

National Energy Board Modernization

British Columbia's Submission to the Expert Panel

March 28, 2017



INTRODUCTION

These are the submissions of the Province of British Columbia (the Province) to the federal government panel considering modernization of the National Energy Board (NEB).

PART I: VALUE OF THE ENERGY SECTOR IN THE B.C. ECONOMY

1. British Columbia (B.C.) ranks second only to Alberta in natural gas production in Canada. B.C.'s natural gas sector employs tens of thousands of people and industry investment has grown from \$1.8 billion in 2000 to \$7.1 billion in 2010. The natural gas industry has been a significant economic driver and revenue generator for B.C. Natural gas revenue generated \$1.35 billion in 2009/10 and has been as high as \$2.6 billion in 2005/06, helping to fund vital social services such as health care and education. In the years 2011 to 2014, \$25 billion was invested in B.C. through oil and gas exploration and development expenditures. The provincial government plans to continue to grow the industry over the next 10 years with a focus on the development of Liquefied Natural Gas (LNG) projects.

PART II: ROLE OF THE NATIONAL ENERGY BOARD

2. The NEB plays a very important role in B.C.'s energy sector. Amongst other things, it is responsible for making recommendations to the Governor in Council respecting the approval of major inter-provincial projects, and for regulating those projects throughout their lifetime. Some notable recent examples of projects that have come before the NEB include the Trans Mountain Expansion and Northern Gateway oil pipelines, the North Montney Mainline Pipeline gas project and the Towerbirch Expansion project. The latter projects are important to the development of the LNG industry in B.C., a key economic priority for the Province.
3. The Province recognizes the importance of having a national energy regulator for projects that cross provincial or national borders. These projects, by their nature, are important not only for individual provinces, but are of regional and sometimes national importance.

There must be appropriate limits to the role of the NEB

4. While the NEB fulfills an important role in the regulation of interprovincial or international undertakings, it is important that this role not extend beyond what is necessary to fulfill its duties under the *National Energy Board Act (NEB Act)* that serve the overall Canadian "public interest".

5. For example, in both the Northern Gateway and Trans Mountain Expansion matters, the NEB wisely did not consider the effects of the “upstream” oil development – that is, the effects related to the extraction and production of oil. The NEB took the same approach with respect to Enbridge Line 9, an approach the Federal Court held was reasonable.¹
6. The Province supports this approach, for two broad reasons. First, the development of natural resources falls squarely within the jurisdiction of the provinces. The ability of the provinces to control and regulate the development of those resources has been a cornerstone of the Canadian constitution since confederation. This was underlined in 1982 with the inclusion of s. 92A, which confirmed the province’s exclusive power with respect to the development of natural resources.² While the NEB plays a vital role in regulating interprovincial works, it is important that it not intrude into areas that are fundamentally provincial in nature.
7. The consideration of the effects of upstream oil and gas development should be conducted by the provinces. In B.C., oil and gas development is carefully regulated by the B.C. Oil and Gas Commission (OGC). The OGC is a single-window regulatory agency responsible for overseeing oil and gas operations, including exploration, development, pipeline transportation and reclamation. The OGC’s core roles include reviewing and assessing applications for industry activity, consulting with First Nations, and ensuring industry complies with provincial legislation. The public interest is protected by ensuring public safety, protecting the environment, conserving petroleum resources and ensuring equitable participation in production.
8. Second, it is important that proceedings before the NEB remain manageable. The consideration of large and controversial projects such as Northern Gateway is a complex and lengthy matter involving many environmental and socio-economic considerations. Adding consideration of upstream (or downstream) effects would make such proceedings that much more lengthy and complex, threatening to make them unmanageable.
9. For these reasons, the Province supports the continued limitation of the NEB’s mandate with respect to the consideration of upstream effects.

¹ *Forest Ethics Advocacy Assn. v. Canada (National Energy Board)*, [2015] 4 F.C.R. 75 at para. 69.

² 92A. (1) In each province, the legislature may exclusively make laws in relation to
(a) exploration for non-renewable natural resources in the province;
(b) development, conservation and management of non-renewable natural resources...in the province, including laws in relation to the rate of primary production therefrom...

10. Similarly, the regulation of interprovincial power lines is generally left to provincial regulatory bodies. Such lines can be designated by the federal Cabinet, and therefore regulated by the NEB; however, there have been no such designations, leaving the regulation of interprovincial lines to provincial regulatory bodies. This approach has worked well, and there is no indication that there is any need for federal regulation of interprovincial power lines. The Province supports the continued provincial regulation of interprovincial power lines.

The NEB should reflect regional interests

11. While the NEB is a national regulator, it is important that it reflect the fundamental nature of Canada – a confederation of provinces.
12. Where a project considered by the NEB has predominantly provincial or regional aspects (such as the oil pipelines referenced above) the panel considering the project should have one or more representatives who have a firm understanding of the unique issues facing that province or region. For example, many of the claims of First Nations in B.C. have not been reflected in treaties with the Crown. This represents a unique challenge for both proponents and regulators. Having a panel member or members from B.C., and with knowledge of its particular characteristics, would make an NEB review of a project more effective and, moreover, acceptable in the eyes of the B.C. public.
13. In addition, where a project has predominantly provincial aspects, the NEB should carefully consider and give significant weight to the submissions made to the NEB by the relevant province. For example, several provinces rely on access to markets for their resources, including electricity, oil and gas, and on key energy-related infrastructure. The NEB should give considerable weight to concerns raised by a province in an NEB proceeding with respect to the impact an NEB decision could have on those matters. A provincial government is responsible for the interests and wellbeing of all those in the province, and no entity is better placed to ensure that that interest is brought to the attention of federal regulators like the NEB and incorporated into their decisions.
14. Approaching projects in this fashion is entirely in keeping with the NEB's approach of balancing a project's benefits and burdens in determining whether or not to recommend the issuance of a certificate.

Provincial regulators and the NEB should collaborate to avoid duplication

15. As noted above, the NEB plays an important role in regulating interprovincial and international undertakings. While public focus is often on hearings involving major projects, the NEB has an

equally important role in monitoring and regulating projects throughout their lifespans. In B.C., the OGC plays a similar role with respect to provincially-regulated pipelines. The NEB and the OGC enjoy efficient collaboration with respect to the regulation of pipelines and other facilities. The two agencies have a memorandum of understanding to improve pipeline safety and provide opportunities for regulatory efficiency. Key parts of the MOU include greater cooperation and coordination between the two regulators in the event of a pipeline emergency, notifying each other when conducting audits, and taking enforcement actions against operators regulated by both authorities.

16. The Province supports this collaboration between the NEB and the OGC. Effective coordination between such agencies reduces costs, increases efficiency and makes regulation more effective and predictable for facility owners and operators. The Province would support giving the NEB an explicit mandate to seek collaboration and means to achieve greater efficiency with its provincial counterparts.
17. This spirit of collaboration and efficiency was evident in the agreement between the provincial Minister of Environment and the NEB with respect to the environmental assessment of projects falling under both provincial and federal jurisdiction. Under that agreement, assessments conducted by the NEB are deemed to be equivalent to environmental assessments conducted by the Province. In this way, projects are subject to one process, which (following a recent Supreme Court of B.C. decision³) leads to decisions by both levels of government. The Province supports the continuation and improvement of that agreement as a means of avoiding duplication, and thereby reducing costs of project development.

Collaboration between provincial regulators and the NEB should extend to NEB Hearings

18. The “Discussion Paper: Decision-Making Roles on Projects” asks whether there should be an enhanced role for the provinces, amongst others, in NEB hearings. The Province believes that the collaboration between the NEB and provincial agencies referred to above should be extended to NEB hearings themselves
19. The NEB conducts hearings much like a court. As such, NEB proceedings do not involve the hearing panel having meetings outside of the hearing room with certain parties or providing any party special access or status. However, even in court proceedings there are opportunities for participants to collaborate in certain respects, such as conferences of experts, where experts endeavor to bridge differences between their opinions.

³ *Coastal First Nations v. British Columbia (Environment)*, 2016 BCSC 34.

20. Similarly, for hearings where it is appropriate, the Province would urge the NEB to allow its staff, and the staff of its counterparts in provincial regulatory bodies, like the OGC, to collaborate during the course of NEB hearings. This could allow, for example, staff to work together on the development of draft conditions proposed by the NEB panel. Of course, this work would be conducted in an open and transparent fashion – the results of the collaboration would be available and accessible to all hearing participants.
21. Allowing provincial regulators to cooperate with the NEB in this fashion would help to avoid unnecessary duplication and overlap between requirements imposed on regulated entities by the NEB and by provincial regulators. It would also help to focus and consolidate the imposition of these requirements at the appropriate level – namely, at the federal level for interprovincial pipelines and similar projects that come under federal regulatory authority.

Streamlining federal approvals – the NEB could become the single window

22. In B.C., the OGC is the principal agency responsible for the permitting and regulation of oil and gas facilities and upstream development. This includes the regulation of LNG facilities, including those planned to be operated on Prince Rupert Port Authority lands.
23. In carrying out its mandate, the OGC is responsible for the issuance of many environmental and resource-related authorizations that would, if they were not related to oil and gas activities, be issued by other ministries. These include permits under the *Land Act*, *Water Sustainability Act* and *Forest Act*. This is commonly referred to as the “one window” approach. In short, oil and gas proponents have only one window to approach in order to obtain the permits necessary to operate. This has produced greater efficiency, reduced cost and waiting time for industry, and a more accessible process for interested persons. The OGC also has the authority to provide select provincial authorizations to federally regulated pipeline permit holders.
24. The Province would encourage the federal government to consider a similar approach for the NEB. The federal government should investigate whether there would be efficiencies in having the NEB act as the “single window” for approvals related to facilities under its jurisdiction, for example under the *Fisheries Act* or the *Navigation Protection Act*.

The NEB must fully consider the interests of First Nations

25. It is essential that First Nations have the opportunity to fully and meaningfully participate in NEB processes. The NEB process must be open to First Nation participants and allow for their

participation in regulatory reviews. The current NEB process on its own is not sufficient to fully consider the interests of First Nations, and the federal government must appropriately consult with and accommodate First Nations regarding potential project impacts on asserted or established Aboriginal rights, including title, and treaty rights (Aboriginal Interests). This reality was underlined by a recent Federal Court of Appeal decision respecting the Northern Gateway pipeline. Project changes and adjustments throughout a project review and regulatory conditions, where approvals are given, are an important means to ensure First Nations interests are considered and accommodated.

26. Federal processes and associated decisions for major projects, such as those that involve the NEB, need to be durable and reliable. The Province would like to rely on the durability of federal processes to support its own required decisions associated with approved NEB applications. The current NEB process lacks a clear articulation or linkage to how other non-NEB federal departments will uphold the honour of the Crown and discharge its consultation and accommodation duties to First Nations. In meeting the Crown's duty to consult, the Crown is required to ensure consultation is proportionate to a preliminary assessment of the strength of any claimed Aboriginal rights (including title), and the seriousness of potential impact to Aboriginal Interests. Whatever approach the federal government chooses to specifically address meeting these components of consultation, should be done in a transparent manner that is consistent with the Canadian Constitution and relevant jurisprudence.
27. The Province also encourages the federal government to ensure any new or supplemental approaches to upholding the honour of the Crown and the requirement to consult and accommodate First Nations be done in a manner that is both timely and efficient. Seeking to address the federal government's duty to consult with and accommodate First Nations following the completion of the NEB process adds additional time to the process and decreases efficiency. Investment decisions for major projects within Canada are undertaken within an international context. Canada needs to have processes for environmental and regulatory review that are competitive with other jurisdictions and that provides proponents with confidence that these processes are both timely and address all the requisite legal components, including the need to consult and accommodate First Nations.
28. Recently, the federal government, through the Major Projects Management Office of Natural Resources Canada, and the Province, through the Environmental Assessment Office, have collaborated in the preparation of a Consultation and Accommodation Report to document Aboriginal consultation conducted in relation to projects primarily regulated by the NEB but that also require an environmental assessment certificate from the Province. This report included preliminary assessments of the strength of claims, seriousness of potential impact, depth of consultation and potential accommodation measures to address, as appropriate, the potential impacts of the project

on each potentially affected Aboriginal group and was used to inform statutory decision makers of the Aboriginal consultation that has occurred

29. In addition, the Province's land and resource agencies, including the OGC, have developed relationships with all B.C. First Nations and expertise in consultation and accommodation. These same agencies will also in many cases be making provincial decisions on the same projects which the NEB is considering.
30. The Province encourages the federal government to modernize the NEB in keeping with efficiency and opportunities to harmonize with provincial jurisdictions. The Province believes there is great opportunity to harmonize our relevant consultation and accommodation processes, for more efficient and effective use of First Nations, NEB, proponent and B.C. agency time. The Province encourages the federal government to develop processes for consultation and accommodation of First Nations in a way that complements and integrates with the traditional quasi-judicial role of the NEB, as well as aligning with the resources, expertise and relationships with First Nations the Province has developed through the numerous ongoing consultations on other land/resource decisions in British Columbia. These processes need to be transparent and clearly understood by all parties – even if they are not specifically part of the NEB's core responsibilities.

PART III: NEB PROCESS

The NEB process is sound, but could be improved

31. In general, the NEB does a good job of conducting hearings. The task of administering processes involving many participants and complex issues is not an easy one. The NEB's comprehensive website and its practice of utilizing process advisors are particularly helpful in assisting participants with the hearing process.
32. However, there are aspects of the NEB process that could be improved. First, recent events, particularly involving the Energy East pipeline, suggest that the NEB needs to better understand and follow principles of fairness and natural justice with respect to the conduct of panel members, and their interaction with persons outside the hearing.
33. In addition, the federal government should ensure that the *NEB Act* provides for NEB processes that are open and comprehensive. Such processes assist an applicant, which benefits from a rigorous and public evaluation of the merits of its project, and ultimately an approval following such a process, as well as the public: projects are better when subject to full and robust scrutiny.

34. In this regard, the Province notes that s. 6 of the *NEB Act* grants the Chair extraordinary powers to force compliance with legislated timelines; in appearance at least, this does not assist in the goal of achieving open and comprehensive processes:
- (2.2) If the Chairperson is of the opinion that a time limit imposed under any of sections 52, 58 and 58.16 is not likely to be met in respect of an application, the Chairperson may take any measure that the Chairperson considers appropriate to ensure that the time limit is met, including
- (a) **removing any or all members of the panel** authorized to deal with the application;
 - (b) **authorizing one or more members to deal with the application;**
 - (c) increasing or decreasing the number of members dealing with the application...
35. As the Province notes below with respect to the timelines for NEB decisions, a panel hearing a matter, while respecting timelines wherever possible, should be able to take the time necessary to deal with matters that are complex or in respect of which the public has a strong interest. In that light, in the Province's view the extraordinary powers set out in s. 6 are unnecessary and can be eliminated.
36. Finally, as noted in the "Discussion Paper: The Hearing Process", the hearing order issued by the NEB includes a list of issues "to guide the primary topics of consideration". The Province believes that it is important for the NEB to give hearing participants the opportunity to express their views on the issues that will frame the NEB hearing before they are finalized. After all, what issues will be considered through the hearing is of central importance to participants in it. The NEB sought the views of participants before the list issues was finalized in the Northern Gateway pipeline hearing, but this was not done for Trans Mountain Expansion. Participants should not have to seek reconsideration of the NEB's decision with respect to the issues relevant to the hearing; rather, the NEB should seek out their views in advance of the list of issues being finalized.

The timing of NEB decisions should be predictable but also allow for flexibility

37. Amendments to the *NEB Act* introduced a number of time limits with respect to NEB decision-making. For example, under s. 52(4) the NEB's report to the minister with respect to the issuance of a certificate must be completed within 15 months of the applicant having provided a complete application.
38. In general, the Province supports having time limits such as that in s. 52(4), particularly when there is some flexibility to this time limit where the NEB requires further information from the applicant.

39. However, the Province also recognizes that, in certain cases, a hearing may be of such length and complexity that additional time may be warranted. In particular, time limits should not have the effect of forcing the NEB to forego oral hearings, which the NEB has traditionally conducted for complex or controversial projects. Oral hearings for those projects are essential if they are to be acceptable in the eyes of the B.C. public.
40. In this regard, the Province would recommend a relaxation of some of the provisions concerning time limits. Under s. 52(7), the 15 month period referenced above can be extended by three months by the minister, but any further extension requires Governor in Council approval. The Province would recommend that the Chair of the NEB, or a panel hearing a matter, be given the ability to extend the 15 month period where the complexity of or public interest in a matter would warrant a further period of time for review.
41. This approach is consistent with that in the B.C. *Environmental Assessment Act*, which grants the executive director of the Environmental Assessment Office discretion to extend assessments conducted under that Act, and for other matters.

Compliance and enforcement should be open and transparent, and emergency management plans should be accessible

42. In keeping with improving the openness and transparency of the NEB regulation of facilities, the Province would recommend that the NEB continue to improve public access to information concerning compliance and enforcement of facilities under its jurisdiction. The ability of the public to see the NEB's compliance and enforcement actions would increase public confidence in the NEB and its regulation of facilities throughout their lifespans. On February 22, 2016 the NEB started posting online information that tracks company compliance with pipeline approval conditions. On September 16, 2016 the NEB introduced a number of updates based on feedback from stakeholders that included the Province of B.C. The Province applauds these actions.
43. The ability of the public to view and consider emergency management plans (EMP) filed by companies under its jurisdiction would also increase the openness and transparency of the NEB. Throughout the hearing respecting the Trans Mountain Expansion project, the Province pushed for disclosure of the proponent's EMPs, particularly as they were to form the basis for plans respecting the expansion.

44. On April 5, 2016 the NEB issued a Board Order that directs NEB-regulated pipeline companies to publish their emergency procedures manuals online for public viewing by September 30, 2016. In making its order, the NEB also stated that “making manuals public is the first step in making more emergency management information publicly available. The Board will, in the coming months, engage pipeline companies on how to publish information contained in their emergency management programs.” On September 8, 2016 the NEB announced that it had decided to require companies, with some exceptions, to publish emergency management program information on their publicly available websites by March 31, 2017. The Board invited comments on the draft Order from companies, first responders, municipalities and members of the public which closed on October 11, 2016. The Province applauds the NEB in taking these steps. The Province strongly supports the full production of EMPs, leaving out only that information that is strictly necessary to maintain the security of a facility. In addition to facilitating emergency response, providing broad access to EMPs will give facility operators the chance to show the public that there are robust plans in place to deal with spills and other emergencies, thereby giving the public greater confidence in the operation of these facilities.
45. In addition, it would be very useful for EMPs to be not only accessible to, but also developed in consultation with relevant parties, including provincial emergency regulators, First Nations, and municipal authorities.⁴ The quality and utility of EMPs would be significantly enhanced if companies under the NEB’s jurisdiction were required to involve, in the development of their EMPs, those who would be likely participants in responding to an emergency. In particular, members of Emergency Management BC have deep expertise in emergency response, and would be valuable contributors to the development of EMPs.
46. Finally, the participation of provincial emergency regulators in the development of the EMPs of NEB-regulated companies would help reduce any overlap between those EMPs and plans required under B.C.’s recently enacted spill response regime.⁵ This would fit within the same spirit of collaboration discussed elsewhere in this submission.

CONCLUSION

47. The Province would like to thank the federal government for the opportunity to provide these comments with respect to the modernization of the NEB.

⁴ See the questions at the end of “Discussion Paper: Public Participation”.

⁵ *Environmental Management Amendment Act, 2016*, SBC 2016, c. 20.