public participation should be an important quality sought when selecting Commissioners. We were pleased to see that the NEB Panel has recommended that the essential competencies of Hearing Commissioners include a wider range of knowledge, including Indigenous traditional knowledge and worldview and engagement. Moreover, the NEB Panel has recommended that a competency matrix for Commissioners be developed through engagement with stakeholders and Indigenous peoples and updated regularly. We agree that a competency matrix, made available to the public and routinely updated, is an important improvement to the existing selection process.

## 5. Information

### A new energy information agency

The NEB Panel has further recommended the creation of a new Canadian Energy Information Agency (CEIA) that would be “accountable for providing decision-makers and the public with critical energy data, information, and analysis.” With this recommendation, the NEB Panel has rightly recognized the dearth of coherent, timely and harmonized energy data in Canada. Indeed, the NEB Panel envisions an “enhanced government role for the collection, analysis, and dissemination of information about energy production, transmission, use, future trends, and associated carbon emissions, to inform policy-makers, industry, Indigenous peoples, academia, civil society, and Canadians” beyond the NEB’s current mandate.

**We strongly support the creation of a new, independent agency with the explicit and enhanced mandate to produce, gather and accessibly provide energy data, information and analysis.** An independent agency is particularly promising because it would have the capacity to address three key concerns: expanding energy forecasting, harmonizing energy data, and improving access to data.

We heard from our expert interviews that the data produced by the NEB needs to be improved and coordinated in a variety of ways in order to be useful and reliable for researchers and other stakeholders. These improvements will fundamentally increase the potential for informed participation at all stages of project reviews and monitoring, and will support strong, evidence-based decision making. Most importantly, this arrangement would ensure that the production of energy data and scenarios is independent of regulatory activities. As the NEB Panel says, the agency would have the “mandate and ability to tell it like it is on energy matters.”

We are pleased to see the NEB Panel's report recognize that future energy supply and demand will look very different than it does today based on market forces and the need to respond to climate change. In this future, transmission lines, particularly those that cross provincial borders, will be increasingly important.

**As such, we support the NEB Panel's recommendation that the CETC's enabling legislation have "provisions to review and strengthen its capacity with respect to transmission lines...and the integration of new forms of (renewable) energy into the national grid."**

Much has been said of the NEB Panel's suggestion that the CEIA be located "proximate to partners in Statistics Canada, Natural Resources, and Environment and Climate Change Canada, to the extent possible." We understand from the NEB Panel's report that this doesn't necessarily mean that jobs from Calgary would be transplanted to Ottawa. The Panel clearly suggests that Canada needs to do much more on energy data. So with commensurate funding, this agency would create new jobs and build new expertise.

**We suggest that the government immediately strike a multi-stakeholder working group to further develop this idea and identify what elements must be enshrined in new legislation.**

## Nature and scope of energy forecasting

As we underscored in our submission to the NEB Panel, forecasting the impacts of Canada's transition away from fossil fuels will require analytical capacity to consider how Canada's energy systems might evolve into the future due to climate policies or shifting markets for high-carbon goods. As the NEB Panel has rightly recognized, the nature of our energy system will look very different as technology, public opinion and the global climate policy landscape evolves.

Currently, the NEB's modelling, for example through its biennial publication Energy Futures, does not consider scenarios in which Canada and the world take progressively more stringent action to limit global GHG emissions, in alignment with successful implementation of the Paris Agreement to which Canada has committed. As a result of this misalignment (and, in some cases, time lag) between Canada's energy modelling and domestic and global shifts in climate policy, the NEB's energy supply and demand projections to 2040 are more optimistic on growth in Canada's fossil fuel extraction sectors than those of our international peers. This has dangerous implications for decision-making.

The NEB Panel has similarly recognized that "this [situation] in turn creates an analytical framework that does not include a wide enough range of scenarios and inherently shades decisions in favour of expanded fossil fuel usage. Change is required now, and the current model is not sustainable." **We fully support the Panel's call for new scenarios, and further recommend that an updated Reference Case scenario be consistent with successful global implementation of the Paris Agreement.**

We also note that, regardless of who produces energy scenarios in Canada, the process design must consider how that information enters the project review cycle. Currently, NEB Energy Futures publications are only considered as evidence in an assessment should a proponent or intervenor bring them forth. We recommend that the Government of Canada consider the ways in which it could make mandatory the inclusion of an updated, Paris Agreement-compliant Reference Case in a joint CETC-EA body review process.

## Harmonization of energy data

In our submission to the NEB Panel, we highlighted that energy and pipeline-related data in Canada needs to be coordinated across those bodies that are currently responsible: NEB, Natural Resources Canada, Statistics Canada, Environment and Climate Change Canada, Transport Canada, the Transportation Safety

Board, and provincial agencies. Both Expert Panels also expressed the need for data harmonization. The new information agency is an excellent candidate to play this coordination role.

The NEB Panel has proposed that safety and operations data remain under the purview of the CETC. We believe that could be appropriate, but a one-stop shop on all data—including safety and operational data—is much preferred. If the Government of Canada decides to carve out certain types of data as per the NEB Panel’s recommendation, we recommend the accessibility and timeliness of this data itself be similarly improved.

## Access to improved energy and project data

We note that the proposal for a new CEIA also supports the recommendation from the EA Panel 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. This would be part of the responsibility of the CEIA.

Other key improvements suggested by participants in our interviews were:

- Align all government datasets in terms of timing, units, and assumptions.
- Collect and produce demand-side energy information.
- Aggregate province-level data, particularly electricity data.
- Provide data in a format that is more accessible for researchers, and others, to use (for example, spreadsheet instead of PDF format) and make assumptions explicit.
- Note and comment on inconsistencies between NEB/CETC data and data published by other federal agencies, where applicable.
- Make new data available to the public in a timely manner, and update it on a regular basis when possible.
- Provide energy- and pipeline-related data in an open format that encourages public access and understanding.

## 6. Participation

### Who can participate

In our submission to the NEB Panel, we underscored that the current limitations on who can participate in project reviews are a barrier to the credibility and the perception of independence of the regulator. 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 Expert Panels have, crucially, recommended the removal of the “standing test” under the NEB Act and the opening of the process to a wider range of**

parties. Please refer to page 35 of our submission to the NEB Expert Panel for a case study on participation directives at the Alberta Energy Regulator.

## Opportunities for participation and pre-project engagement

Both Expert Panels have recognized the need to expand the preliminary phase of projects and formalize Indigenous and public participation at this earliest stage of the review. The NEB Panel states that “we see the regulator playing a stronger role than it does today in establishing a framework that works for everyone to guide early conversations about possible project proposals, and to improve the quality of project plans” and recognizes scoping as an important part of the process.

We welcome this recognition. 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 of a project EA could lessen conflict later in the process and provide much greater certainty for proponents.

The EA Panel goes further, recommending the instatement of a formal Planning Phase, which would allow for greater participation in the task of scoping the study and review, and provide greater predictability to proponents. We strongly support this direction, noting that funding will be required to support involvement in this earlier phase as well.

Both Expert Panels have also recommended enabling more diverse forms of participation in project decision-making. In particular, the NEB Panel evokes “a future where interested parties can make their own determinations about the extent to which they would like to participate, and the responsibilities they bear in so doing” and recommends (at a minimum) reinstating the option for anyone to submit a letter of comment. Similarly, the EA Panel endorsed 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 such a framework could be enshrined in the legislation or regulations.

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.

## Enabling meaningful participation

The NEB Panel recommends three innovative mechanisms to support participation that we believe merit highlighting: a Public Outreach Office within the CETC, an independent Public Intervenor Office, and Regional Multi-Stakeholder Committees.

On the second two mechanisms, we suggest that the government immediately strike multi-stakeholder working groups to further develop these ideas and identify how they can be enshrined in new legislation.

### Public Outreach Office within CETC

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 are pleased to see that both Panel reports acknowledge and discuss the lack of navigability and transparency of project information.

In response to this situation, the NEB Panel recommends the establishment of a Public Outreach Office within the CETC that would be “charged with engaging citizens and helping them to navigate the many

processes and documents that can represent a barrier for participation in the regulatory system” within the CETC. We support this proposal and emphasize that, in addition to information related to project reviews, the site should include monitoring and operational data. All data should be searchable and available by location.

### Independent Public Intervenor Office

Second, the NEB Panel recommends the establishment of an independent Public Intervenor Office with the mandate to “both inform participants of the mechanics of hearing processes, and most importantly to directly represent the interests and views of interested parties if they wish.” We believe that this Office would be an excellent complement to simultaneous reforms to make the process more accessible to groups and individuals, provide better information and permit diverse forms of participation. While not all groups will choose to use this service, many will benefit from its guidance in presenting their viewpoints, gathering information, and collaborating with others. This mechanism could have the side benefit of rendering project reviews more efficient and less adversarial. It has major potential to better support the involvement of landowners in project reviews.

While more oriented toward consumers and the provincial energy context, the Ontario Energy Board’s Consumer Charter<sup>10</sup> provides an example of an energy regulator working with stakeholders to inform them of their rights and facilitate their input.

To complement the expertise of Hearing Commissioners, we recommended in our submission to the NEB 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. The Public Intervenor could play a role in calling upon these experts to support participants when necessary.

### Regional Multi-Stakeholder Committees

Finally, the NEB Panel recommends the establishment of Regional Multi-Stakeholder Committees “meeting on a regular basis with a mandate to review and discuss every aspect of the CETC’s operations and throughout the lifecycle of regulated infrastructure” in a given region. We applaud this direction and highlight that Indigenous peoples and landowners have particular potential to benefit from this approach.

## Financial support for participation

We would not want the new mechanisms proposed above to distract us from the important problem of participant funding. As recognized by both Expert Panels, meaningful participation requires resources for legal advice, scientific research and time. Participants in our expert interviews made it clear to us that the current level and method of financial support offered to participants is vastly inadequate to support meaningful intervention. We know this as well from our first hand experience as intervenors.

The NEB Panel has recognized that participant funding merits review, and the EA Panel has recommended 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.” We recommend further clarity and specificity on this point, and ultimately a requirement for regular review of participant funding practices be enshrined into forthcoming legislation.

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<sup>10</sup> Ontario Energy Board. “Consumer Charter.” (2017). <https://www.oeb.ca/consumer-protection/how-we-protect-consumers/consumer-charter>; Mowat Centre. *Energizing Consumers : A proactive energy consumer charter for Ontario*. (2016). <https://mowatcentre.ca/energizing-consumers/>

## 7. Conclusion

We appreciate the opportunity to provide comments on the NEB Panel's report in support of 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. We would also like to commend, once more, the NEB Expert Panel for their detailed and thoughtful work on some of the most challenging and important questions about energy regulation in Canada today.

Yours sincerely,



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