



Environmental Defence Canada

Comments on the Environmental and Regulatory Reviews Discussion Paper

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Environmental Defence Canada (EDC) welcomes this opportunity to provide comments on the Environmental and Regulatory Reviews Discussion Paper. The reform of Canada's environmental and regulatory laws and processes is a once-in-a-generation opportunity to address the damage done to energy and industrial project review processes by previous governments and put in place a world-leading regime for environmental decision-making and energy regulation in Canada.

EDC participated throughout the previous year in the government's environmental and regulatory reform processes. In particular, EDC focused its efforts on the Expert Panel on NEB Modernization, including producing a white paper on how to design a "climate test" for major energy projects¹ and a comprehensive set of recommendations on how to make the NEB a world-class energy regulator.² We submitted comments and recommendations to the Expert Panel for the Review of Environmental Assessment Processes and the Standing Committee on Transport, Infrastructure and Communities that reviewed the *Navigation Protection Act*.³ EDC also helped to educate the public about the reform of environmental and regulatory processes and mobilized thousands of Canadians to participate and send comments to the federal government.

EDC commends the federal government for its efforts to restore public trust in environmental assessment (EA) and regulatory processes, protect Canada's land, air and water, advance reconciliation with Indigenous peoples, and deliver greater regulatory certainty for industrial and energy projects. The Discussion Paper contains some positive improvements to realize the government's vision and create a next-generation environmental decision-making process.

¹ Environmental Defence. (March 2017). "NEB Modernization: Aligning Energy Project Assessment with Climate Policy." Retrieved from: <http://environmentaldefence.ca/report/climate-test-aligning-energy-project-assessment-climate-policy/>.

² Environmental Defence. (March 2017). "Overhauling the NEB: Energy Regulation for a Clean Economy." Retrieved from: <http://environmentaldefence.ca/wp-content/uploads/2017/04/EDC-NEB-Modernization-submission-March-2017-FINAL.pdf>.

³ Council of Canadians and Environmental Defence. (December 2016). "Navigation Protect Act Written brief to Standing Committee on Transport, Communities and Infrastructure." Retrieved from <https://canadians.org/sites/default/files/water/submission-mpa-stotic-1216.pdf>.



However, the reforms proposed in the Discussion Paper do not go far enough. They fall short of the overhaul that is required to regain public trust, robust oversight and thorough regulation, and EAs that are based on science, facts and evidence, while serving the public interest and advancing reconciliation with Indigenous peoples and the implementation of United Nations Declaration on the Rights of Indigenous Peoples (UNDRIP). They do

not adequately reconcile conflicting recommendations from the Expert Panels on NEB Modernization and the Expert Panel for the Review of Environmental Assessment Processes. In some cases, key recommendations to improve the EA and energy project decision-making processes were either completely ignored, misunderstood, or adopted partially and inadequately in the Discussion Paper.

This submission from EDC is not comprehensive, but instead describes key areas where EDC believes the Discussion Paper on one hand succeeds and on the other falls short in developing a next-generation regime for EA and decision-making. It also makes constructive recommendations on how the Government of Canada must improve upon the Discussion Paper in order to restore public confidence in the EA process and energy project review process while ensuring the new laws and regulations protect Canada's land, water, air and climate.

Environmental Assessments

There are several key recommendations made by the Expert Panel for the Review of Environmental Assessment Processes that were absent from or undermined in the Government of Canada's Discussion Paper. Despite the strong recommendations from the Expert Panel, the Discussion Paper essentially proposes amendments to the 2012 *Canadian Environmental Assessment Act* (CEAA) that fall far short of the overhaul needed for Canada to have world-leading EA laws and processes. These are EDC's key recommendations for EA to address the shortcomings of the Discussion Paper:

Sustainability-based assessment

Ensuring sustainability through EA goes beyond just "considering" the social, cultural and health effects of an energy or industrial project, along with the environmental ones. **It means ensuring that federal decisions maintain ecological integrity, meet Canada's climate commitments, and uphold UNDRIP, while contributing to high levels of human well-being.** EA legislation must:

- Establish **sustainability** as its core objective. **The legislation must ensure that federal decisions promote the greatest number and most equitably distributed lasting net gains for the environment and**



human well-being. This “sustainability test” should be the principal determination of “public interest” for all projects.

- Set out sustainability principles, including respect for the interests of future generations, that provide clarity and direction to responsible authorities, decision-makers, industry, Indigenous groups, and the public.
- Require consideration of alternatives. “Alternatives” means both “alternatives to the project” and “alternative means of carrying out the project.” The legislation must require consideration of alternative means, and allow for consideration of reasonable alternatives to the project. The Discussion Paper does not include this requirement.
- Set out criteria to apply the “sustainability test”. **EA legislation should set out the sustainability-based decision-making criteria and trade-off rules, enable the Minister of Environment and Climate Change to enact further criteria in rules and regulations, and develop assessment-specific criteria and rules.** Project and sector alignment with Canada’s climate commitments must be a central part of these criteria, including being a deal-breaker if a project or sector’s cumulative effects make those climate commitments unattainable.

Governance, Transparency and Accountability

The Discussion Paper recommends maintaining a politicized Cabinet decision-making process that would significantly undermine the government’s ability to gain public trust for natural resource projects. **Cabinet has the ability to ignore or override sound scientific information, Indigenous perspectives or public concerns for any reason, including political considerations. This can undermine the entire EA process using a non-transparent Cabinet justification.** This is no way to restore public trust in environmental decision-making and would not help the federal government achieve its objective of providing regulatory certainty to get natural resources to market. To enhance governance, transparency and accountability in environmental decision-making, legislation must:

- **Make the Minister of Environment and Climate Change the highest level of decision-maker.** Cabinet must not be making decisions on EAs. Furthermore, decisions must be transparent and the Minister must be accountable, after applying the sustainability criteria and trade-off rules described above.
- Legislation should provide a right of appeal of interim and final decisions made by the Minister.
- **The new proposed impact assessment agency should be solely responsible for EAs.** This means regulators and offshore boards, such as the National Energy Board (NEB), the Canada-Nova Scotia Offshore Petroleum Board, and the Canadian Nuclear Safety Commission, should not be authorities responsible for EAs. Regulators should be involved in EA processes as experts and advisors, but returning to joint reviews co-led by



- regulators would be counterproductive. Regulators do not have the expertise to conduct EAs and the public does not trust them to do so.

Legislated regional and strategic assessments

EDC commends the government Discussion Paper for mentioning regional and strategic assessments, and in particular starting with a strategic assessment for climate change. But the Discussion Paper does not discuss legislative requirements for these assessments. Legislative changes must:

- Require strategic EAs (SEAs) of plans, policies, and programs currently under the Cabinet directive. This includes new or revised federal legislation, rules, regulations or guidance, and federal budgets.
- Establish in legislation criteria for when a SEA or regional EA (REA) is triggered, e.g. because a project or sector is high-carbon or induces development in a relatively undisturbed area. Furthermore, legislation should spell out that impacted civil society groups or Indigenous groups can request a SEA or REA and require the Minister to respond to requests in writing within a prescribed period.
- Require consideration of alternative development scenarios. Legislation must move beyond the current “regional studies” allowed under CEEA 2012 by requiring that REAs and SEAs include consideration of alternative development scenarios, selection of the preferred scenario, and means of achieving it.

Legislated Climate Test

All project EAs and SEAs must include a test that ensures lifetime greenhouse gas (GHG) emissions would be consistent with Canada’s climate commitments and economically viable in a carbon-constrained world. Outstanding questions remain on how to effectively design a climate test, so the federal government should hold a workshop with leading experts and stakeholders to focus on the development, design, adoption, implementation and application of a climate test. Legislation should set out minimum requirements for the climate test, including:

- **Assessment of the upstream, direct, downstream and lifespan emissions and climate effects of a project or sector.** Downstream effects may be more difficult to assess for some types of project or sector, so the climate test should include an evaluation of a project or sector’s economic viability using global oil supply and demand scenarios in line with the Paris Agreement.
- **The climate test should ask whether a project will help or hinder progress towards domestic and international immediate and long-term climate obligations.** Canada has weak 2030 emissions reduction



targets, so the climate test must also assess a project or sector's viability in the low-carbon scenarios identified in Canada's mid-century Long-Term Low-Greenhouse Gas Development Strategy.⁴ The climate test must recognize that Canada's current commitments are a floor, not a ceiling, and consider the need for greater carbon reduction ambition into the assessment of long-term projects with significant emissions.

- **Legislation should put a trigger in place that ensures all activities that are not likely to assist in the transition to decarbonization are automatically assessed before project decisions are made.** Potential inconsistency with keeping on an identified pathway to compliance with Canada's climate commitments would qualify as a sufficient ground for federal triggering. If this trigger leads a project to fail the climate test, it must be rejected at the outset.
- **A climate sustainability definition and principles should be enshrined in EA legislation.**
- Detailed recommendations for how to design a climate test can be found in Environmental Defence's submission to the Expert Panel on NEB Modernization, *Aligning Energy Project Assessment with Climate Policy*.⁵

National Energy Board

In order to restore public trust in the major energy project review process, ensure decisions are based on scientific evidence and the public interest, and advance Indigenous reconciliation and uphold UNDRIP, the NEB is in need of a complete overhaul. While the Discussion Paper wisely excluded some of the worst recommendations made by the Expert Panel on NEB Modernization, it did not lay out the package of reforms required to make the NEB a model for 21st century project review and energy regulation. It also failed to reconcile the best recommendations of the Expert Panel on EA Reform with those of the Expert Panel on NEB Modernization.

EDC fully supports the following items related to the NEB in the Discussion Paper:

- Omitting the "National Interest Determination" proposed by the NEB Modernization Expert Panel. This would have seen interprovincial energy projects being approved by Cabinet before they went through a formal review process, a recipe for poor environmental decision-making, public distrust and political gridlock.

⁴ Government of Canada. (November 2016). Canada's Mid-Century Long-Term Low-Greenhouse Gas Development Strategy. Retrieved from http://unfccc.int/files/focus/long-term_strategies/application/pdf/canadas_mid-century_long-term_strategy.pdf.

⁵ Environmental Defence. (March 2017). "NEB Modernization: Aligning Energy Project Assessment with Climate Policy." Retrieved from: <http://environmentaldefence.ca/report/climate-test-aligning-energy-project-assessment-climate-policy/>.



- Removing the Standing Test for participation in project reviews. All Canadians should be able to participate in the review of major energy projects under federal jurisdiction.
- Expanding the definition of public interest in the *NEB Act* to explicitly include environmental, safety, social and health considerations.
- Removing the residency requirement and enhancing the diversity of the NEB and Hearing Commissioners to include more Indigenous representation and people with backgrounds in public participation, climate science, and renewable energy.

However, the Discussion Paper's proposed changes miss the mark when it comes to the energy regulator Canada needs in the 21st century. In particular,

- **Authority for EAs must be removed from the NEB. EAs for all projects must be done by the new EA authority.** The NEB should provide expert advice and analysis to EAs, but should not be leading them. This extends to "Joint Review Panels" like the one used for Northern Gateway.
- EDC supports the Discussion Paper's proposal to develop a separate model to deliver timely and credible energy information, but the Discussion Paper does not provide additional detail. In particular, **the NEB should be responsible for delivering energy data that is in line with climate science. The NEB producing credible oil global supply and demand scenarios that are aligned with the Paris Agreement is essential to design a climate test and understand the economic viability of major energy projects in a carbon-constrained world. The fundamentals of a climate test are not present in the Discussion Paper's proposals for reforming the NEB.**
- Energy and pipeline-related data also needs to be better coordinated across federal bodies currently responsible for that data: the 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, but the Discussion Paper does not lay out what this might look like.
- Removing the requirement that NEB members and Hearing Commissioners reside in Calgary is a positive step, but the federal government must do more to ensure that "energy" is not synonymous with "oil and gas." **As was recommended by the Expert Panel, the NEB headquarters should be relocated to Ottawa, where most other federal agencies are located.**

EDC would also like to take this opportunity to request that the NEB review of Energy East be postponed until the process to modernize the NEB and reform Canada's EA laws and processes is complete. EDC reminds the federal government that it has acknowledged that the existing NEB energy project review process lacks public confidence. Energy East is the largest and longest pipeline ever proposed in North America and its review should not be undertaken using an outdated and discredited process by a captured regulator. **If the purpose of NEB Modernization is to restore public confidence in environmental reviews and**



energy project decision-making, then the five interim principles and outdated Energy East hearing process should not be used for this controversial project. Continuing with the Energy East review using an old process by the existing NEB will have the effect of undermining the credibility and legitimacy of the pipeline review in the eyes of the public.

Navigation Protection Act

EDC is gravely concerned about the Discussion Paper's response to the Standing Committee on Transport, Infrastructure and Communities' recommendations on the *Navigation Protect Act (NPA)*. The Discussion Paper fails to provide a pathway to recognizing in law our shared responsibility to carefully steward waterways to ensure they are available for current and future generations.

EDC's submission on the NPA, along with many others from Indigenous groups, civil society organizations and Canadian residents, called for federal protections to be restored to all waterways. **However, the Discussion Paper is considering leaving 99 per cent of lakes and rivers unprotected from energy and industrial projects under the NPA.** EDC understands that Transport Canada will provide clarity on a process to add navigable waters to the Schedule of lakes and rivers, but the onus should be on the federal government to protect the right to navigation and waterways for transportation, recreational, cultural and spiritual practices.

There is also no clear commitment from the federal government to restore reviews of projects that impact navigable waters, such as pipelines or power lines. Kinder Morgan's Trans Mountain Expansion and TransCanada's Energy East pipeline cross thousands of lakes, rivers and other waterways, threatening navigation and waterways that we will pass down to future generations. Access to information documents show that the 2012 amendments to the NPA were guided by the advice of industry associations, including the oil and gas industry.⁶ **The federal government must restore protections and regulations to waterways, not entrench changes made to satisfy the industries that put waterways at risk.**

Legislative reforms to the NPA must include the following parts to restore and enhance the NPA:

- **Restore and strengthen protections for all lakes, rivers and waterways and protect public and Indigenous rights to navigation.**

⁶ Heather Scofield. (February 20, 2013). "Pipeline industry drove changes to Navigable Waters Protection Act, documents show." *The Canadian Press*. Retrieved from https://www.thestar.com/news/canada/2013/02/20/pipeline_industry_drove_changes_to_navigable_waters_protection_act_documents_show.html.



- Require consideration of environmental factors in decision-making about navigable waters, recognizing that waterways are not merely an economic highway, but part of our natural heritage.
- **Reinstate and strengthen federal scrutiny of large pipelines and power lines and other projects crossing navigable waters.**
- Incorporate co-governance with Indigenous nations, recognizing their authority and jurisdictions over waterways on their traditional territories.
- Create a public registry, as suggested in the government's response to the Standing Committee, to facilitate a consultation process that fosters true collaboration between the public and government .
- Implement strict safeguards for waterways within the framework of the United Nations-recognized human right to water and sanitation.
- Recognize that the government manages navigable waterways subject to public trust principles for current and future generations.
- Apply a precautionary approach in regulating any works or activities that threaten public and Indigenous rights to navigation and associated environmental values.

Co-governance with Indigenous Peoples

EDC defers to Canada's Indigenous Peoples to comment on proposals in the Discussion Paper that directly affect their rights and interests. We do, however express our support for the following proposals in the Discussion Paper:

- The creation of an open science and data platform to access and integrate the available science, evidence and indigenous knowledge that supports EA and regulatory processes.
- Incorporating Indigenous knowledge alongside other sources of evidence.
- Coordinating and integrating as appropriate consultation and accommodation with Indigenous peoples;

However, EDC submits that the Discussion Paper falls short of requiring decision-makers to obtain the consent of Indigenous jurisdictions.

Cooperation and partnership based on recognition of Indigenous rights throughout EA and project review processes cannot "seek to achieve free, prior and informed consent." **First Nations consent *must* be achieved or a project cannot move forward.**

If the federal government is serious about restoring trust among the public and Indigenous groups, and living up to its statement that there is no more important relationship than its relationship with Canada's Indigenous Peoples, there can be no



ambiguity in the law. To uphold UNDRIP and maximize progress towards reconciliation, legislation must:

- **Acknowledge and require the need to obtain the free, prior and informed consent of Indigenous peoples.**
- Include mechanisms for establishing regional co-governance models with Indigenous and, if possible, provincial governments
- Provide flexibility in timelines: Rather than legislated timelines, the legislation should allow authorities to collaboratively establish timelines on a case-by-case basis.
- Include relevant management frameworks established by Indigenous governments and the potential impacts of a project on Indigenous or treaty rights as legislated decision-making factors in EAs.
- Provide incentives for Indigenous governments to take the lead in conducting regional assessments in cooperation with the federal government;

Conclusion

After participating over the last year in the federal government's mandated environmental law reform process, EDC submits that the Discussion Paper falls short of capitalizing on the opportunity to deliver world-leading environmental decision-making laws and processes and energy regulation. The Discussion Paper makes some strong recommendations to improve upon the current regime, but it amounts to tinkering around the edges of CEEA 2012, the broken NEB, and the gutted NPA. If implemented without improvement, the Discussion Paper is not enough to protect Canada's land, air, water and climate, restore public trust in the environmental decision-making process, and advance reconciliation with Indigenous peoples. We strongly encourage the federal government to consider the improvements outlined by EDC in this submission before drafting legislation.

EDC looks forward to continuing to work with the federal government on the reform of Canada's environmental laws and the modernization of the NEB. If you have any questions or comments about the contents of this submission, please do not hesitate to contact me at 416-323-9521 ext.248 or pderochie@environmentaldefence.ca.

Sincerely,

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