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West Coast Environmental Law submission to Expert Panel on NEB Modernization

1. Introduction

Please accept the following submissions for consideration by the Expert Panel on National Energy Board (NEB) Modernization. In the submissions below, we urge the panel to be visionary in modernizing the NEB. The scale of change required is significant; a reconstruction rather than a renovation.

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 relation to such environmental assessments as the proposed Site C Clean Energy project, proposed Enbridge Northern Gateway pipelines and tankers project, and proposed Kinder Morgan Trans Mountain pipelines and tankers expansion project (TMX).

West Coast presented at the NEB Modernization Panel's session in Vancouver on February 8, 2017. We also participated in the dialogue discussion later that day and attended the Indigenous Engagement as observers on February 9, 2017.

In preparation for these submissions, West Coast held numerous discussions with our colleagues and contemporaries working for communities and the environment. This includes the Pembina Institute and Ecojustice, among others, and we strive to reduce duplication where possible by endorsing points of alignment.

Many of the recommendations below relate to the NEB's current role under sections 52 and 54 of the *NEB Act* (NEBA), as opposed to its other regulatory functions. This focus stems from a couple of high profile and controversial NEB proceedings, namely the Kinder Morgan Trans Mountain Expansion Project (TMEX) review, and the Energy East review. We understand that consultation and engagement will continue throughout the NEB Modernization process, as well as the other environmental law reviews.

Finally, these submissions are meant to be considered in concert with our submissions to the Environmental Assessment (EA) Review panel.[1] In particular, the recommended changes to the

[1] Anna Johnston, *West Coast Environmental Law Submissions on next generation environmental assessment*, (December 23, 2016) online: http://eareview-examenee.ca/view-submission/?id=1482516029.7653

NEB should be understood to be nested within those recommendations, as summarized and discussed below.

Some of the principles set out in the EA submission apply to the NEB, but that should not be confused with those bodies playing the same role. West Coast, among others, has proposed that the question in next-generation EA should be: *which option among a range of alternatives is the most likely to result in lasting, equitably distributed net environmental, social and long-term economic benefits?* As will be set out further below, in our view the NEB is not well-suited to undertaking the planning functions of next-generation EA.

For this reason, it is important to remember that NEB modernization cannot happen in a vacuum, and must be considered in concert with the broader environmental law reform.

2. Summary of recommendations

A modernized NEB should be a progressive, independent expert body charged with protecting the public by ensuring that proposed projects are economically viable in a carbon-constrained world. It would provide key economic and market analysis to inform next-generation environmental assessment at the regional, strategic and project scales. It would have a clear climate mandate. It would engage meaningfully with Indigenous peoples on a nation-to-nation basis. It would no longer be responsible for recommending approval or rejection of projects, but rather produce an important input into those decisions. In so doing, it would restore public trust in Canada's environmental laws and regulatory regime while playing a key role in the decarbonization of Canada's energy infrastructure.

The recommendations listed below are discussed in further detail in this submission. They include:

Recommendation #1: Remove the responsibility for reviewing EAs from the NEB and vest it in an improved Environmental Assessment Agency, who would also be responsible for strategic and regional EA.

Recommendation #2: NEB analysis should focus on the economic need for and technical viability of a project, including the risk of stranded assets consistent with decarbonization goals. The NEB review would be an input into a broader sustainability assessment.

Recommendation #3: The legislation should include guiding principles and factors to consider when deciding whether to issue a Certificate of Convenience and Necessity, including climate change policy and international obligations, the impacts on First Nations rights and title, consistency with UNDRIP, and the impacts on local residents and municipalities, with special attention to the peoples and cultures that have been or are vulnerable to being disproportionately affected by environmental decision-making.

Recommendation #4a: The public should be afforded the opportunity and means to meaningfully participate throughout all stages of NEB regulatory processes, from the early stages of applications through to follow-up, monitoring and enforcement. Meaningful participation means, among other things, that dialogues are deliberative; there is a toolbox

containing different means of engagement; and the public has the ability to influence decisions, adequate funding to do so, and is engaged in the design of participation opportunities.

Recommendation #4b: The default should be that all applications for NEB-regulated projects include public hearings. All hearings must allow for oral cross-examination.

Recommendation #5: The NEB should improve its lifecycle oversight by meeting or exceeding the CESD recommendations and collaborating with Indigenous peoples in establishing and enforcing conditions and lifecycle monitoring.

Recommendation #6: The NEB should incorporate plans and policies (set by government) to decarbonize Canada's energy resources in its lifecycle oversight (in addition to project-level reviews), and the development of those plans and policies should be subject to rigorous and open strategic environmental assessments that are overseen by an independent assessment authority.

Recommendation #7: The NEB, in collaboration with Indigenous peoples and other relevant federal departments and agencies (e.g., Environment and Climate Change Canada and DFO), should be responsible for follow-up, monitoring, compliance and enforcement, and should provide to the assessment authority information about: the proponent's satisfying commitments made during EAs; the meeting of conditions of approval; permits issued, conditions of those permits, and the fulfillment of those conditions; environmental, social and economic effects and whether those effects are as predicted; any non-compliance and enforcement actions; the need for and success of adaptive management; and all other information related to an undertaking; and that the assessment authority post that information on a public, searchable database that retains information for all time.

Recommendation #8: In turn, the assessment authority should provide the NEB with information and recommendations related to NEB lifecycle regulation of proposals based on the outcomes of the environmental assessment, as well as any strategic and regional assessments that have been conducted.

Recommendation #9: The production of energy information and reference scenarios, including the Energy Futures reports, should require scenarios that include emissions reduction targets consistent with international obligations, in a manner consistent with best international practices.

Recommendation #10: The energy information function of the NEB should be housed in an independent body, whose function is to provide objective information for regional strategic planning as well as project-level reviews. This can be thought of as a ***Statistics Canada for Energy.***

Recommendation #11: NEB members should include representation of diversity, including regional and sectoral diversity.

Recommendation #12: The NEB should remove the Calgary residence requirement for permanent board members.

Recommendation #13: NEB recommendations must be subject to a statutory right of appeal.

Recommendation #14: Cabinet decisions must be subject to appeal, and provide full reasons that provide justification, transparency and intelligibility, consistent with those required by administrative law.[2]

Recommendation #15: Decision-making should start at a regional and strategic level, which would then feed into project-level reviews in which the NEB economic need test is one input into the determination of which option is the most likely to lead to the greatest equitably distributed net benefits to the environment, communities and the long-term economy.

Recommendation #16: Nation-to-nation collaboration should happen from the earliest stages of every process through to decision-making and follow-up, in strategic and regional EA planning, as well as project-level reviews, including setting the scope and hearing schedule. Nation-to-Nation collaboration should be consistent with the UNDRIP.

3. History of NEB & regulators

The NEB was created in 1959, following a contentious pipeline debate in 1956 and two subsequent Royal Commissions on energy. The second report summarized the purpose of the NEB as follows:

> The National Energy Board, as a permanent body of the Government of Canada, provides a forum where the industry can discuss its problems at the Canadian government level. What is perhaps of more importance, this Board as an agent of the Government can and should keep in close touch at all times with the industry, in all its phases, and with its problems, as these have a bearing upon the prosperity of the Canadian economy and of the industry itself. [3]

The NEB was intended to depoliticize the approval process of pipelines, and was granted the dual role of advisor on energy policy and adjudicator on energy projects.[4] In other words, it played the unusual role of advocating for certain policies that it developed, in proceedings over which it was also the judge.

In 1959, the impacts of greenhouse gases on climate change were virtually unknown. In 1959, 'Status Indians' were not allowed to vote, and had only recently been allowed to hire a lawyer

[2] See *Baker*, [1999] 2 S.C.R. 817 at paragraph 43; and *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 47
[3] Canada, Royal Commission on Energy, *Second Report* (July 1959) at 141
[4] Earle Gray, *Forty Years in the Public Interest: A History of the National Energy Board* (Toronto: Douglas & McIntyre, 2000) at 17.

and gather in groups of more than five. In 1959, public participation was not of major concern for the NEB, although formally, any 'interested party' could participate in NEB hearings.

It goes without saying that the world we live in today – in which energy policy and climate policy are inextricably linked and crucial to our survival; where Aboriginal and treaty rights are enshrined in the Constitution and grounded in the goals and spirit of reconciliation; and where public engagement and interest is high (because the decisions affect us all) – is dramatically different than it was in 1959.

Indeed, in our submission, the founding assumption that informed the NEB's existence is no longer a given, considering our climate reality and international obligations. The starting point should not be "*How* do we export Canada's energy resources?" but, "*Should* we export Canada's energy resources in a carbon-constrained world? And if so, how?"

The very purpose of the NEB's energy regulation role – to act as a substitute for competition where natural monopolies occur – has very recently been stretched by the addition of environmental assessment responsibilities, introducing broad questions of environmental planning into the mix. There is a tension between the core questions that these regimes ask at a project level*:* an energy regulator asks "*Is there an economic need for the project?*" while environmental assessments ask "*What are the environmental impacts, how can they be mitigated, and are residual significant adverse effects justified in the circumstances?"* As many have noted, this has resulted in an uneven application of environmental assessment principles, public participation in processes, and recognition of Aboriginal rights.[5]

Instead, in a carbon-constrained world, we must shift away from the ad-hoc, proponent-driven process towards decision-making that starts with strategic and regional sustainability planning, followed by project-level reviews that fit within an overall strategy towards decarbonization. A modernized NEB must have a role in decarbonization, as a regulator of both interprovincial and international pipelines and transmission lines.

The 2012 amendments to the *National Energy Board Act*, and the replacement of the *Canadian Environmental Assessment Act* (CEAA) with *CEAA 2012*, removed the ability for the Agency to jointly appoint review panels with the NEB. This effectively made the NEB the sole federal body responsible for reviewing certain major projects such as pipelines, and placed an unprecedented level of attention on the NEB, as experienced throughout the maligned Kinder Morgan Trans Mountain and Energy East review processes.

4. Differing conceptions of the NEB: regulator or licensor

The Expert Panel's dialogue sessions were a welcome venue for discourse amongst a wide range of stakeholders. One key takeaway from the Vancouver round-table on February 8th was a

[5] See, for example: Karen Campbell, *Ecojustice Submissions to the NEB Modernization Panel*, (March 7, 2017) online: http://www.neb-modernization.ca/system/documents/attachments/f393c769306aadf29b4e3322b8dd212708b983bc/000/005/780/original/Submission_to_NEB_Modernization_Panel_-_Final_.pdf?1489003322

statement made by the representative for TransCanada pipelines. In response to the revelation that the NEB had only rejected one pipeline in its history (in 1966), the representative offered valuable insight into the views of industry: that **proponents view the NEB as a licensing body, wherein a proponent who follows procedural requirements should essentially be guaranteed to get permission for any proposed project.** In other words, proponents appear to see the regulatory review and environmental assessment leading to the granting of a certificate under s. 52 of *NEBA* as procedural rather than substantive requirements.

Put another way, according to proponents, the purpose of the regulator is not to regulate industry or engage in planning, which involves the consideration of options (including the "no" option) and which is the core purpose of environmental assessment, but rather to grant licenses.

This view of the NEB as a licensor is at odds with the *NEB Act* itself, which contemplates a scenario where a project is not recommended.

This industry view of the regulator does not help with the public perception that the NEB is, as many have called it, a captured regulator with a revolving door between government and industry.[6] We do not delve further into the issue of captured regulators in these submissions, other than to note the real and perceived problems as context to some of the recommendations set out below.

The key difference between these conceptions is central to the modernization of Canada's environmental laws. Can a licensing body, whose function is to discharge procedural requirements, be an effective regulator? Can such a body truly discharge constitutional duties to consult with First Nations if the expectation is that proposed projects will proceed following a review? We submit that it cannot.

James Bonbright's definition of a regulator is helpful in drawing the distinction between these conceptions: "*The primary purpose of the regulation must be, ostensibly at least, the protection of the public in the role of consumers rather than in the role either of producers or of tax-payers.*"[7] In other words, the purpose of regulation must go beyond enabling producers, to ensure the protection of the public.

In our submission, the modernized NEB should have a critical role in the transition away from a hydrocarbon-based economy. However, in order to do so, it will require significant structural change.

5. The potential of NEB Modernization: functions and tradeoffs.

[6] See, *inter alia*, the submissions of former BC Hydro CEO Marc Eliesen at the Vancouver dialogue session, February 8, 2017

[7] James C. Bonbright, *Principles of Public Utility Rates*, 1961 New York, Columbia University Press, at 4

> *Regulatory organizations can be structured in different ways, and choices about their organizational structure can impact regulators' behavior and performance, both overall as well as at the level of individual employees.*[8]

As discussed in our presentation to the panel in Vancouver, the role of regulators involves the performance of a series of functions. These functions can be distributed amongst various bodies and structures. The configuration of various functions and structures will necessarily involve tradeoffs. We therefore encourage the panel to consider its task, in part, as distributing various functions as a fundamental part of the modernization process.

In *Structuring Regulators: The Effects of Organizational Design on Regulatory Behavior and Performance*[9] Carrigan and Poole analyze decisions about regulatory organizations along vertical and horizontal structures, and review an expansive body of research. The authors draw two major conclusions:

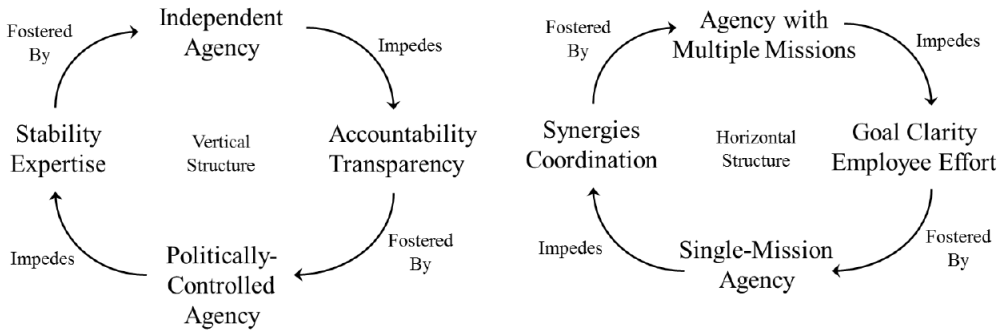
1) that organizational characteristics typically thought to be unrelated to structure, such as employees' mobility and diversity, as well as the political environment in which the regulator resides, have important consequences for the relationship between organizational structure and organizational behavior; and
2) that all organizational design choices involve tradeoffs. Decisions about how to structure regulatory organizations should take these tradeoffs explicitly into account.[10]

Carrigan and Poole also note "that while structure matters, a regulator's performance is not fully determined by its structure, whether vertical or horizontal. Management still matters."[11]

As presented to the panel, Carrigan and Poole summarize the tradeoffs in regulatory organization design choices in the following diagram:

[8] Carrigan and Poole at ii
[9] Christopher Carrigan and Lindsey Poole, *Structuring Regulators: The Effects of Organizational Design on Regulatory Behavior and Performance*, Penn Program on Regulation, June 2015, submitted via email to the NEB Modernization Expert Panel.
[10] Ibid at iii
[11] Ibid at iii

Figure 1: Illustrating the Tradeoffs in Regulatory Organizational Design Choices



The tradeoffs within a horizontal structure are relevant to the modernization of the NEB. Having multiple missions or functions, as the NEB does, may increase coordination, but also impedes goal clarity. The current NEB mandate includes multiple missions, or functions as discussed below and, in our submission, has overburdened the Board. In addition to the traditional function as an economic regulator, the NEB is now charged with conducting environmental assessments, engaging with Indigenous peoples, and engaging with the public. The gap that has emerged between 'regulatory licence' and 'social licence' is a direct result of the NEB's multiple missions impeding goal clarity.

Similarly, the NEB's accountability and transparency has been challenged by the Board's real or perceived ties to the industry it is meant to regulate, and the high profile controversies that have plagued the board since 2012.

6. Functions of regulators and how they can be distributed

In order to determine how various functions should be distributed within a modernized NEB, it is useful first to list them. Pembina Institute's *A Vision for a modernized National Energy Board*[12] discusses three main functions: studying and making recommendations about proposed projects; overseeing the lifecyle operation of energy infrastructure; and producing energy information. We add the following specific functions to these themes.

West Coast Environmental law conducted a comparative study of how the functions of energy regulators are distributed in three other jurisdictions (Norway, Germany and USA), which is summarized below in Appendix 1. Two important observations emerged. First, jurisdictions configure various functions amongst different bodies, with some overlap. Second, Canada stands alone in its lack of planning to inform decisions on energy infrastructure.

A) Studying and making recommendations about proposed projects

[12] Pembina Institute, Good governance in the era of low carbon: A vision for a modernized National Energy Board. (2017). http://www.pembina.org/pub/good-governance-era-of-low-carbon

Under this core function, the NEB currently issues approvals for specific projects, including an overall public interest determination and recommendation to Cabinet, approving specific routing, and applying conditions. The NEB is also responsible for ensuring tolls and tariffs for these projects are just and reasonable, consistent with the foundational purpose of regulation as a substitute for competition for natural monopolies.

As discussed at length during the Expert Panel sessions across the country, the current process does not enjoy the trust of the public. This is in part due to the increased mandate imposed on the NEB, including the responsibility for EA, Aboriginal consultation, and public engagement which are also subject to arbitrary and unrealistic time limits.

As Carrigan and Poole's diagram at Figure 1 above suggests, an agency with multiple missions tends to struggle with goal clarity and employee effort. This is precisely what has happened with the NEB, which has been given the additional responsibilities of environmental assessment – responsibilities that are often in tension with the NEB's core competency of economic need. The same could be said about Indigenous engagement, which has been increasingly delegated by the Crown, in particular since *Rio Tinto Alcan vs. Carrier Sekani Tribal Council*[13]. Indigenous engagement is discussed in further detail below.

Recommendation #1: Remove the responsibility for reviewing EAs from the NEB and vest it in an improved Environmental Assessment Agency, who would also be responsible for strategic and regional EA.

i) Public interest versus economic need

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.

The NEB's economic needs test should also be aligned with higher level goals of decarbonization, which should include the possibility of stranded assets, and the financial viability of an applicant to decommission a project after its used and useful life has passed.

[13] *Rio Tinto Alcan vs Carrier Sekani Tribal Council* [2010] 2 SCR 650 at 44

The NEB should continue to evaluate and make findings about the economic need for and technical feasibility of a project, but that economic need test must consider climate obligations and scenarios, consistent with the recommendations below about energy information.

Recommendation #2: NEB analysis should focus on the economic need for and technical viability of a project, including the risk of stranded assets consistent with decarbonization goals. The NEB review would be an input into a broader sustainability assessment.

Recommendation #3: The legislation should include guiding principles and factors to consider when deciding whether to issue a Certificate of Convenience and Necessity, including climate change policy and international obligations, the impacts on First Nations rights and title, consistency with UNDRIP, and the impacts on local residents and municipalities, with special attention to the peoples and cultures that have been or are vulnerable to being disproportionately affected by environmental decision-making.

Public engagement is a key element to project-level reviews. Given the dramatic increase in public participation regarding these projects, public engagement must be improved. Our proposal is to nest NEB economic need recommendations within the project-level EA or sustainability assessment, which in turn would be subject to higher-level strategic and regional environmental assessment outcomes. This would reduce NEB participation by concentrating the bulk of public input into the EA processes. Public participation, especially for affected First Nations and landowners, should remain a priority for NEB modernization.

ii) Meaningful testing of evidence

Current NEB processes, under statutory time limits, have impoverished the NEB's ability to adequately and meaningfully test evidence. We endorse the submissions by Ecojustice and the EPA Caucus[14] on the EA review, which contain the principles and elements of meaningful participation.

Recommendation #4a: The public should be afforded the opportunity and means to meaningfully participate throughout all stages of NEB regulatory processes, from the early stages of applications through to follow-up, monitoring and enforcement. Meaningful participation means, among other things, that dialogues are deliberative; there is a toolbox containing different means of engagement; and the public has the ability to influence decisions, adequate funding to do so, and is engaged in the design of participation opportunities.

Recommendation #4b: The default should be that all applications for NEB-regulated projects include public hearings. All hearings must allow for oral cross-examination.

[14] Environmental Planning and Assessment Caucus of the Canadian Environmental Network, *Achieving a Next Generation of Environmental Assessment Submission to the Expert Review of Federal Environmental Assessment Processes,* (December 14, 2016) online: http://rcen.ca/sites/default/files/epa_caucus_submission_to_expert_panel_2016-12-14.pdf.

B) Overseeing lifecycle operation of energy infrastructure

Overseeing lifecycle operation of energy infrastructure includes the monitoring of performance of infrastructure, including compliance with conditions imposed on project approval. This function, importantly, also includes the decommissioning of infrastructure that is no longer used and useful, which will be an increasingly important role for the NEB in the transition away from fossil fuel infrastructure, and the decentralization of power generation as it becomes more distributed through renewable technologies such as solar.

The 2015 Fall Report of the Commissioner of the Environment and Sustainable Development (CESD), an office of the Auditor General of Canada,[15] found that the NEB did not adequately track company implementation of pipeline approval conditions, or consistently follow up on deficiencies in company compliance with regulatory requirements. This finding is of great concern, and compounds the perception of the NEB's cozy relationship with industry. To its credit, the NEB has taken corrective action in response to the Commissioner's recommendations, and in our submission, a modernized NEB must maintain industry leading standards of tracking and compliance moving forward.

Additionally, all information and activities regulated by the NEB relating to a project or activity should be made available in a searchable public registry. Linkages also need to be made between the environmental assessment authority and the NEB in order to facilitate process for industry, as well as to ensure that all information related to projects from the initial stages through to decommissioning, as well as the regional-scale picture of cumulative impacts, are available in one public database.

Recommendation #5: The NEB should improve its lifecycle oversight by meeting or exceeding the CESD recommendations and collaborating with Indigenous peoples in establishing and enforcing conditions and lifecycle monitoring.

Recommendation #6: The NEB should incorporate plans and policies (set by government) to decarbonize Canada's energy resources in its lifecycle oversight (in addition to project-level reviews), and the development of those plans and policies should be subject to rigorous and open strategic environmental assessments that are overseen by an independent assessment authority.

Recommendation #7: The NEB, in collaboration with Indigenous peoples and other relevant federal departments and agencies (e.g., Environment and Climate Change Canada and DFO), should be responsible for follow-up, monitoring, compliance and enforcement, and should provide to the assessment authority information about: the proponent's satisfying commitments made during EAs; the meeting of conditions of approval; permits issued, conditions of those permits, and the fulfillment of those conditions; environmental, social and economic effects and whether those effects are as predicted; any non-compliance and

[15] 2015 Fall Reports of the Commissioner of the Environment and Sustainable Development *Report 2—Oversight of Federally Regulated Pipelines*, online: http://www.oag-bvg.gc.ca/internet/English/parl_cesd_201601_02_e_41021.html

enforcement actions; the need for and success of adaptive management; and all other information related to an undertaking; and that the assessment authority post that information on a public, searchable database that retains information for all time.

Recommendation #8: In turn, the assessment authority should provide the NEB with information and recommendations related to NEB lifecycle regulation of proposals based on the outcomes of the environmental assessment, as well as any strategic and regional assessments that have been conducted.

C) Producing energy information

The function of producing energy information includes data collection and forecasting, which is currently done primarily through the biennial *Energy Futures* report. As discussed by numerous presenters to the Expert Panel, this function is a fundamental input into the planning process, understanding individual and cumulative greenhouse gas (GHG) impacts of projects, and project needs assessments.

However, in its current form, *Energy Futures 2016* is limited in its value because its reference case fails to incorporate climate reality and international obligations, as well as key policies such as Alberta's emissions cap, the *Pan-Canadian Framework on Climate Change,* and the federal government's GHG reduction targets. As a result, the scenarios considered by the NEB in *Energy Futures 2016* consider high and low oil prices, in addition to business-as-usual production,[16] 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.

The International Energy Agency (IEA) has been producing scenarios that incorporate emissions reductions targets for some time. This year, for the first time, the IEA, along with the International Renewable Energy Agency (IRENA) modeled scenarios for keeping average global temperature increases below two degrees Celsius.[17] The IEA and IRENA state at p.158:

> In most countries, the Reference Case foresees modest increases in renewable energy shares based on the countries own long-term plans. For instance, Canada and the United States have rather conservative policy ambitions.

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[16] Keith Stewart, *The National Energy Board's pro-oil bias on display*, Greenpeace.org, October 26, 2016 online http://www.greenpeace.org/canada/en/blog/Blogentry/the-national-energy-boards-pro-oil-bias-on-di/blog/57844/ ;

[17] OECD/IEA and IRENA, *Perspectives for the Energy Transition: Investment Needs for a Low-Carbon Energy System*, (2017)

These conservative policy ambitions can and should be reversed for Canada to meet its international climate obligations. The energy information function is a critical input into the planning stage as well as the project-level reviews, and would be vastly improved by incorporating specific emission reduction scenarios, rather than focusing solely on oil price projections.

In the USA, for example, the Energy Information Agency (EIA) is a standalone body that produces energy information, separate from decision-making bodies at the federal and state level.

Recommendation #9: The production of energy information and reference scenarios, including the Energy Futures reports, should require scenarios that include emissions reduction targets consistent with international obligations, in a manner consistent with best international practices.

Because of the technical nature of producing energy information, it can be beneficial to have expertise from the industries being studied. However, the perception of a 'revolving door' with industry has contributed to further entrench the view that the NEB is industry captured. Energy information and decision-making functions do not need to be housed in the same organization; it is arguably more effective to keep these functions separate.

Recommendation #10: The energy information function of the NEB should be housed in an independent body, whose function is to provide objective information for regional strategic planning as well as project-level reviews. This can be thought of as a ***Statistics Canada for Energy.***

Alternatively, the NEB could continue to produce energy information, provided that this function is sufficiently independent from project-level reviews and operations. The energy information produced could be housed within a database managed by the assessment authority with a public, searchable database as we have proposed in our EA submissions.

Carrigan and Poole's tradeoffs in favour of independence (in this case, from industry) and single missions would suggest an increase in accountability and transparency, and goal clarity. Expertise could be maintained and expanded to include the broader energy sector, including renewables, while coordination should be encouraged through secondments and inter-departmental cooperation, similar to the current GHG studies performed by Environment and Climate Change Canada.

D) Absence of planning and implementing government policy

Regional and strategic planning is a major function that is lacking in Canadian energy policy and decision making. In Germany, Norway and the USA, planning is a function carried out by a regulatory body or set by government through legislation and policy.

Since the period of deregulation in the 1980s, the NEB's role in energy planning has been reduced significantly. The NEB's responsibility for issuing export licenses has served as a

planning tool in that regulation of exports can ensure resource supplies are maintained within Canada.[18] In the past, the NEB would have to ensure a surplus was readily available decades into the future.[19] However, this requirement is now lowered to ensure a due allowance for reasonably foreseeable circumstances in the current energy market in Canada.[20]

As discussed above, environmental assessment is primarily a planning tool, rather than a regulatory tool, and thus, it is appropriate that the NEB does not perform this function. Rather, as we have proposed, a next-generation EA would start with regional and strategic planning, which would then set parameters for specific projects for project-level reviews. The energy information functions set out above would serve as an important input into this strategic planning.

Done correctly, a regional and strategic plan would reduce the regulatory burden at the project-level review, and provide more certainty and clarity while ensuring sustainability goals and consistency with long-term climate targets and international obligations.

The German experience in engaging in planning offers a concrete example of how planning is a critical part of an energy transformation. Germany's rapid transition towards renewable energy sources, and the phase-out of nuclear energy, was the result of government-led planning and legislation, informed by consultation with industry and the public. As a result, nearly one third of Germany's electricity in 2016 was sourced from renewables.[21]

7. Solutions and tradeoffs relevant to key challenges

A) Independence, transparency and accountability

A key challenge to the current regulatory regime is the perception that the NEB is not sufficiently independent of the industry that it is meant to regulate.

i) NEB governance

From a governance perspective, this requires a much more diverse representation amongst Board members, as has been proposed by several parties, and which we endorse. In particular, the location of the NEB in Calgary and the requirement for Board members to reside in Calgary contribute to this problem. Recent satellite offices in BC and Quebec are a step in the right direction, but not nearly enough.

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[18] Earle Gray, *Forty Years in the Public Interest: A History of the National Energy Board* (Toronto: Douglas & McIntyre, 2000) at 95.

[19] Ian McDougall, "The Canadian National Energy Board: Economic "Jurisprudence" in the National Interest or Symbolic Reassurance?" (1973) XI Alta L Rev 327 at 344-345.

[20] *National Energy Board Act*, RSC 1985, c N-7, s. 118.

[21] The legislative amendments and reforms included the Atomic Energy Act, Act to Accelerate the Expansion of the Grid, Energy Industry Act, Renewable Energy Sources Act, Energy and Climate Fund Act.
See also, Gorebel, Annegret, Bundesnetzagentur, *Role and Structure of the German Regulatory Authorities and the Role of BNetzA in implementing the "Energiewende"* (Campinas: Bundesnetzagentur, 2013) at 44. & *Practical Law, Electricity Regulation in Germany: overview* (United Kingdom: Association of Corporate Counsel, 2014) at 1: available at
<http://uk.practicallaw.com/cs/Satellite?blobcol=urldata&blobheader=application%2Fpdf&blobkey=id&blobtable=MungoBlobs&blobwhere=1248117347218&ssbinary=true>.

Recommendation #11: NEB members should include representation of diversity, including regional and sectoral diversity.

Recommendation #12: The NEB should remove the Calgary residence requirement for permanent board members.

We also endorse the recommendations to move the NEB headquarters back to Ottawa.

B) Transparency and accountability

Currently, where certain projects are subject to recommendations, rather than decisions, and Federal Cabinet makes the final decision, only the Cabinet decision is appealable, following the *Gitxaala*[22] case. In *Gitxaala*, the Federal Court correctly identified Cabinet as the final decision-maker, and concluded that only the Cabinet decision was subject to judicial review. This meant that the inputs into Cabinet's decision, such as the NEB recommendation, would not be subject to judicial review, even for basic standards of procedural fairness. This problem is of particular concern because Cabinet has relied heavily on the recommendation of the NEB, as was the case in the Trans Mountain review. The problem of transparency and accountability is made worse because Cabinet can claim privilege over its deliberations, and is in the practice of issuing sparse reasons. As presented at the dialogue sessions in Vancouver, this has the effect of undermining a fundamental element of Canada's constitutional democracy – where governments and administrative tribunals are held accountable by the courts.

For these reasons, we endorse the following recommendations, made by Ecojustice and others:

Recommendation #13: NEB recommendations must be subject to a statutory right of appeal.

Recommendation #14: Cabinet decisions must be subject to appeal, and provide full reasons that provide justification, transparency and intelligibility, consistent with those required by administrative law.[23]

8. Nesting NEB decision-making within next-generation EA

In the environmental assessment (EA) review process, West Coast has proposed, along with many others, that next-generation EA needs to understand EA as a planning tool, and not just a project-level review. Our submissions[24] include the following recommendations:

1. Ensuring a strong federal role and encouraging collaborative assessment
2. Implementing UNDRIP and moving down the path of reconciliation
3. Aiming for sustainability, credibility, accountability and fairness
4. Emphasizing regional and strategic EA
5. Triggering regional, strategic and project-level EA

[22] *Gitxaala v Canada* 2016 FCA 187 (Gitxaala)
[23] See *Baker*, [1999] 2 S.C.R. 817 at paragraph 43; and *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190 at paragraph 47
[24] Anna Johnston, *West Coast Environmental Law Submissions on next generation environmental assessment*, submission to the Expert Panel Review of Federal Environmental Assessment Process, Dec 23, 2016 online: http://wcel.org/sites/default/files/publications/wcel-submissions-to-ea-panel-final-16-12-23.pdf.

6. Ensuring the best available information throughout all stages
7. Providing meaningful public participation opportunities
8. Decarbonizing in accordance with Canada's climate goals
9. Ensuring sustainability after the assessment
10. Implementing a governance model to enable and encourage co-governance and regional and strategic assessment.

Many of these principles also apply to NEB modernization. It is important to understand our submissions in this process in the context of our EA submissions. It is also important to understand our recommendations regarding environmental assessments and NEB-regulated projects in the broader context. As the above list suggests, environmental assessment is a complex, multifaceted tool that requires all of its elements to be working in order for it to work as a planning tool. There are a number of issues with environmental assessment in Canada today, and from the 40 years of experience we have had with environmental assessment in Canada we have learned how to strengthen all of the facets of environmental assessment. Our recommendations regarding strategic and regional EA, public participation, collaboration with Indigenous jurisdictions and greater emphasis on regional and strategic EA are just some elements of an integrated package of reforms that are necessary in order to build public trust in, and strengthen, federal environmental assessment.

Recommendation #15: Decision-making should start at a regional and strategic level, which would then feed into project-level reviews in which the NEB economic need test is one input into the determination of which option is the most likely to lead to the greatest equitably distributed net benefits to the environment, communities and the long-term economy.

By starting with strategic EA, and applying the 'traffic light' approach,[25] the number of project reviews would be reduced, thereby reducing the regulatory burden and increasing regulatory efficiency while ensuring sustainability goals are met. Under the current proponent-driven system, there is simply no way to ensure this.

9. Nation-to-nation collaboration

The role of the NEB in discharging the Crown's constitutional duty to consult is before the Supreme Court of Canada at the time of writing. In our submission, the environmental law reforms, including NEB modernization, must ensure *at a minimum* that nation-to-nation consultation must occur at every level. This includes the strategic and regional EA proposed, as well as at the project level. In *Rio Tinto,* the Supreme Court of Canada stated the duty to consult

[25] The traffic light approach essentially involves using strategic (or class) and regional assessments to identify classes of undertakings that should:
• Not proceed due to environmental, social, political or Indigenous unacceptability, either at all or in particular geographic areas (i.e., receive a red light);
• Proceed to an identified level of environmental assessment, with any guidance on project siting, design, etc. identified at the strategic or regional level (i.e., receive a yellow light); and
• Should receive approval in principle, subject to registration of proposals with the federal government and implementation of identified mitigation measures (i.e., receive a green light).
For a discussion of the traffic light approach, see Mark Haddock, *Environmental Assessment in British Columbia* (Environmental Law Centre, University of Victoria: 2012) at 27: http://www.elc.uvic.ca/documents/ELC_EA-IN-BC_Nov2010.pdf.

extends to "strategic, higher level decisions" that may have an impact on Aboriginal claims and rights."[26] Further, consultation jurisprudence confirms that consultation should happen at the earliest opportunity.[27]

This means that the proposed strategic and regional EA would incorporate collaborative decision-making from the start. At the NEB project level, it would include involving First Nations in setting the scope of reviews and hearing schedule.

This change would help, not hinder the NEB in its processes. For example, in the review of the Trans Mountain Expansion, the unilaterally established hearing order originally scheduled Aboriginal Oral Testimony during peak harvesting season in late summer and early fall, causing numerous complaints from First Nations who had to choose between exercising their rights or talking about them. The NEB ultimately rescheduled the hearings, but this blunder could have been avoided entirely. Further, as discussed by numerous First Nations representatives at the round-table dialogues, the NEB has struggled to assess Aboriginal rights and title within the framework of the current system.

Recommendation #16: Nation-to-nation collaboration should happen from the earliest stages of every process through to decision-making and follow-up, in strategic and regional EA planning, as well as project-level reviews, including setting the scope and hearing schedule. Nation-to-Nation collaboration should be consistent with the UNDRIP.

10. Beyond consultation – Co-management and UNDRIP

NEB modernization must also incorporate the spirit of reconciliation and the obligations of the United Nations Declarations on the Rights of Indigenous Peoples – in particular, the right to free, prior, and informed consent (FPIC). To that end, we recommend a co-management approach at all levels of decision-making.

Co-management encompasses both "the problem-solving process involved in sharing management power across organizational levels," and approaches that embody a move away from top-down, centralized decision-making by the federal and provincial governments, to more decentralized and collaborative decision-making involving Aboriginal peoples and/or community-level bodies.

The Royal Commission on Aboriginal Peoples notes that in Canada:

> [C]o-management has come to mean institutional arrangements whereby governments and Aboriginal entities (and sometimes other parties) enter into formal agreements specifying their respective rights, powers and obligations with

[26] *Rio Tinto Alcan vs Carrier Sekani Tribal Council* [2010] 2 SCR 650 at 44

[27] *The Squamish Nation et al v. The Minister of Sustainable Resource Management et al*, 2004 BCSC 1320. Paras 74, 83, 92; and *Sambaa K'e Dene First Nation v Duncan*, 2012 FC 204, [2012] FCJ No 216. Paras 89, 164-166

> reference to the management and allocation of resources in a particular of….lands and waters.[28]

A co-management framework includes key elements, which set out who decides, what are the rules of engagement, and how disputes are resolved. In terms of NEB modernization, it means moving away from a regime that treats First Nations only as stakeholders, but rather, as decision-makers, and one that enables the financial and technical capacity to engage in decision-making processes.

In our submissions to the EA review panel,[29] West Coast proposed co-governance boards (at p.31):

> **Co-Governance Boards**
> To facilitate jointly-managed assessment, the legislation should enable and encourage the establishment of regional co-governance boards in each province and territory (while providing for the continuation of existing co-governance bodies). Such boards would be empowered through federal and ideally, provincial or territorial legislation and be served by an equal number of commissioners nominated by Indigenous peoples' organizations and the Crown (federal, provincial and territorial), with one of each serving in a co-chair role. Co-governance boards would also require staff to help carry out its functions.
> The boards would be explicitly empowered to seek and implement solutions that uphold the respective jurisdiction, authority and laws of all levels of government including Indigenous governments. They would also be empowered to serve the functions of the Assessment Authority that are not national in scale, such as:
> 1. Informing and engaging the public, Indigenous peoples, local governments and industry in regional and strategic assessments, and facilitating that engagement in assessments reviewed by review panels or commissioners;
> 2. For all levels of EA that do not go to a review panel, appointing and directing Assessment Councils and reviewing the EA;
> 3. Serving as a secretariat to support review panels;
> 4. Managing contracts with external experts;
> 5. Implementing follow-up obligations; and
> 6. Developing terms of reference; and
> 7. Providing secretariat support to the involved governments in collaborating on decisions.

We have proposed significant changes to how decisions are made. Whatever the outcome, First Nations governance rights should be included at every step of the process for decisions that affect their rights, whether it is the NEB, CEAA or another body. This includes higher level strategic planning that will inform project-level reviews.

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[28] Royal Commission on Aboriginal Peoples, *Report of the Royal Commission on Aboriginal Peoples, Volume 2 Restructuring the Relationship* (Ottawa: Canada Communications Group –Publishing, 1996) at 640.
[29] Supra note 1 at 31

11. Conclusion

NEB modernization requires significant structural change for the regulator to be relevant in today's world. In the submissions above we have proposed a number of concrete recommendations that will allow for the NEB to play an important role in the energy transition.

A modernized NEB should be a progressive, independent expert body charged with protecting the public by ensuring that proposed projects are economically viable in a carbon-constrained world. It should provide key economic and market analysis to inform next-generation environmental assessment at the regional, strategic and project scales. It should have a clear climate mandate. It should engage meaningfully with Indigenous Peoples on a nation-to-nation basis. It should no longer be responsible for recommending approval or rejection of projects, but rather produce an important input into those decisions. In so doing, it would restore public trust in Canada's environmental laws and regulatory regime while playing a key role in the decarbonization of Canada's energy infrastructure.

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.

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Appendix 1: Comparative table of functions in 4 jurisdictions

	Function	CANADA			GERMANY			NORWAY				UNITED STATES			
		Gov't	NEB	CEAA	Gov't	BNetzA	BKartA	Gov't	NPD	MPE	PSA	Gov't	FERC	EIA	EPA
PROJECT REVIEW	**Evidence Gathering**		✓	✓									✓		
	Tolls & Tariffs		✓			✓							✓		
	Decision Making & Licenses	✓				✓		✓	✓				✓		
	Environmental Assessment		✓	✓					✓		✓				✓
LIFECYLE OPERATION	**Monitoring Conditions & Performances**		✓			✓	✓		✓		✓		✓		
	Decommissioning		✓										✓		
PRODUCING ENERGY INFORMATION	**Data**		✓						✓					✓	
	Forecasting		✓											✓	
	Planning					✓			✓			✓			

NEB: National Energy Board
CEAA: Canadian Environmental Assessment Agency
BNetzA: Bundesnetzangentur (Federal Network Agency)
BKartA: Bundeskartellamt (Federal Cartel Office)
NPD: Norwegian Petroleum Directorate
MPE: Ministry of Petroleum and Energy
PSA: Petroleum Safety Authority
FERC: Federal Energy Regulatory Commission
EIA: Energy Information Administration
EPA: Environmental Protection Agency