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West Coast Environmental Law Submissions on Modernizing the National Energy Board

Dear Sirs/Mesdames,

Please accept the following submissions on the proposals relating to the National Energy Board (NEB) contained in the Environmental and Regulatory Reviews Discussion Paper (Discussion Paper) released June 2017.

The Discussion Paper contains promising elements, but falls short of the mark of what is required to build a progressive, independent expert body capable of protecting the public by ensuring that proposed projects are economically viable in a carbon-constrained world. See our [“Making the Grade: A Report Card on Canada’s Proposal for Strengthening Environmental Laws and Processes”](#) for our preliminary evaluation of the Discussion Paper (uploaded separately).

West Coast Environmental Law is dedicated to safeguarding the environment through law. Since 1974 our staff lawyers have successfully worked with communities, non-governmental organizations, the private sector and all levels of governments, including First Nations governments, to develop proactive legal solutions to protect and sustain the environment. We have represented clients in National Energy Board reviews of such proposed projects as the Enbridge Northern Gateway pipelines and tankers project, and the Kinder Morgan Trans Mountain pipelines and tankers project (Trans Mountain).

We have submitted separate comments on *Fisheries Act* and federal environmental assessment (EA) reform, and have written you our recommendations on restoring lost protections under and modernizing the *Navigation Protection Act*. Many of our concerns with the Discussion Paper’s treatment of the National Energy Board with respect of environmental assessments (such as the proposed joint assessment model) are captured in our EA submissions and are not repeated here.

The recommendations set out below build on our [submission to the expert panel¹](#) appointed to review the National Energy Board (the Expert Panel) and reflect discussions with government pursuant to its release of the Discussion Paper. Our submission is not intended to be comprehensive; rather, it outlines priority issues of particular concern in the Discussion Paper as they relate to building a modern, trustworthy lifecycle energy regulator.

¹ West Coast Environmental Law, “West Coast Environmental Law submission to Expert Panel on NEB Modernization” (31 March 2017): https://www.wcel.org/sites/default/files/publications/2017-03-31-wcel_submission_nebmodernization_final.pdf.

POSITIVE ELEMENTS OF THE DISCUSSION PAPER

It is important to acknowledge the proposals in the Discussion Paper that to varying degrees support some of our recommendations to the Expert Panel. The most prominent of such proposals are:

1. Increasing public participation and dropping the “standing” test that currently excludes members of the public from NEB processes.
2. Inclusive monitoring and compliance activities in close collaboration with Indigenous peoples, communities and landowners.
3. Developing a separate model to deliver timely and credible energy information to Canadians.
4. Separating the roles of Chief Executive Officer and Chairperson of the NEB.
5. Enhancing the diversity of NEB members and increasing Indigenous representation.
6. Removing the Calgary residence requirement for NEB members.
7. Increasing Indigenous representation among the NEB and Hearing Commissioners.

In principle, we support these proposals while looking forward to seeing the details of how they are to be implemented.

RECOMMENDATIONS

1. NEB analyses should be focused on economic needs for and technical viability consistent with decarbonization goals

NEB analyses should focus on the economic need for and technical viability of a project, including the risk of stranded assets, and be consistent with Canada’s decarbonization goals and obligations. In particular, the legislation should require that the NEB’s economic needs analysis consider climate obligations and scenarios, and be aligned with climate change commitments and obligations, including at a minimum achieving decarbonization by no later than mid-century. It should also require the NEB to assess the possibility of stranded assets and the financial viability of decommissioning. Rather than be a responsible authority for environmental assessments of energy transmission projects, such NEB analyses should be an input into broader determinations of a project’s contribution to sustainability that would be made through a robust, comprehensive impact assessment process.

2. Legislation should include guiding principles and factors to consider, including consistency with a new impact assessment sustainability test

Legislation should include guiding principles and factors to consider when deciding whether to issue a certificate of public convenience and necessity, including climate change policy and international obligations, impacts on Indigenous rights and title, consistency with the UN Declaration on the Rights of Indigenous Peoples (UNDRIP), and impacts on local residents and municipalities. While the proposal to explicitly require consideration of environment, safety, social and health considerations in public interest determinations is welcome, we were concerned to see that the Discussion Paper does not contain a commitment to enshrining in legislation substantive goals or binding factors to consider in regulatory reviews.

As we note in our submission to the Expert Panel:

The public interest determination has traditionally been the test of energy regulators. Under the current regime, the NEB primarily conducts an economic needs test when determining the public interest. However, as many contributors at the dialogue session identified, public interest is not defined, and the omission of climate change, limiting of public participation and inadequate engagement with First Nations has put the NEB's public interest determinations in question. A more accurate description of the NEB's project review test is the evaluation of economic need for and technical viability of a project. While these are important inputs into the public interest, they are only two of many factors that a modernized regulatory regime should consider. The public interest, on the other hand, encompasses a much broader range of factors, including but not limited to ecological impacts, intergenerational and intragenerational equity, human health impacts, climate impacts, social and cultural impacts, resource maintenance and efficiency, and their integration.²

Perhaps even more fundamentally, in our submission it should be the agency and decision-makers responsible for impact assessment who should bear principal responsibility for assessing this broader range of factors through a legislated sustainability test embodied in a "next generation" environmental assessment law, not the NEB.

3. Legislation should require scenarios that include emissions reduction targets consistent with international obligations

While the proposal for a "separate model to deliver timely and credible energy information to Canadians" is welcome, the Discussion Paper contains little detail. The regulatory framework should require the NEB to provide scenarios that include emissions reductions targets consistent with international obligations, in a manner consistent with best international practices, when producing energy information and reference scenarios. As we noted to the Expert Panel:

[T]he scenarios considered by the NEB in Energy Futures 2016 consider high and low oil prices, in addition to business-as-usual production, which on a global scale would result in an estimated six degree increase in average global temperatures above pre-industrial levels, three times the global consensus of a two degree maximum increase before irreversible harm and runaway climate change become a destabilizing force.

This major oversight has the effect of creating its own feedback loop, whereby a business-as-usual forecast supports an economic needs assessment for a project, which further entrenches business-as-usual assumptions for the lifecycle of a project. This is simply not possible in a carbon-constrained world.

4. Require co-governance with Indigenous peoples

While the Discussion Paper contains a number of proposals related to collaborating with Indigenous jurisdictions on federal environmental assessments, it fails to include similar explicit proposals for co-governance in the NEB regulatory context outside of EAs. As we proposed to the Expert Panel, we recommend that "expanding the role of Indigenous peoples" in the monitoring of energy infrastructure be strengthened to a requirement to collaborate on a nation-to-nation basis with Indigenous jurisdictions in all stages of regulatory processes,

² West Coast Environmental Law, *ibid* at 9.

including establishing and enforcing conditions and lifecycle monitoring, and implementing follow-up, monitoring, compliance and enforcement. Nation-to-Nation collaboration should be consistent with UNDRIP.

5. Recommendations and decisions must be subject to a statutory right of appeal

The Discussion Paper is silent on providing a statutory right of appeal of NEB and Cabinet recommendations and decisions. To be credible and accountable, the legislation must provide a right of appeal of process and final decisions. In our submissions on federal EA reform we recommend a similar provision in EA legislation for EA decisions, and the establishment of an independent tribunal to hear such appeals. That tribunal could also be mandated to hear appeals of decisions under the *National Energy Board Act* (as well as appeals under other federal environmental legislation).

CONCLUSION

The Discussion Paper contains promising recommendations for modernizing the NEB, but we strongly encourage the implementation of the above recommendations in order to help ensure that the NEB functions as a credible and accountable body that help ensure Canada transitions towards a sustainable energy future and meets its international obligations regarding Indigenous peoples and climate change.

Thank you for considering these recommendations. If you have any questions or would like to discuss these or other matters further, please do not hesitate to contact us.