



Good governance in the era of low carbon

A vision for a modernized National Energy Board

Over the last decade, energy infrastructure proposals — including fossil fuel projects like oilsands pipelines and renewable energy development like wind farms — have become increasingly contentious across Canada. Public trust in energy decision making is at an all-time low, brought on by rapidly changing realities in, and expectations of, the energy sector.

The evolving values of Canadians, global response to climate change, exertion of Indigenous rights and title over natural resource management, and changes to the powers and role of regulatory bodies have all dramatically changed the landscape in which major resource projects are considered. These social, political and economic trends, coupled with a chronic lack of adequate public forums for Canadians to engage with federal and provincial decision-makers on energy and climate, have resulted in individual project reviews becoming a proxy for sector and economy-level policy discussions.

In response to this situation and other structural failures, the federal minister of natural resources was mandated by the prime minister to modernize the National Energy Board (NEB), Canada's federal energy regulator. The NEB has three main functions: studying and making recommendations about proposed projects, primarily interprovincial pipelines and powerlines;

overseeing the life cycle operation of energy infrastructure; and producing energy information. It is mandated to do these things in the “Canadian public interest,” a concept which is not defined in the NEB Act. The NEB modernization process, led by an expert panel, will review the NEB's structure, scope, governance model and expertise¹ with the aim to strengthen the regulatory process and ensure Canada has a modern and effective regulator, particularly as the world shifts to cleaner sources of energy.

In this discussion paper, we set out a vision and principles for modernizing the energy regulation regime in Canada. We also identify a number of questions that we believe must be examined by the expert panel in order to realize a fulsome review as outlined in the panel's Terms of Reference, and outline preliminary recommendations to the expert panel.

Vision for modernization

The federal government has made strong international and domestic commitments to mitigate climate change by ratifying the Paris climate agreement, setting greenhouse gas emissions reduction targets for 2020 and 2030, and adopting a pan-Canadian plan to reduce emissions across all sectors of the economy.

However, national and sub-national energy regulators have not caught up to these policy trends. In our view, energy regulation could play an essential role in enabling — not hindering — Canada’s road to decarbonization. In its current function the NEB, established in 1959 when these imperatives were nonexistent, fails to assess climate change impacts in its activities, from project reviews to data production and monitoring.

Modernizing the NEB should be about good governance in the era of low carbon: applying best-available climate science to reviews of major infrastructure projects, ensuring project economics are consistent with low-carbon pathways, and protecting Canada’s long-term public interest by quantifying the climate risk — and opportunity — associated with new projects. In order to ensure the NEB can play an effective role in Canada’s transition to a low-carbon economy, the external environment in which project proposals are made must be reformed. Specifically, national and sub-national governments must implement and enforce climate policy commensurate with achieving Canada’s domestic and international climate commitments. This will encourage (though not guarantee) the selection of projects that support Canada’s transition to a decarbonized economy before they arrive at the regulator.

NEB modernization is also, crucially, about restoring public and stakeholder confidence in energy regulation, and facilitating nation-to-nation discussion and decision-making between the Government of Canada and Indigenous communities. Achieving these distinct but complementary goals will require meaningful public and Indigenous participation at project-specific reviews, and established and maintained regulatory independence. Achieving this will require a serious examination of opportunities to expand, divide and shift the various elements of the NEB’s current mandate to improve the ways in which the Board interacts with communities.

To that end, we expect the federal government’s efforts to modernize the National Energy Board will deliver a renewed structure well equipped to deliver evidence-based, transparent and inclusive energy regulation aligned with Canada’s domestic and international climate commitments, and in the spirit of reconciliation with Indigenous peoples. We expect a modernized NEB to adhere to reflect the following elements of this vision:

- **Modern regulators should reflect the values of the society in which they operate.** The values of the Canadian population have changed dramatically since the NEB was established in 1959, including with respect to energy, the environment, and Indigenous rights and title. As such, regulators should support Canada’s compliance with the Paris Agreement, the United Nations Declaration on the Rights of Indigenous Peoples and not obstruct the country’s ability to achieve the 94 “Calls to Action” of the Truth and Reconciliation Commission of Canada.
- **Modern regulators should support Canada’s commitment to the Paris Agreement on climate change.** Canada has made clear international commitments to mitigate climate change, including commitments to reduce national emissions by 30% below 2005 levels by 2030, and to develop a mid-century greenhouse gas reduction strategy. Regulators should not set or be the primary implementers of climate policy — objectives must be set at a higher level, through a participatory process, and a corresponding policy framework must be in place. However, regulators must ensure that the construction and operation of infrastructure supports, and does not compromise, this overarching framework.

- **Modern regulators should conduct their work in the spirit of reconciliation with Indigenous peoples.** As a first step, regulators should move to uphold the principles and obligations as outlined in the United Nations Declaration on the Rights of Indigenous Peoples, particularly given the Government of Canada² and the Province of Alberta³ have articulated their support for and intention to observe the Declaration.
 - **Modern regulators should be accessible to the public, make evidence-based decisions, and be free from bias.** Public trust in the NEB is at an all-time low because of its perceived (and/or real) state of industry capture and the politicization of its decision-making. Decisions on infrastructure and policy will always have a values-based component; however, many aspects of environmental assessments and project approvals are currently needlessly discretionary. A trusted energy regulator that conducts due process without unnecessary delay is in the interest of the Canadian public and industry.
 - **Modern regulators should aspire to be world-leading and to deploy predictable, rigorous and inclusive practices for natural resource and infrastructure management.** Regulators should ensure high quality, inclusive project reviews aimed at increasing and maintaining trust in the regulator across all interested parties. A regulator's structure alone does not determine its effectiveness and credibility — internal culture, knowledge and bias play at least as important of a role, and are even harder to change. However, changing the structure of a regulator can work in combination with other efforts to improve its independence, predictability, and transparency.
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Nine tenets of modern and effective energy regulation

Energy regulators provide a vital public service to Canadians. The NEB, with its mandate to regulate pipelines, energy development and trade in the Canadian public interest, will only become more important as Canada continues its transition to a low-carbon economy.

As such, the NEB modernization process as outlined by the federal government is a historic opportunity to equip Canada with a trusted and empowered institution that truly operates in the public interest.

In order to get there, significant reforms to the NEB Act, and to the operating culture and practices at the Board, are required. We view the following tenets as essential to this transformation and to modern energy regulation in Canada – spanning the full cycle of project review, operation and monitoring, and data production.

1 Energy regulation should occur in an environment where strong energy and climate policies and programs are in place.

These policies and programs must be developed through participatory processes, align with Canada's international climate commitments, and be rooted in scientific and technical evidence. Project assessments should question the extent to which energy infrastructure is aligned with, and helps achieve, these policies.

2 Project-specific market evaluation and needs assessments should draw on data and forecasting that examines the implications of domestic and international climate action on the economic viability of proposed projects.

This includes scenarios where all parties to the Paris Agreement, including Canada, respect commitments to limit global warming to well below 2°C and to achieve greenhouse gas emissions neutrality by the second half of the century.⁴

3 Energy regulators must be independent of bias and interferences from government and non-government stakeholders.

Independence should be established through the regulator's funding model as well as the selection criteria, expertise and mandate of Board members conducting hearings.

4 Energy regulation should be conducted on the basis of independent information of the highest quality, including information provided by the proponent and third parties.

This should be achieved by reducing potential conflicts of interest between industry and consultants and providing regulators sufficient time and resources to engage outside experts when necessary.

5 Energy regulators should proactively and predictably support involvement of all interested parties and the public as a fundamental component of evidence gathering, decision-making and monitoring.

Interested parties should have access to the information, resources and expertise required to present their interests and cross-examine proponent information.

6 Energy regulation must be conducted in partnership with First Nations, Métis and Inuit nations.

Natural resource management and energy regulation are cornerstone issues of reconciliation between the federal government and Indigenous communities. As such, the legitimacy of the NEB modernization process in part hinges on the extent to which the resulting regime can ensure the full participation of diverse Indigenous groups in the modernization review.

7 Energy regulation should result in project decisions that are transparently documented and defensible.

The final decision-making body must be required to provide detailed and direct responses to questions and recommendations presented through the decision-making process.

8 Energy regulators should ensure frequent and credible life cycle monitoring and oversight of projects within its purview.

Energy regulators should employ a precautionary approach to oversight, and should enforce and ensure industry compliance with its full suite of regulations.

9 Energy regulation should be recognized as being distinct from, although closely linked to, planning tools such as environmental assessment.

An environmental assessment (EA) is the “formalized process of identifying and assessing the impacts and possible contribution to sustainability of a proposed development, decision, plan or policy and then planning to avoid or mitigate negative impacts and advance sustainability priorities.”⁵ EA can be conducted for individual projects, for geographic regions or for sectors of natural resource development. Functionally, an EA is a planning tool — making it distinct from the more narrowly-focused scope of energy regulation. Ideally, EAs and energy regulation should be linked so that each fully informs the other.

Key questions for modernization review

The NEB has repeatedly demonstrated that it is not able, in its current form, to realize the vision for modern and effective energy regulation articulated above.

Some describe this as a gap between the “regulatory license” (what a project proponent must do/demonstrate in order to get the government approvals required to proceed) and the “social licence” (what a project proponent must do/demonstrate in order to obtain broad-level public support for its project). Modernizing the regulator is an opportunity to address this gap.

In light of this, we encourage the expert panel to consider the following questions about the NEB’s structure and mandate:

- Does the NEB have sufficient expertise to conduct environmental assessments, or is a different body better placed to bear that responsibility?
- Does the NEB have the expertise regarding climate change that is required in a modern energy regulator?
- Is the NEB monitoring energy projects throughout their life cycle in a way that protects the public interest? Could greater independence be achieved by assigning these functions to a separate agency?
- Is the current governance model (hearings commissioners appointed from within the NEB’s governance board) the best model to ensure independence and public trust?
- Could the NEB have an expanded role in energy data production and as a public educator on energy? Could greater independence be achieved by spinning off these functions into a separate agency similar to the Energy Information Agency (EIA) in the United States?
- Are the final decisions, currently made by the Governor in Council, defensible and transparent? What legislative mechanisms or structural changes could ensure greater accountability?



Modernizing the NEB should be about good governance in the era of low carbon: applying best-available climate science to reviews of major infrastructure projects.

Recommendations

In the sections that follow, we present a proposal for modernizing the energy regulation regime that entails changes to the NEB's mandate, structure, expertise and culture. While the following recommendations pertain only to the NEB, it is important to note that this proposal has been developed even as reform for the federal EA processes is underway. For energy projects, the EA and NEB project review processes, and their accompanying Acts, are closely linked. This proposal is based on certain assumptions about EA reform and may be modified as more information becomes available.

Structure and decision-making on major projects

- Expand the NEB's role in energy data production and as a public educator on energy.
 - Retain the NEB's responsibility for conducting a needs assessment for energy projects, drawing from improved datasets and forecasts that consider action on climate change. These needs assessments will include having regard to the provisions currently set out in section 52(2a-d) of the NEB Act (availability of commodities, existence of markets, economic feasibility and financial responsibility of the applicant).⁶
 - Revise timelines for project reviews according to the scale of the project, with the possibility of extension on a discretionary basis.
 - Modify the NEB Act to explicitly recognize the link between energy regulation and climate objectives.
 - Shift the responsibility for conducting full EAs of energy projects (according to next-generation principles⁷) to a new or significantly reformed federal EA body.⁸ This allows for a deep and consistent expertise on environmental impacts to be developed and maintained within this organization.
- In this revised energy project review process:
- a. The NEB provides a report to the EA reviewing body on its "needs assessment".
 - b. The process is set up in such a way to enable nation-to-nation collaboration on processes and decision-making with Indigenous nations.
 - c. Support systems for the full and meaningful participation of the public and any interested parties are established.
 - d. Provisions for ensuring the independence of commissioners, participating experts and project documents are in place.
 - e. The Governor in Council retains the responsibility for making final decisions with respect to project necessity and environmental impact, but must provide more detailed decision statements and rationale. To achieve this end, the relevant Acts must be modified to require that the GIC provide detailed reasons for its order, including responding directly to any questions raised and recommendations developed through the project review process.

Mandate and future opportunities

- Modify the NEB Act and CEA Act to recognize the link between energy regulation and climate objectives.
 - o Integrate this recognition into the preamble and/or statement of objectives, in order to weave these considerations into all functions, not just adjudicative functions.
 - o Modify section 52(2) of the NEB Act (or its future equivalent) to require that market scenarios involving action on climate change be included.
 - o More explicitly define “the public interest” to include the contribution of a project to national sustainability goals and protection of Indigenous rights.
- Conduct sector-level strategic EAs in order to establish objectives and principles for given energy sectors before individual energy projects arrive at the regulator for consideration.
- Establish an agency with a stronger mandate to produce Canadian energy data and educate the public on energy and climate.
 - o Require the production of scenarios that consider Canadian supply and demand in a world where global warming is limited to well below 2°C (in alignment with the Paris Agreement) through increasingly stringent domestic and international policies.⁹
 - o Modify the NEB Act (or future equivalent) to ensure that these new forecasts are considered in the needs assessment for proposed projects by default.
 - o Require that the energy information agency provide details on the assumptions used in its forecasting.
- Coordinate and harmonize data currently produced by the NEB with those produced by NRCan, StatsCan, ECCC, Transport Canada and the Transportation Safety Board.
- Provide the adequate financial resources and new expertise necessary for an agency to adopt these new and expanded responsibilities.

Governance and operations

- Revisit the regulator funding model to ensure independence and prevent undue industry influence (it is, however, appropriate that industry support the energy regulator’s operations).
- At the agency/body that conducts hearings, make the following changes to the manner in which those that preside over the hearings (commissioners) are selected:
 - o Appoint commissioners from outside of the agency (not from among the members of the governance board of the regulator as in the current NEB model). These individuals could be pre-selected and be available to sit on review panels as they occur.
 - o Ensure the diversity and representation of commissioners, including the representation of different regions and Indigenous peoples, including by removing the requirement that permanent commissioners must reside in Calgary.
- o Embed strict merit-based requirements for the appointment of commissioners in the appropriate Act. Required expertise should emphasize the need for a strong understanding of the procedures and ethics of public participation.
- Implement a blind selection process for industry consultants hired by proponents to complete Environmental Impact Statements and support project applications, such that these consultants are in an improved position to provide independent advice and information.

Annex 1: Current role and function of the National Energy Board

Current adjudicative functions

The NEB “regulates pipelines, energy development and trade in the Canadian public interest.”¹⁰

Test of public convenience and necessity:

- When reviewing projects, NEB decides whether or not to issue a “certificate of public convenience and necessity,” having regard to (NEB Act, Section 52(2)):
 - (a) the availability of oil, gas or any other commodity to the pipeline;
 - (b) the existence of markets, actual or potential;
 - (c) the economic feasibility of the pipeline;
 - (d) the financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity to participate in the financing, engineering and construction of the pipeline; and
 - (e) any public interest that in the Board’s opinion may be affected by the issuance of the certificate or the dismissal of the application.
- The NEB provides a recommendation report to the Governor in Council as to (a) whether or not the certificate should be issued based on the criteria above and (b) should the certificate be issued, what conditions should apply (NEB Act, Section 52(1)).
- This report must be submitted no longer than 15 months after the application was declared complete (NEB Act, Section 58(5)).
- The Governor in Council directs the NEB to issue the certificate, with or without conditions, or dismiss the application. The order must set out the reasons for making the order (NEB Act, Section 54).

Test of significant and adverse environmental effects:

- For projects requiring a certificate from the NEB (as described above) and appearing on the designated project list under the CEA Act, the NEB becomes the responsible authority for studying the environmental impact of the project.
- The NEB is responsible for ensuring that any “interested party” is provided with an opportunity to participate in the project review. “Interested parties” are limited to persons who “the person is directly affected by the carrying out of the designated project or if, in its opinion, the person has relevant information or expertise.”
- The NEB must consider the factors identified in Section 19(1) in its assessment.
- The NEB provides recommendations to the Governor in Council within the same report issued according to the public necessity and convenience test above. It must provide recommendations as to whether or not there will be “significant and adverse environmental effects” and whether or not those effects are “justified in the circumstances,” taking into account the mitigation measures and the follow up program that are to be implemented by the proponent (see CEA Act, Section 29(1)).
- The same timelines apply.
- The Governor in Council decides whether or not the project is likely to cause significant adverse effects and whether or not they are justified in the circumstances. They then direct the NEB to issue a decision statement to the proponent of the project including conditions, if any (CEA Act, Section 31(1)). The decision statement must be posted on the website.

Current data production and public education mandate

- The NEB is responsible for “studying and keeping under review... matters over which Parliament has jurisdiction relating to:
 - (a) the exploration for, and the production, recovery, manufacture, processing, transmission, transportation, distribution, sale, purchase, exchange and disposal of, energy and sources of energy in and outside Canada; and
 - (b) the safety and security of pipelines and international power lines.” (NEB Act, Section 26)
- The NEB must report on these matters to the Minister of Natural Resources from time to time, and can provide advice about energy matters to other ministers or government agencies of all levels.
- The NEB regularly publishes Energy Futures, a report providing long-term outlook on energy supply and demand in Canada. These projections are based on current conditions and policies.
- The NEB Act does not outline a specific mandate for public education on energy, but other NEB documents recognize this as part of its responsibility relating to its broader public involvement efforts.

Endnotes

1. Government of Canada, “National Energy Board Modernization” (2016). <https://www.canada.ca/en/services/environment/conservation/assessments/environmental-reviews/national-energy-board-modernization.html>
2. Kristy Kirkup, “Government supports Indigenous declaration without reservation,” *Canadian Press*, July 20, 2016. <http://www.cbc.ca/news/indigenous/government-supports-undrip-without-reservation-1.3687315>
3. Government of Alberta, “Ministers on task to implement the objectives of UN Declaration on Indigenous Rights,” media release, July 9, 2015. <https://www.alberta.ca/release.cfm?xID=3829383ECC178-FCCA-F36A-8D2EC714192D76A2>
4. United Nations Framework Convention on Climate Change, “Paris Agreement” (2015). http://unfccc.int/paris_agreement/items/9485.php
5. West Coast Environmental Law, “Environmental Assessment.” <http://wcel.org/our-work/environmental-assessment>
6. Currently, the NEB decides whether or not to issue a “certificate of public convenience and necessity,” having regard to (NEB Act, Section 52(2)): (a) the availability of oil, gas or any other commodity to the pipeline; (b) the existence of markets, actual or potential; (c) the economic feasibility of the pipeline; (d) the financial responsibility and financial structure of the applicant, the methods of financing the pipeline and the extent to which Canadians will have an opportunity to participate in the financing, engineering and construction of the pipeline; and (e) any public interest that in the Board’s opinion may be affected by the issuance of the certificate or the dismissal of the application.
7. For a summary of the principles upon which we expect the EA process to be reformed, please see “Twelve Pillars of a Next-Generation Environmental Assessment Regime” produced from a meeting of over 30 of Canada’s leading EA experts, academics, lawyers and practitioners: http://wcel.org/sites/default/files/publications/WCEL_FedEnviroAssess_ExecSum%2Bapp_fnldigital.pdf
8. Others have suggested that a new, quasi-judicial body be established to conduct EAs. This approach would be consistent with our proposal.
9. To do this, the EIA World Energy Outlook (WEO) 450-ppm scenario can be used as a guide, as well as future WEOs as they become available. Currently, the NEB’s base scenario assumes no action on climate.
10. “National Energy Board - fact sheet.” <https://www.neb-one.gc.ca/bts/whwr/nbfctsh-eng.html>



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