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CANADIAN ENERGY PIPELINE ASSOCIATION

Submission to the National Energy Board Modernization: Expert Panel

March, 2017

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Submission to the Expert Panel Review on National Energy Board Modernization

The Canadian Energy Pipeline Association (CEPA) represents Canada's 11 major transmission pipeline companies who transport 97 per cent of Canada's daily natural gas and onshore crude oil production.

The Context of this Review

Over the past decade, as major pipeline projects advanced through the National Energy Board ("NEB" or "the Board") review process, the Board has found itself in the centre of an increasingly contentious debate about new energy infrastructure projects in the context of broader public policy issues such as climate change, upstream and downstream effects of projects, Indigenous[1] rights and title and Federal-provincial energy policy. At the same time, there have been growing public expectations that these policy issues would be dealt with in regulatory review processes. This is new for the NEB. From its establishment in 1959 until recently, the NEB maintained a relatively low profile, earning a reputation as a respected, quasi-judicial regulator that operated independently from the government and generally outside of the broader public policy debate. This recent change in public expectations has put unprecedented attention on the NEB, led to some public dissatisfaction and with a process that was never meant to be a forum for public policy and resulted in a perception by a vocal minority that the NEB is broken.

This perceived loss in confidence is not only felt by the public, environmental and Indigenous groups, but also by the pipeline industry itself. The review process for major projects has become too uncertain for project proponents and has been encumbered by too many issues that are not part of the NEB's core mandate. While there have been some amendments and improvements to the *National Energy Board Act* over the years such as those under the *Pipeline Safety Act*, there has not been a comprehensive review of the mandate, governance, structure and adjudicatory, life-cycle oversight and advisory roles of the NEB since its inception in 1959. CEPA welcomes this NEB Modernization review as an opportunity for continuous improvement to the NEB's technical expertise and an ability to build on its strengths as an independent, quasi-judicial life-cycle regulator.

NEB Modernization that promotes certainty and efficiencies in processes and regulatory oversight is critical. CEPA member companies propose to invest up to $50 billion in pipeline infrastructure projects in Canada over the next five years and will continue to add needed infrastructure over the longer term. To bring these projects to realization, companies need to have a competitive investment climate. There is serious risk that companies will invest their capital in other jurisdictions if they see the Canadian regulatory system imposing unacceptable process uncertainty, risks, costs and delays.

With all of the focus on new projects, we must not forget that the NEB is accountable for the ongoing daily full life-cycle oversight of 73,000 km of existing pipelines under its jurisdiction. This work is overshadowed by major

[1] CEPA uses the term "Indigenous" throughout this submission to refer to the Aboriginal peoples of Canada as defined in s. 35 of the Constitution Act, 1982.

project reviews but is vital to the safe operation of pipeline systems and the competitiveness of the energy sector in Canada.

As an outcome of this review, the pipeline industry would like to see a strengthened independent, quasi-judicial, expert regulator that oversees the full life cycle of pipelines, from design and planning, the review process for new projects including environmental assessment ("EA"), through construction, operations, maintenance and abandonment. As a further outcome of this review and the related *Canadian Environmental Assessment Act 2012*, *Navigation Protection Act* and *Fisheries Act* reviews underway across the Federal government, CEPA seeks a renewed NEB mandate for integrated project review that is fair and transparent, coordinated, clear, efficient, comprehensive and based on science, fact and evidence. In particular the NEB review should avoid duplication, outline clear accountabilities, be based on transparent rules and processes, ensure procedural certainty for project proponents, allow meaningful participation, and balance the need for timeliness and inclusiveness.

CEPA recognizes that the responsibility to create investment confidence and certainty goes hand-in-hand with building public confidence in regulatory processes. We would ask this Panel to keep these two important objectives in mind as it considers the diverse recommendations and suggestions from Canadians over the course of this review.

As part of our submission, CEPA has provided a detailed response to each of the Expert Panel's Themes and Discussion Papers that have framed and guided this review and public consultations over the past months. However, at the outset we would like to emphasize five principles that underpin all of our positions. CEPA believes these principles are essential for the future viability of the pipeline industry as well as for improving public confidence.

I. **The NEB must be an independent, quasi-judicial, expert regulator;**

II. **The NEB must be a full life-cycle regulator, with responsibility for oversight of design and planning, the review process including environmental assessment, construction, operations, maintenance and abandonment;**

III. **The NEB review process must be coordinated, efficient and provide process certainty;**

IV. **The NEB review process is guided by government policy, but is not the appropriate venue to address broader public policy issues;**

V. **The roles and responsibilities of the Federal government, industry, Indigenous groups and the NEB related to consultation and accommodation over the full life-cycle in the NEB process must be clarified.**

KEY PRINCIPLES

I. The NEB must be an independent, quasi-judicial, expert regulator

The NEB was established as a federal agency in 1959 and is intended to operate at arm's length from the government. As an independent regulator, it was bestowed with court-like independence and given a broad public interest mandate over pipeline project approvals and life-cycle oversight. It does not, and should not set public or government policy. The Parliament of Canada, through duly elected and democratically accountable officials rightfully has that mandate. Independent regulatory tribunals such as the NEB should take the policy environment created by the government into account, while observing strict independence and objectivity in the decisions they make. Likewise, the government should not interfere in decisions that an independent tribunal, such as the NEB, makes within its mandate. However, over the past several years as major pipeline projects progressed through the NEB review process, the line between these two distinct roles has become blurred and in the worst case can result in a final Cabinet decision that contradicts the outcome of a lengthy review by the NEB. A key to the integrity of the Board's regulatory processes as well as public confidence in its decisions is to ensure that policy level decisions are dealt with by government, leaving the NEB to operate independently within its core mandate and areas of expertise.

The NEB has quasi-judicial powers with the rights and privileges of a superior court. As such, its decisions are legally enforceable. As a quasi-judicial regulator, its hearing processes must be grounded in fairness and transparency and be based on principles of administrative law, natural justice and procedural fairness. This grounding in administrative law provides a rich history of decision-making precedents and a solid foundation for decision-making by the NEB for areas within its jurisdiction and mandate. Procedural fairness and natural justice must be preserved, especially in formal processes of the NEB. As an outcome of this review, these core principles must be maintained to ensure a fair and unbiased model for energy regulation.

While other submissions to this Expert Panel have suggested that that the NEB's mandate and public interest test should be broadened to include considerations such as climate change and a transition to a low carbon economy, CEPA suggests that matters and issues that are not connected to the NEB's core responsibility as an independent, quasi-judicial regulator should not be part of its mandate.

As an outcome of this NEB Modernization review, the independence of the NEB must be reinforced in terms of its formal and procedural independence from the government, the depth and breadth of its expertise and the finality of decisions made within its mandate.

II. The NEB must be a full life-cycle regulator, with responsibility for oversight of design and planning, the review process including environmental assessment, construction, operations, maintenance and abandonment

While much public attention has been focused on NEB project reviews, what is poorly understood is that the NEB's role doesn't start, and doesn't stop, at the project review and hearing process. The NEB oversees the full life-cycle of a pipeline from the planning and approval process, construction, operations, maintenance and finally abandonment. Each step, including the EA, is part of an integrated process, overseen by the full range of expertise

required to ensure that pipelines are designed, constructed, maintained, operated and abandoned or decommissioned safely.

Review Process: During a project review the NEB must determine if the project is in the public interest, can be built and operated safely and in a manner that protects the environment. The NEB imposes conditions for approval that may apply before, during and after construction and during operations. These conditions are above and beyond the measures required by regulations, code or proposed in project applications. Moreover under the *Pipeline Safety Act* the NEB has enhanced powers and tools to impose post-approval project-specific conditions, backed by strong enforcement tools.

Environmental Assessment: The NEB Filing Manual, which sets out the Board's requirements for all of its applications, ensures that EAs conducted by the NEB are in alignment with EAs conducted by the Canadian Environmental Assessment Agency ("CEA") under *CEAA 2012*. EA fits naturally into the development of the NEB recommendation report, which integrates engineering, environmental and socio-economic considerations. As a life-cycle regulator for pipelines, the NEB has expertise that the CEA Agency does not. It is familiar with industry best practices for pipeline construction and operating standards and has the expertise to consider environmental effects that are unique or potentially significant to pipeline projects and to understand when mitigation is required and when it is effective. As a life-cycle regulator, the NEB is best positioned for rigorous EA follow-up and compliance enforcement, which includes post-approval conditions and a robust program for ongoing inspections and audits. Full life-cycle regulation also contributes to continuous improvement of NEB conditions and mitigation requirements - subsequent projects benefit from the learnings of previous projects.

Construction: During construction, the NEB oversees compliance with conditions, statutes and regulations, along with commitments made by companies during the review process. The NEB utilizes a suite of compliance verification activities including on-site environmental, engineering and work safety inspections, audits, investigations and responses to any complaints. If necessary, the NEB also has escalating enforcement tools, including notice of non-compliance, corrective action plans, administrative monetary penalties (AMPs), inspection officer orders and safety orders, revocation of an authorization, disallowance or suspension of the toll or tariff, and finally prosecution.

Operation: The NEB's oversight does not end once a project has been constructed. These same compliance verification activities and enforcement tools are used throughout operation of the pipeline to ensure compliance with the Onshore Pipeline Regulations ("OPR"). The OPR governs all aspects of a company's operations. In addition, the NEB has trained staff who participate in emergency response drills and, if necessary, are ready to assume control of an emergency.

Deactivation / Decommissioning / Abandonment: Finally, if a pipeline is to be deactivated, decommissioned or abandoned, an application or notification to the NEB is required and the NEB will assess whether it can be done safely and how best to mitigate risks to people or the environment.

Life-cycle Enforcement: To put this life-cycle oversight into perspective, in 2015, on the 73,000 km of existing pipelines it regulated, the NEB undertook:

- **Project applications**: received two s. 52 applications, 52 s. 58 applications, 526 Part VI Import/Export applications, 22 traffic, tolls and tariff applications and abandonment application.
- **Compliance activities**: completed 142 construction and operations inspections, evaluated 20 emergency response exercises, reviewed 13 emergency procedures manuals, conducted 137

compliance meetings, conducted six management system audits and reviewed 30 environmental reports related to monitoring of reclamation success on rights-of-way and compliance with conditions.

- **Enforcement actions**: issued 143 Notices of Non-Compliance (NNC) and Assurances of Voluntary Compliance, four inspection officer orders, eight safety orders and 12 AMPs.
- In total, the NEB conducted 348 compliance activities related to security, public safety and environmental protection. Of these, more than 100 compliance verification activities were specifically directed at ensuring that the environment is being protected, including 41 environmental construction and operations inspections, 30 environmental report reviews, and 36 compliance meetings with companies.

The strength of this entire system is that it covers the full life-cycle of all pipelines that are under the jurisdiction of the NEB. Given the specific expertise required and the continuity of life-cycle oversight, having a separate Department or agency involved in any of these steps, including the EA, would compromise the effectiveness of full life-cycle regulation and Canada's world class pipeline safety regime. The overall result of introducing another Department or agency would also heighten uncertainty, reduce the efficiency of regulatory processes, create duplication and potentially lead to disjointed or contradictory conditions of a pipeline project.

III. The NEB review process must be coordinated, efficient and provide process certainty

A regulatory framework that lacks process certainty, results in excessive timelines or imposes duplicative levels of review without a corresponding benefit will reduce Canada's competitiveness, threaten our ability to get our resources to markets and affect the credibility of our regulatory processes. NEB Modernization must therefore aim to make the regulatory review process more effective, coordinated, efficient and procedurally certain, while maintaining the same level of safety and environmental protection that currently exists.

In recognition of the NEB's strengths and its ability to assess the specific environmental effects of pipelines, the NEB is now responsible for conducting EAs under *CEAA 2012* for all federally regulated pipelines.

In recognition of the need to minimize duplication, certain *Navigation Protection Act* accountabilities were delegated from Transport Canada to the NEB. Changes made in 2012 under Bill C-38 gave the NEB responsibility to assess navigation-related impacts of pipeline watercourse crossings, eliminating the overlapping authority between the NEB and Transport Canada. The 2012 changes consolidated that authority by placing the responsibility for assessing project impact to navigation with the NEB as the single, best placed, technically competent regulator.

In recognition of the need to ensure efficient processes, 2012 changes enabled the NEB and the Department of Fisheries and Oceans ("DFO") to sign a Memorandum of Understanding which gave the NEB the responsibility to assess impacts of pipeline watercourse crossings on fisheries during the NEB review process. This significantly reduced overlapping authority between the NEB and DFO.

These three changes under *CEAA 2012,* the *Navigation Protection* Act and the *Fisheries Act* were positive steps that not only created a more efficient EA and permitting process, but also created a better outcome by reinforcing accountability with a single regulator that has the necessary expertise and experience required.

The Canadian regulatory system plays a key role in providing the necessary degree of certainty to maintain investor confidence and ensure that Canada remains competitive. NEB Modernization should aim to preserve the existing level of protection of the environment, together with rigorous life-cycle oversight, while simultaneously supporting a coordinated and efficient process. To achieve this goal, it is essential that amendments under *CEAA 2012,* the *Navigation Protection* Act and the *Fisheries* Act that achieved a one project, one review approach to reviewing pipeline projects, overseen by the best-placed regulator, be preserved.

IV. The NEB process is guided by government policy, but is not the appropriate venue to address broader public policy issues

The current NEB review process, including the EA conducted by the NEB, is one of the most rigorous and robust regulatory processes in the world. It is transparent, science and evidence based, and grounded in sound administrative law principles that have worked effectively for decades. While this process is robust and has served the public interest for nearly sixty years, some public stakeholders now expect that broader public policy issues will be addressed in individual pipeline project decisions. From the project proponent's perspective, companies are now faced with an approval process that can create unacceptable risks, trigger unnecessary polarization within the review process and, in the worst case result in a final Cabinet decision that is at odds with an NEB recommendation.

The quasi-judicial, technical review process of the NEB is not the proper venue to address broader public policy issues such as climate change and transitioning to a low carbon economy, Indigenous matters and consultation that are beyond the scope of a single project, overall Canadian energy policy, inter-provincial trade issues such as provincial revenue-sharing, whether a particular geographic or marine area is a "no-go" and other potential "showstoppers". Trying to insert these issues into the NEB review process, especially at the end of a lengthy project review, has proven unsatisfactory for all parties involved, resulted in inefficient processes that can't resolve complex public policy issues in the end, and are providing too much uncertainty and risk for investors.

This problem is particularly challenging for linear infrastructure projects such as pipelines that can extend over thousands of kilometers and affect diverse local, regional and national interests. Decisions regarding large-scale, cross-Canada or international pipeline projects ("Major Pipeline Projects") involve multiple interests from different geographic regions and levels of government that want to be heard on not only project specific issues, but also on the related public policy issues.

To prepare for Major Pipeline Project reviews, proponents can spend hundreds of millions of dollars to complete complex route-specific environmental and engineering assessments, finalize complicated commercial negotiations, secure shipper commitments, and conduct multi-year engagement with Indigenous groups, private landowners and other affected communities and stakeholders. At the end of this process, these broad public policy issues still remain unresolved. Left unresolved, these issues can heavily politicize a final Cabinet decision. That decision then becomes a proxy for the unresolved climate, energy, federal-provincial issues and broader Indigenous rights and title issues. The net effect is longer reviews, significantly greater regulatory uncertainty and intolerable risk.

If risks associated with regulatory processes prove to be unmanageable and too unpredictable, investors will no longer be prepared to invest in getting Canadian resources to market. This will negatively impact current and future investment in resource development and eliminate the benefits that these projects can provide to Canadians.

A proposed solution – a Two-Part review: The net effect of uncertainty in the existing review processs the erosion of both public confidence and investor confidence in regulatory processes. To help remedy this, CEPA is proposing a Two-part review for Major Pipeline Projects that will separate out the broader public policy issues from the well-established, standard technical review of routing, engineering, environmental and land matters.

A new approach to Major Pipeline Projects is needed to:

- Provide a venue for consideration of new projects in the context of broader public policies that are now, and rightly belong, outside of the NEB's mandate;
- Provide a means of establishing if a project is in the public interest test early in a project review, rather than at the very end of a lengthy, costly regulatory process; and
- Provide certainty for proponents of multi-billion dollar projects that they can proceed into the NEB's technical review with full awareness and understanding of the policy constraints and considerations associated with their project.

Part one: The first part of the review would address broader public policy considerations and whether the project is in the national interest – the question of "if" the project should proceed.

Part one would be designed to address the high level policy questions in a transparent and open process that would gain input from relevant stakeholders and Indigenous groups. The process would be based on a project description that provides information about the need for the project, basic project economics and benefits, a general route corridor, key environmental issues, engineering design challenges, and acknowledges the interests of affected Indigenous groups. With this information, the first part would consider the project in the context of broad public policy issues. The issues that would be considered in Part one would include issues such as climate change and transition to a low carbon economy, Indigenous matters and consultation that are beyond the scope of a single project, consistency with overall Canadian energy policy, inter-provincial trade issues such as provincial revenue-sharing, whether a particular geographic or marine area is a "no-go", the need for new infrastructure, regional or cumulative social and economic impacts, and any other potential project specific "showstoppers".

If it is found that the project should proceed, it would then progress to a more detailed technical assessment in the formal NEB project review process in Part two. As proposed, the first part would help mitigate investor risk by signaling whether a project should proceed to a detailed assessment *before* proponents invest years of preparation and hundreds of millions of dollars developing technical proposals.

Part one could be done by the Major Projects Management Office or by a similar agency that would consider the project in a "whole of government" approach. It would result in a binding GIC Cabinet decision at the end of the process. This process cannot be an open-ended process, but must be disciplined and follow stringent timelines. If approved, the GIC would be subject to a successful Part two review. The issues considered in the first part would generally not be reconsidered in the more detailed second part (recognizing that some issues, such as environmental impacts would be explored at a broad level in Part one and a more detailed level in Part two).

Part two: The second part of the review would be a project specific assessment that would consider "how" a project could proceed.

Part two would consider the details of the project through a process that is very similar to the current NEB review for s. 52 applications. A detailed application would be made to the NEB based on the Filing Manual requirements,

including a comprehensive environmental and socio-economic assessment ("ESA"). The NEB would conduct a thorough review of the ESA and technical aspects of the engineering design, economics and detailed route. The ESA would consider project-specific mitigation measures to address routing considerations raised by landowners, Indigenous communities and other stakeholders directly affected by the proposed project. The assessment in this part would be based on well-established scientific and engineering principles that would typically be of interest to a narrower group of stakeholders who are directly affected by the project.

With the broader public policy issues dealt with in Part one, Part two would enable a timely decision by the NEB that would be final and NOT require an additional GIC approval.

The opportunity for an improved process was demonstrated by the Report from the Ministerial Panel for the Trans Mountain Expansion Project, which was conducted at the end of a lengthy two and a half year NEB process. The report concluded by identifying six high-level questions for the government to consider, if not resolve, before making a final decision on the project. Those six questions align with the type of broad issues that CEPA suggests be considered in Part one – climate change, national energy policy, reconciliation with Indigenous Peoples, including UNDRIP and FPIC, economic risks and rewards, and reconciling public interest with regional interests. With a Two-part review, these important national issues would be considered before a project proponent enters into the technical review. Part one would take these issues out of the project specific review and preserve the distinction between the policy-making role of the government and the quasi-judicial role of the NEB.

CEPA is proposing that the Two-part review would **only** apply to Major Pipeline Projects that, due their scale and economic impact, raise public policy issues of national concern. CEPA is not proposing that this Two-part review process be implemented beyond the transmission pipeline context nor is it proposing that all NEB regulated pipeline projects be subjected to a Two-part review process. This point needs to be underscored because smaller projects, whether under provincial or federal jurisdiction, do not have the same impact on issues of national concern. For those projects, the current review process by the NEB is working effectively.

Circumstances under which a Two-part review is triggered, scope of each part, Indigenous and stakeholder participation, process and Governor in Council (GIC) decision making need to be addressed if a Two-part review were to be adopted and implemented.

CEPA believes a Two-part review would set the foundation for increased public confidence in the NEB review process. Specifically, the implementation of the first part would separate the broad public policy issues from the project-specific review, provide a transparent and public venue to consider the project within the Federal government's policy framework and allow the NEB review to achieve its intended purposes. The successful implementation of a Two-part review process would require the government to take action to fill in those policy gaps that are currently being debated in the context of pipeline-specific regulatory reviews. The proposed Two-part review process itself would not fill these policy gaps but rather, would provide a more appropriate forum to discuss whether a particular project fits into broader energy policy considerations. The Two-part process would reduce capital risk due to uncertain regulatory processes and set a foundation to build public confidence.

V. The roles and responsibilities of the Federal government, industry, Indigenous groups and the NEB related to consultation and accommodation in the NEB process must be clarified.

CEPA and its member companies recognize and respect the legal and constitutional rights of Canada's Indigenous peoples and their unique cultures and traditions. Our member companies are committed to engaging in meaningful consultation with Indigenous groups who may be affected by their respective projects. The pipeline industry works to avoid or minimize any effects on Indigenous rights and aims to obtain the support of affected Indigenous groups where possible.

Significant time and resources have been invested to build and sustain positive relationships with many Indigenous groups that are near existing and proposed operations. These relationships and associated projects provide significant and tangible benefits to many Indigenous communities through increased training, education, and employment, as well as procurement, construction, and other long term business opportunities.

There are a number of challenges with the current approach to Indigenous consultation and involvement in NEB regulated pipeline projects. These issues are causing unnecessary delays, creating uncertainty for proponents and investors, and creating frustration on the part of Indigenous groups. Moreover, some of the recent initiatives introduced by the Federal government meant to enhance Indigenous consultation and involvement in specific pipeline projects have created more uncertainty and unnecessary duplication. These challenges need to be addressed in this review in a comprehensive and thoughtful manner that balances the rights and interests of all parties involved.

The Unique Circumstances of Linear Projects

Before addressing CEPA's specific concerns and recommendations in these areas, it is important to underscore that pipeline and other linear projects face a unique set of circumstances when it comes to Indigenous consultation in comparison to other resource development projects. This unique context must be considered when assessing the feasibility of any recommended changes proposed for Indigenous consultation prior to project approvals as well as any engagement relating to life-cycle regulation.

First, linear projects like pipelines often require consultation with a large number of Indigenous groups. These groups frequently have widely varying interests and concerns, different levels of capacity and knowledge about pipeline developments and operations, and different expectations about how they want to be consulted. To provide some context, TransCanada is undertaking consultation with over 200 different First Nations and Métis groups for Energy East and Kinder Morgan and Enbridge each consulted with over 100 First Nations and Métis groups for their respective Trans Mountain and Northern Gateway projects.

While this is not a simple undertaking, there has been success in building support for pipeline projects amongst many, but not all, Indigenous groups. Changes that build confidence in the NEB and associated EA processes may be helpful in obtaining the understanding and support of additional Indigenous groups, but this will not completely address the issue. Certain Indigenous groups (and non-Indigenous groups and individuals) will likely remain opposed to pipeline projects under any circumstances for a variety of reasons, including a philosophical opposition to the development of fossil fuels. These positions need to be considered but they also need to be balanced with the wishes of other Indigenous groups that may support and obtain significant benefits from a project if it proceeds.

Second, any changes need to take into account that the Indigenous interests at issue and the magnitude of impacts can vary significantly within and between projects. For example, pipelines may go through private or Crown land that has been ceded through historic or modern treaty, reserve land, treaty lands, or through private or Crown land that are subject to outstanding claims, some of which may be overlapping. These varying contexts affect the potential rights and impacts at issue. For example, certain projects may have very limited new impacts on

Indigenous groups because they are being undertaken on existing rights of way or private land where no Indigenous rights are being exercised.

In short, one-size-fits-all approaches are not feasible as not all projects are the same, not all impacts are the same, and not all Indigenous rights and interests at issue are the same. Context matters – and a nuanced approach is needed to align and adapt to the very significant legal and practical differences relating to Indigenous rights and interests across the country.

This is not to say that the status quo approach to Indigenous consultation should be maintained. It shouldn't because the status quo is not necessarily working. All parties need a better process that sufficiently protects and balances the rights and interests at issue. This process needs to ensure meaningful Indigenous consultation and help to avoid or minimize impacts to Indigenous or treaty rights. However, it also must at the same time ensure timely decision-making with clear roles and responsibilities, consistent approaches, and avoid unnecessary duplication. CEPA believes that the following changes will assist in meeting these important objectives:

1. Create separate processes outside of the NEB to address issues that go beyond the scope of individual project reviews;
2. Clarify the roles and responsibilities of proponents, the Federal government, Indigenous groups and the NEB, and in the consultation process;
3. Implement a consistent and principled approach to key issues in Indigenous consultation, such as the determination of strength of claim and which Indigenous groups need to be consulted for a given project; and
4. Ensure that Indigenous monitoring of pipeline construction activities and involvement in post-construction life-cycle regulation activities are appropriately tailored to the nature of the Indigenous interests impacted and maintains the decision-making role of the NEB.

These important objectives are individually addressed in detail in specific chapters in pages 25-34.

GOVERNANCE AND STRUCTURE

The NEB must remain independent of government, while making decisions within its mandate and within the environmental and energy policy framework set by the Federal government.

The NEB is an independent quasi-judicial tribunal charged with making decisions in the public interest about the safe and efficient operation of federally regulated pipelines. As a result of these decisions, Canadians have the energy they need, when and where they need it, confident that world class pipeline safety standards have been met.

To make these decisions, Board members require broad knowledge of the energy industry and specific expertise in areas such as administrative law, engineering, economics, environmental science and Indigenous matters. Supported by about 400 staff, the NEB has the expertise to understand complex issues around pipeline infrastructure in a national and global economy. It must be positioned to attract and retain that broad expertise. CEPA supports regional and Indigenous representation on the NEB provided that Board members and staff have relevant technical expertise.

- **Board members should not be involved in the day-to-day operations of the NEB.** Board members are independent, expert decision-makers appointed by the GIC (Cabinet) for the purpose of adjudicating on pipeline and energy matters;
- **The role of Chair of the NEB should be separated from that of CEO.** The Chair provides strategic leadership to the Board, while the CEO is the administrator responsible for the efficient operation of the Board. Board members and staff, at all levels and in all roles, must continue to function in a regulatory role, acting at all times in accordance with the principles of natural justice and procedural fairness.
- **NEB headquarters should remain in Calgary to support the independence of the Board from government and the efficient routine (daily) interactions between regulated companies and the Board**. The NEB is not a government department and should not be located in Ottawa. It is appropriate to be geographically close to the companies it regulates.
- **The NEB should remain in Calgary because it is the centre of pipeline business and it needs to be there to regulate effectively.** Some stakeholders have taken the position that the NEB should be moved out of Calgary because of regulatory capture, suggesting that it is too close to the industry that it regulates. The NEB is located in Calgary because there are literally thousands of transactions and obligations at every stage of the development and life-cycle of a pipeline that require daily interaction between experts at the NEB and technical experts at pipeline companies. There is no evidence to suggest that the NEB shows bias in favour of the industry that it regulates nor in the decisions that it makes. Any perception of industry capture or bias is not borne out by the facts.
- **Permanent Board members and staff fulfill full-time roles and must be on the job every day. They should be co-located to maintain efficient, cost-effective core business functions**. Temporary Board members may be located anywhere that telecommuting is supported to

enhance regional balance and the necessary skill mix.

- **The Board could delegate some technical decision-making functions to staff.** In the interests of efficiency and timely decision-making, many routine matters, such as field variances, could be handled by expert staff who are familiar with the projects. The Alberta Energy Regulator ("AER") is a model to explore.
- **All of the Board's decision-making functions are supported by the life cycle regulatory oversight of the NEB under its current mandate**. For over 50 years, the pipeline industry and the Canadian public has had the advantage of full life cycle regulatory oversight – this means that mitigation measures to address safety and environmental issues are understood by NEB staff and proponents, and set in place at the application and review stage. If the project is approved, the mitigation measures become conditions of approval and are subject to inspection and audit by Board staff to ensure implementation during construction and operation. Ongoing monitoring and reporting to the Board confirms that the mitigation is effective and operations are safe, and if they are not, the Board can order additional measures to be taken to correct any deficiencies. Non-compliance is subject to a robust set of enforcement actions and monetary penalties.

MANDATE

As an independent, quasi-judicial regulator the NEB oversees the full life cycle of pipelines, from design and planning, the review process including EA, through construction, operations, maintenance and finally abandonment. As an expert regulator, the NEB must focus on these core responsibilities related to pipeline adjudication and life-cycle regulation. To discharge these critical functions effectively, the NEB's mandate should not be expanded to include roles and responsibilities that are outside of this core function.

The NEB's role and expertise is not in policy development or to be the primary implementer of policies such as how to transition to a low carbon economy. This is the role of the government. However, in recent years the NEB has been pressed to clarify government policy within project specific reviews. The proposed Two-part review described above is a solution to removing policy issues from NEB reviews for Major Pipeline Projects. This would separate out the broader public policy factors that fall more properly within the political arena from the well-established standard technical review, allowing the NEB review to focus on the areas of technical expertise that are within its mandate.

While other participants in the NEB Modernization process have advocated for the NEB's role to be expanded to address climate change and transitioning to a low carbon economy, CEPA recommends that NEB Modernization should focus on improving the expertise of the NEB in its core areas of responsibility.

- **The current mandate of the NEB is appropriately focused on pipeline safety, security and regulation through the Board's core business functions**. Much of the NEB's work is related to the life-cycle oversight of over 73,000 km of existing pipelines. This work is vital to the safe operation of these pipelines and competitiveness of the energy sector in Canada. The everyday business of the Board must continue to operate efficiently.
- **The NEB's mandate should not be expanded to include offshore renewables.** As a life-cycle quasi-judicial regulator with expertise in the operation, maintenance and performance of pipelines, its technical skills are specific. This expertise is not transferable to adjudication or life-cycle oversight of renewables.
- **The NEB's mandate should not be expanded to include transition to a low carbon economy**. This is a policy objective of the government and it is not the role of an independent, quasi-judicial regulator. Regulators should not be setting nor should they be the primary implementer of climate change policy. These policies must be set at the political level, where extensive collaboration, trade-offs and overall understanding of the interplay of various policy tools can be understood and put into practice across all sectors of the economy. This sort of policy development is simply not within the framework, nor the expertise of a quasi-judicial regulator. While the government can support the move to a low carbon economy through policy guidance and regulatory and economic tools, these are unrelated to the effective life-cycle regulation of existing pipeline infrastructure that is crucial to the Canadian economy. To maintain the effectiveness of the NEB's core responsibilities, it is fundamental to distinguish the policy making role of the government and the quasi-judicial function of the NEB.
- **The NEB's energy information function is not a core role of an independent, quasi-judicial regulator.** Energy information can also be managed by respective government

Departments, including NRCan and Environment and Climate Change Canada. This is particularly so with respect to producing information and data specific to climate change across all economic sectors. It would be more appropriate that the energy information function be placed with a government Department or an outside agency similar to the US Energy Information Administration, which collects this kind of data in the United States.

- **The core responsibilities and strengths of the NEB are related to its quasi-judicial nature and its life-cycle oversight of pipelines. These core strengths include overseeing the EA process for federally regulated pipelines as well as the role it currently undertakes with respect to secondary permits under the *Navigation Protection Act* and the *Fisheries Act*.** The NEB has decades of experience considering environmental effects of pipelines. As a life-cycle regulator, it is familiar with industry best practices for pipeline construction and operating standards, and has the expertise to take environmental effects that are unique or potentially significant to pipeline projects into consideration. As a life-cycle regulator, the NEB is well positioned for rigorous EA follow-up and compliance enforcement, which includes post-approval conditions and a robust programme for inspections and audits. This oversight lasts the full life of the pipeline. Moreover, under the *Pipeline Safety Act*, the NEB has enhanced powers and tools to impose post-approval project specific conditions. The benefits of this life-cycle perspective would be severely diminished if the EA responsibilities and post approval permitting responsibilities were granted to other authorities.

- **While consistency with EAs conducted by the Canadian Environmental Assessment agency is important, the conduct of EAs for federally regulated pipelines should remain within the NEB as an expert, full life-cycle regulator.** While some have advocated for consolidating EAs within another agency and suggest that consistency and quality of EAs would improve, CEPA disagrees. The unique technical, operational and environmental considerations of pipeline construction and operation are well known within the NEB. Other agencies lack this expertise and life-cycle knowledge.

PUBLIC INTEREST AND THE ROLE OF POLICY

In fulfilling its adjudicative role, the NEB must consider whether a project is in the public interest. Through the NEB's integrated review process, the Board balances socio-economic, safety, land, environmental and Indigenous matters. As recently described by the NEB in its presentation, posted on the Expert panel's website:

> *The Public interest is inclusive of all Canadians and refers to a balance of economic, environmental and social interests that change as society's values and preferences evolve over time. As a regulator, the Board must estimate the overall public good a project may create and its potential negative aspects, weigh its various impacts, and make a decision.*

Making decisions in the public interest for linear projects that can extend over thousands of kilometers has become increasingly complex as social, political and economic trends have evolved. Decisions on Major Pipeline Projects involve multiple interests, different levels of governments, and increased public expectations to be heard on a range of issues from climate change, Indigenous rights and title, federal-provincial energy strategy, marine shipping, and a host of local and regional concerns.

It has become increasingly apparent that policy guidance from the government on broader public policy issues is required.

If these broader public policy issues that feed a public interest determination are given clarity by the government and are considered or resolved in a more appropriate forum, the NEB would be able to focus on making decisions in the public interest based on its project specific integrated assessment of safety, technical, environmental and socio-economic interests, grounded in science, fact and evidence. The public interest test considered by the NEB should not be expanded.

- **Clarity regarding the scope of factors that are relevant to the Board's public interest determination is needed.** S. 52(2) directs that the NEB must take into account "*all considerations that appear to be directly related to the pipeline and to be relevant*", and may take into account a number of specific factors, including "*any public interest that in the Board's opinion may be affected...*" The Board has discretion to consider factors that are beyond those specified. It also has the statutory tools necessary to keep a focused review, based on what it considers to be directly related or relevant to a specific project. However, this lack of legislative clarity has led to frustration and dissatisfaction for some participants who want to deal with broader public policy issues and for proponents, who want certainty and a clear process.
- **While allowing the NEB flexibility to determine what may be relevant to the public interest is important, policy guidance on broader public policy issues is needed.** These are issues that are beyond the scope of any specific project and not within the mandate of the NEB to resolve.
- **Providing greater clarity on the broader policy issues would allow the NEB review and public interest determination to focus on the factors that are directly related and relevant to a**

pipeline application. Issues that are not directly related to the project are beyond the scope of the NEB and fall more appropriately within the policy making role of the government. This distinction is important to separate the policy making role of the government and the independent, quasi-judicial role of the NEB. It is also important to ensure a focused review that is predictable, evidence based and related to the project itself

- **The NEB review and public interest determination is not the appropriate place to resolve broad overarching issues such as climate change. Broad policy objectives such as climate change should be pursued via comprehensive national strategies, not on a project by project basis.** Canada's international and national environmental commitments should be addressed through national policy instruments. Canada has made significant progress in advancing its GHG commitments through a pan-Canadian framework for climate change that is now accompanied by more specific policies in some Canadian jurisdictions, including the application of carbon taxes and cap and trade systems. While the NEB review and the EA process needs to fit within this broader policy framework, it is not the venue to determine whether any specific project is on a pathway to meeting national GHG reduction targets or whether it does, or does not, align with the totality of federal government policies, instruments and the pan-Canadian framework. Those are policy decisions that are beyond the scope of the NEB. While the NEB review process should align with broader public policy priorities including climate change objectives, it should be recognized that individual projects have a limited effect on national objectives.
- **Policy clarity from the government to the NEB can be provided in different ways.** While the proposed Two-part review process is appropriate for Major Pipeline Projects, other ways could involve greater use of strategic and regional EA. Government policy direction should be provided through legislation and regulation so that all parties clearly understand the government's objectives and the standards against which projects are to be evaluated

DECISION MAKING

The NEB came into existence in 1959, built on the recommendations of two Royal Commissions in the wake of what has come to be known as the Great Pipeline Debate. The key issues at that time were economic, involving concerns that building energy export pipelines to the United States could undermine the energy supply needs of eastern Canada. Government involvement in and the politicization of pipeline decisions were believed to have contributed to the defeat of the St-Laurent government at the time. Ultimately, the impetus that led to the formation of the NEB was to move politically charged pipeline decisions out of the political arena into an independent quasi-judicial regulator whose decisions would be sheltered from the politics of the day.

The 1959 *National Energy Board Act* set up a decision-making process that granted the NEB authority over approving federally regulated pipelines. The Board's decision to approve a pipeline under s. 52, for pipelines exceeding 40 km, required Cabinet (GIC) confirmation before a certificate could be issued. Although the Cabinet could still decline to issue a certificate, this override was rarely, if ever used.

This decision making authority was not significantly altered until 2012, when Bill C-38 amendments changed the role of the NEB from making a "decision" to making a "recommendation" to Cabinet, which then makes a decision whether or not to accept the recommendation. The impact of this amendment was to potentially diminish the value of an independent review when, at the end of that review, the political decision at the Cabinet level is at odds with the NEB recommendation. This has not only led to a greater politicization of pipeline decisions, but has led to a perceived loss of independence of the NEB review process.

- **Pipeline decisions under s. 52 must be depoliticized. CEPA recommends that the 2012 amendment changing the role of the NEB from making a "decision" on s. 52 applications to making a "recommendation" to Cabinet be reversed, restoring the balance of decision making towards the NEB, a quasi-judicial regulator whose decisions are based on science, fact and evidence.** The result of the 2012 amendments was to shift the decision from what should be a politically neutral decision made by an independent, quasi-judicial tribunal with both technical and legal expertise, to the Federal Cabinet. This should be reversed.
- **The NEB should continue to make final decisions on s. 58 applications and such decisions should not be subject to Cabinet (GIC) approval.**
- **Should a Two-part review process be adopted** for Major Pipeline Projects, the decision making role of Cabinet and the NEB would need to be adjusted in both Part one and Part two of the review, with Cabinet approval required for Part one but not for Part two.
- **Provided that the broader public policy issues are addressed in more appropriate forums, such as the Two-part review, the NEB's decisions should be final.** The independence of the NEB must be preserved. The NEB's independence is based on its ability to arrive at its conclusions, within its mandate, free of political interference. The key here is to distinguish between making policy and making decisions within its core mandate.
- **Making decisions that are in the public interest requires a fair and transparent**

process that is grounded in procedural fairness and due process. Regulatory decisions have to be made in a multi-dimensional framework that recognizes that no one consideration is likely to determine the outcome. Striking that balance requires a process that is fair and transparent and follows the principles of administrative law and due process. A fair process is fundamental to the public interest and necessary to achieve social acceptability of decisions reached by regulatory tribunals such as the NEB.

- **Governments must stand behind final decisions related to NEB Modernization, as well as EA, Navigation Protection and Fisheries Act Reviews.**

THE HEARING PROCESS

Public confidence in decisions made by regulators is largely dependent on whether the process is, and is perceived to be, fair and transparent. Similarly, project proponents require clear and transparent processes to provide the degree of certainty needed to make investment decisions that can involve spending hundreds of millions of dollars simply to get through the regulatory review process.

The quasi-judicial nature of the NEB's hearing process is grounded in fairness and transparency, based on principles of administrative law, natural justice and procedural fairness. This grounding in administrative law provides a rich history of decision-making precedents as well as a solid foundation for decision-making by the NEB. These core principles must be maintained to ensure a fair and unbiased model for pipeline decisions.

Procedural fairness and natural justice must be preserved, particularly in formal processes of engagement such as hearings. At a minimum, this requires that project proponents have the ability to address the comments and arguments made with respect to the project and to know the case it must meet. It also requires that decisions are based on science, fact and evidence, as opposed to opinions and positions that are not subject to testing through cross examination or response by a project proponent.

- The core principles and elements that should be reflected in the hearing process are:
    - **Procedural fairness**: founded in natural justice, procedural fairness allows all parties, including the proponent, the ability to understand the case that needs to be met, to understand the evidence and test it (orally or through written questions) and be able to have a predictable process that allows the parties present their views on that evidence
    - **Efficiency:** The regulatory process should efficiently obtain the necessary information that is required to make its decision. When there are differing views, duplicative opinions do not necessarily result in a greater understanding or resolution of those views. There are examples of hearing processes, such as the one used for the Northern Gateway Pipeline and the Mackenzie Valley Pipeline projects that took years to complete, but did not resolve the opposing views. Review processes must have time limits – to carry on for years is neither efficient nor does it lead to a better outcome.
    - **Science, fact and evidence based decision-making:** The NEB process must ensure that science, fact and evidence are considered rather than broader public policy issues that are not directly related to a particular project.
    - **Reasonable and predictable processes.** Proponents can spend hundreds of millions of dollars simply to get through the regulatory phase. The hearing process needs to be laid out in a clear and understandable manner, with clearly defined goals, outcomes and timelines and a clear definition of the roles and obligations of all parties, including government, Indigenous communities, the public and the project proponent. There must be a publicly available mechanism to

share information and appropriate opportunities for public participation and input. Decisions must be transparent and provide reasons.

- **The current delineation between s. 52 and s. 58 applications on the basis of pipeline length remains reasonable**. The NEB Act currently requires a public hearing (oral or written) for all s. 52 applications and gives the NEB discretion to hold public hearings for s. 58 applications. The dividing line between these two types of projects is whether a pipeline is over or under 40 km in length. It is not practical or necessary to hold public hearings for the vast majority of s. 58 applications and the NEB has typically used its discretion appropriately in such circumstances. Some s. 52 applications are relatively small in scope and may not warrant a public hearing. In this case, the NEB currently has the discretion to use a written hearing process which can make the process more efficient.

- **Written hearings should be considered in all but the most controversial proceedings.** Oral hearings are considerably more onerous than written hearings for all parties involved. Written hearings may not involve as much preparation and formality, but still provide appropriate opportunities for all parties to test evidence and ask questions. Oral hearings should only be used when the oral portion of the hearing will improve understanding or is required to more rigorously test the evidence. Anecdotally, other regulatory tribunals in Canada and other countries make greater use of written proceedings than the NEB does.

- **The maximum timeline for s. 58 applications where a hearing is not required should be 9 months**. S. 58 applications are allowed to take up to 15 months, the same maximum time as s. 52 applications. This can have the unintended effect of those less complex projects taking the full time allocated.

- **The maximum timeline for s. 52 applications should not exceed 15 months**. There is a multi-year process for the proponent to engage and prepare for an application, prior to even filing. This extends the overall timeline for bringing a project to completion by many years. The proposed Two-part review would also help to enable a more efficient NEB process for Major Pipeline Projects.

PIPELINE SAFETY

Prevention, Emergency Preparedness, Response, Liability & Compensation

The coming into force of the *Pipeline Safety Act* (the "PSA") on June 19, 2016 further strengthened Canada's pipeline safety regime by modernizing the NEB's tools and requirements for prevention, emergency preparedness and response, liability and compensation. For the pipeline industry, changes under the PSA are among the most sweeping since the passing of the NEB Act in 1959. The fact that the *Act* was unanimously supported in Parliament sent a strong message that despite already high standards and excellent safety records, more could be done to build public confidence around pipeline safety. To that end, the CEPA supports and accepts these new and expanded obligations under the PSA even though those obligations come with significant additional material costs.

The transmission pipeline industry is one of the most regulated pipeline industries in the world, and pipeline safety standards in Canada are in the realm of world class. In addition to the information set out in the Panel's Discussion Paper on pipeline safety, there is additional information (some set out below) that CEPA believes is essential to a more complete understanding of the extent of a pipeline company's obligations to pipeline safety

Prevention : The PSA clarified and strengthened the powers of the NEB audit and inspection officers by moving from general powers exercised in practice, to specific powers of enforcement with respect to monitoring and compliance requirements for accident prevention. The PSA also updated the NEB's damage prevention regime and the much-needed harmonization with provincial damage prevention regimes. Finally, new sentencing provisions were created to give the NEB explicit power to sentence offenders including monetary penalties.

Emergency Preparedness & Response: Prior to the PSA, the NEB lacked explicit authority to take control of incident response and clean-up. Under the PSA, pipeline companies are now required to maintain a minimum level of "readily available" financial resources to ensure quick response. Government can also create a Pipeline Claims Tribunal to deal with claims for compensation in extraordinary circumstances and the NEB has the authority to take control of incident response and clean-up and order companies to reimburse governments, third parties and or individuals for clean-up costs. Notably, these changes under the *Act* must be considered with the additional changes to the *National Energy Board Onshore Pipeline Regulations* that maintain strict requirements for NEB regulated companies to have a comprehensive published emergency management programs.

Liability & Compensation: The PSA's most significant effect is in the area of liability and compensation. In addition to unlimited liability for fault negligence, the key feature of changes to liability in the *Act* is the addition of absolute liability for all companies without proof of fault or negligence up to $1 billion dollars. However, there are other legislative amendments to liability and compensation in the PSA that represent some of the toughest liability and compensation standards in the world. Pipeline companies must now carry a sufficient amount of financial resources that at a minimum, matches their absolute liability amount. Furthermore, the PSA makes it explicit that governments may sue for environmental damages related to an incident or release caused by a pipeline company.

- **Indigenous participation in pipeline safety can be increased.** The natural resources sector is the largest private employer of Indigenous people in Canada, with more than 13,500 working in the energy sector. However, CEPA sees more value in the exercise of building

public confidence amongst Indigenous populations and economic opportunity for trained Indigenous peoples to be involved in pipeline safety, specifically monitoring and emergency response. **CEPA recommends a coordinated strategy between industry, government, post-secondary institutions and Indigenous communities for training with a job in the line of sight in pipeline safety operations, including planning, monitoring, incident response and related employment.**

- **There must be a greater awareness and enforcement of laws regarding intentional pipeline incursions, tampering, and damages that are directly related to maintaining pipeline integrity, operation and maintenance**. Peaceful, lawful protests are an important part of a free and democratic society. However, intentional pipeline tampering or damage, as well as protests that blockade or make contact with pipeline infrastructure, represent significant safety concerns for industry employees, the general public and the environment. Too often, the justice system does not proceed with or drops charges against offenders who threaten or carry-out intentional damage affecting pipeline integrity and or operations and maintenance. **CEPA recommends a coordinated strategy between industry, government and environmental groups to raise awareness about the danger of intentional pipeline incursions, tampering or damage as well as the implications of impeding operations and maintenance activities. These kinds of acts are serious offences and should be charged to the full extent of the law as a deterrent given the magnitude of safety and environmental risks associated with them.**

TOOLS FOR LIFE-CYCLE REGULATION

In 2012, as part of the *Jobs, Growth and Long-term Prosperity Act*, the NEB Act was amended to provide the NEB with authority to establish a system of Administrative Monetary Penalties (AMPS) through regulations to promote compliance. This legislation enshrined in law specific powers of enforcement including the ability to sentence offenders with stiff monetary penalties per day per infraction for failure to adhere to monitoring and compliance requirements for safety and environmental protection throughout the life-cycle of a pipeline. The pipeline industry has observed that the NEB is actively using these tools and in an increasingly transparent manner by posting this information on their website. Importantly, there has also been an increase in the number of inspections being conducted as the NEB was provided additional funding in 2012 to hire staff for this purpose.

Tools and requirements regarding safety and environmental compliance derive principally from the NEB Act and associated regulations. However, regulatory requirements are also included in other federal and provincial legislation and processes. For example, the *Federal Fisheries Act* and *Species at Risk Act*, as well as the EA process all play important roles and in many instances provide the legal base for imposing project specific conditions on a pipeline from development and throughout its life-cycle. That is why, in terms of safety and environmental protection, these acts and the EA process should continue to be an integral part of project specific NEB reviews.

Tools and requirements regarding safety and environmental protection are also used to enhance risk management for pipeline companies. In the pipeline industry, this is referred to as a risk-informed approach whereby the NEB uses comprehensive project specific and company wide data from various activities as well as industry trends in safety and environmental impacts when developing and planning compliance verification activities. Historically, the NEB used to advocate for goal-oriented regulation and is now moving to more prescriptive approaches that don't always result in desired outcomes, are rigid, and don't easily allow for innovation and adaptation.

- **CEPA recommends that the NEB increase public education and awareness by showcasing the current suite of compliance and enforcement tools available to the NEB, how they are using them and the positive impacts and changes the pipeline industry is making as a result – there is a story worth telling to help build public confidence in pipeline safety and environmental protection.** The process for dealing with landowner complaints is poorly defined and public awareness of the requirements and the full suite of tools used by the NEB for compliance and enforcement of safety and environmental protections is poorly understood. This situation prevails despite an increase in the overall number of inspections and posting more information on its compliance and enforcement actions including inspection reports and condition compliance.
- **The NEB should focus on goals and outcomes that enable industry-wide innovation and adaptation.** The NEB's shift to a more prescriptive approach to advance risk management has important ramifications for safety and environmental protection, compliance and enforcement. The pipeline industry's experience is that there are many different ways to achieve an outcome and address a risk. The NEB should focus more performance-based regulation to enable innovation and adaptation.
- **Publication of safety and environmental performance reporting could be improved.** The primary environmental performance reporting occurs in the form of after-the-fact "as-built" and

"post construction" monitoring reports. As a result, the NEB website on safety and environmental protection focuses primarily on safety and in addition, the regulatory document index and condition compliance table is difficult to use. Publicizing this information in a more user friendly, real-time application, tracking the effectiveness of mitigation measures and the status of post-construction environmental monitoring would improve transparency, help address the concerns of landowners, and be a useful reference for future pipeline specific project planning and development.

- **If monitoring committees are established, they need to be well-defined, non-political and must ensure that monitoring activities are not put at risk.** CEPA has serious concerns about the use of monitoring committees. (see Indigenous Engagement, Indigenous Monitoring and Involvement in Full Life Cycle, Page 31). While project specific monitoring committees could offer a limited but potentially important opportunity to enhance participation, there must be input from the effected proponent, consideration of the arrangements that may already be in place between the proponent and Indigenous groups, and clearly defined roles and responsibilities. **Monitoring committees cannot have parallel processes or regulatory roles. Their powers (if any beyond referral to the NEB) cannot overlap with the NEB, its technical experts and its compliance, safety and environmental protection tools.**

INDIGENOUS ENGAGEMENT

Separate Processes are needed for issues that go beyond Project Reviews

The starting point for improving Indigenous consultation for NEB regulated pipeline projects is recognizing and delineating the limits of what the NEB and proponents can and cannot reasonably address. The proposed two-part review would help, but it is not the full answer to the question because certain Indigenous concerns cannot be effectively addressed in the context of project-reviews.

Project reviews need to be focused on identifying and understanding asserted or established Aboriginal or treaty rights that may be adversely impacted by a project, assessing the severity of those potential impacts, and identifying reasonable measures that can avoid or mitigate those impacts. These are issues that proponents and the NEB are equipped to address.

Too often, project reviews become a forum to advance issues that are unrelated to the project application, such as historic grievances relating to prior Crown conduct in traditional territories and ongoing disputes over Indigenous rights and title including overlapping claims, treaty implementation, or treaty interpretation. Project reviews are also often hindered by issues that go beyond individual projects like impacts of past developments on Indigenous and treaty rights and climate change, for which proponents can only reasonably be expected to deal with the effects associated with the pipeline project.

While these issues can be significant for Indigenous groups, they all require broader government action that goes beyond what proponents and the NEB can do. These issues should be recognized and dealt with as nation-to-nation issues rather than proponent or NEB issues.

- **The Federal and Provincial governments should work with Indigenous groups to establish more effective processes outside of project reviews to discuss, prioritize, and expeditiously resolve nation-to-nation issues.** This should include ongoing disputes over Indigenous rights and title, overlapping claims, treaty implementation and interpretation, and cumulative effects on Indigenous and treaty rights.
- **For Major Pipeline Projects, the Federal government should engage Indigenous communities early in the process to identify whether there are issues that cannot be addressed within a project review and require a separate nation-to-nation process.** These steps would help reduce the conflict, frustration, and delay that currently arise over these issues in the NEB process and, in so doing, help advance the government's broader goals of advancing reconciliation and developing a renewed Nation-to-Nation relationship.

INDIGENOUS ENGAGEMENT

Clarifying Roles and Responsibilities

The duty to consult is a Crown duty but, in practice, governments can and do rely heavily on proponents and regulatory processes to fulfill Indigenous consultation and accommodation requirements. CEPA supports the Federal government delegating to or relying upon proponents to fulfill certain aspects of the duty to consult and supports the integration of Indigenous consultation into existing regulatory processes to the extent possible.

This makes sense because proponents are best able to explain and answer questions about their projects and put in place measures that avoid and minimize impacts on Indigenous or treaty rights. It also makes sense to integrate Indigenous consultation into the NEB process to the extent possible to avoid unnecessary duplicative processes. That said, there needs to be much greater clarity about the roles and responsibilities in consultation and accommodation as between the Federal government, industry, Indigenous groups and the NEB.

It is currently unclear where the roles of the Federal government and proponents begin and end. The Federal government's participation also often comes too late in the process and is not sufficiently coordinated or aligned with consultation efforts by proponents. This can be a challenge, particularly where the Federal government has created new processes for Indigenous consultation mid-way through reviews or even after reviews are completed.

The role of the NEB in Indigenous consultation is also unclear, particularly where the NEB is the final decision-maker. This needs to be clarified, with any necessary modifications to its mandate to ensure consistency with any direction provided by the Supreme Court of Canada in *Hamlet of Clyde River* and *Chippewas of the Thames.*

Finally, Indigenous communities are not always fulfilling their reciprocal obligations to provide information in the consultation process. In particular, they do not always identify the specific Indigenous or treaty right at issue, the specific locations where such asserted or established rights are being exercised, and how those rights may be impacted by a project. It is challenging for project proponents to assess impacts and examine potential mitigation measures without this specific information.

- **Consultation by the Federal government for Major Pipeline Project reviews requiring deep consultation should be done at the outset of the project, be sustained, and better coordinated with proponents**. This will help to ensure that issues are dealt with in a timely manner and avoid unnecessary duplication.
- **The Federal government should ensure that any effort to implement a Nation-to-Nation dialogue on project reviews is done in a way that does not undermine or devalue relationships between Indigenous groups and industry**. Pipeline companies want to develop direct and positive relationships with Indigenous groups near their projects. These relationships help to advance reconciliation and are important given the long operational life of many projects which go well beyond the Crown's initial involvement.
- **Proponents should receive greater guidance on Indigenous consultation that clearly sets out their responsibilities, the role of the Federal government and the NEB, and the factors that will be considered in assessing the adequacy of consultation**. This could be done through formal delegation letters at the outset of a

project, through specific policy guidance from the Federal government or NEB, or through direction in legislation.

- **Indigenous groups should be provided greater guidance to outline what the duty to consult is focused on (impacts to asserted or established Indigenous or treaty rights) and the reciprocal obligations on Indigenous groups to participate in this process.** This guidance should include details on the informational obligations, including the need to identify concerns early and with specific reference to the asserted or established Indigenous or treaty right at issue, where that asserted or established right is exercised, and how it may be impacted by the project.

- **Capacity funding requests need to be reasonable and tied to reasonable work plans for understanding and responding to the decision-at issue**. The need for capacity funding must be determined on a case-by-case basis with regard to the decision at issue, the potential impacts at issue, other available capacity funding or in-kind support, and related work that has already been conducted and can be re-purposed or simply updated (i.e. pre-existing traditional land use studies in the same area). While the proponent should be responsible for project specific consultation, the Federal government should assume the responsibility to provide foundational level funding to communities to build/sustain the ability to consult with the Crown and various proponents.

INDIGENOUS ENGAGEMENT

More Coordinated and Consistent Approaches to Key Issues

Pipeline projects often require both provincial and federal approvals for pipeline projects. Unfortunately, at times Federal and Provincial governments have taken different positions on key issues in Indigenous consultation. This has created challenges, particularly where these issues arise after the federal review process is well underway.

There are two particular challenges for the pipeline industry that underscore the need for more coordinated and consistent approaches to key issues.

First, the Federal and Provincial governments are not always aligned with respect to the strength of claim of a particular Indigenous group. This can lead to different conclusions about the depth of consultation required. To make matters worse, proponents are often not made aware of these differences until very late in the process. For example, on a recent project, the Federal government changed its view on the depth of consultation required for several Indigenous groups that were previously categorized as having a low strength of claim. The proponent was advised of this *after* the NEB process was completed and the NEB had delivered its report. While new information may come to light in consultation that requires a reassessment of the depth of consultation required, the Federal government needs to better assess this issue at the outset of projects and to reconcile any inconsistencies with the provinces to the extent possible.

Second, the Federal government does not have a consistent approach to identifying which Indigenous groups need to be consulted for a given project. It also frequently adds Indigenous groups to the consultation list once the process is well underway and, in some cases, includes Indigenous groups that are not impacted by the project. For example, there have been instances where the Federal government has required consultation with Indigenous groups that are 300-400km away from a project. There are also instances where the Federal government has dramatically increased the number of Indigenous groups that need to be consulted or added new Indigenous groups through a series of periodic decisions over a two year period including up to two weeks before a decision. This creates significant difficulties for pipeline proponents and unnecessarily taxes the capacity of Indigenous groups when they are consulted unnecessarily about a project that will have no impact on them. Nobody benefits if too many Indigenous groups are identified for consultation.

- **The Federal government or NEB should develop a set of objective, consistent, and transparent criteria to identify Indigenous groups that will need to be consulted for a particular project.** These decisions should be made at the outset of the process, with a mechanism to enable proponents to seek early advice from the Federal government on Indigenous groups that need to be consulted for the purposes of early engagement.
- **The Federal government should work with provincial governments to ensure better information-sharing on asserted and established Aboriginal and treaty rights and traditional land-use. This should include ensuring a consistent approach to assessing strength of claim and a process to reconcile differing conclusions on strength of claim in project reviews requiring both Federal and provincial approvals.**

INDIGENOUS ENGAGEMENT

Indigenous Monitoring Activities and Involvement in Full Life Cycle

CEPA member companies have been working to increase Indigenous participation in their projects. In many cases, this has included involving Indigenous peoples in construction, archeological, and environmental monitoring for pipeline projects.

While increasing Indigenous participation in projects is important, there are concerns with the NEB's approach to conditions around Indigenous monitoring as well as the Federal government's recently announced plans to establish Indigenous advisory and monitoring committees for the Line 3 Replacement Program and TransMountain Expansion that will "oversee environmental aspects throughout the project life". In the course of this review, there have been recommendations to go even further and establish an Indigenous Constitutional Rights Compliance Office to advise and assist Indigenous groups throughout the NEB processes as well as with monitoring throughout the life of the project. CEPA has concerns with these current and proposed approaches.

These concerns should not be interpreted as opposition to involvement of Indigenous peoples in monitoring and life-cycle activities. The actions of CEPA members clearly demonstrate otherwise. However, any initiative to increase Indigenous involvement in construction monitoring and post-construction life-cycle activities cannot be one-size-fits-all and must be designed with:

i. Input from the affected proponent;
ii. Consideration of the arrangements that are already in place with Indigenous groups;
iii. Focus on monitoring activities that could adversely impact reserve land, modern treaty lands, Crown land, and areas where Aboriginal and treaty rights are being exercised (i.e. not on privately owned land) and a focus on the Indigenous groups that could be most impacted; and
iv. Clear roles and responsibilities.

To the extent that this involves the creation of any committee or other entity, these entities should be advisory in nature, limited in membership with regional representation from among the Indigenous groups most impacted by the project. The committees need a clear scope of responsibility, which will in turn minimize mis-interpretation and impacts on the ongoing working relationship between pipeline companies and Indigenous groups and the NEB and Indigenous groups.

In all cases, the NEB should remain the final decision-maker.

- Any requirements for Indigenous monitoring of pipeline construction activities and involvement in post-construction life-cycle regulation activities should maintain the decision-making role of the NEB, be appropriately tailored to the nature of the Indigenous interests impacted and take into account pre-existing monitoring arrangements, logistical and safety limitations, any required technical expertise, and the need to ensure timely maintenance and repair of operating pipelines.
- The Federal government's Advisory and Monitoring committees for Line 3 and TransMountain expansion were established without the meaningful input of the affected

proponents, creating regulatory uncertainty given the lack of details regarding their mandate and composition. There are over 100 Indigenous groups consulted on each of these projects and it is unclear who will be on these committees, what authority they will have, what issues they will be responsible for, who they will report to, what their relationship will be to the NEB, what happens if they take a different view on an issue than the NEB and how such disputes will be resolved. It is also unclear when they will be put in place and how this will impact work that has already been completed.

- The NEB's broad requirements to develop and consult on Aboriginal Monitoring Plans for construction and the Federal government's Advisory and Monitoring committees have the potential to disregard previous monitoring arrangements that proponents may have already negotiated with Indigenous groups impacted by the project. These requirements are not specifically tailored to focus on the Indigenous groups that are most impacted by the project nor do they recognize the expectations that such broad requirements can create for monitoring positions for all affected Indigenous groups. Monitoring positions are limited and it is logistically not possible to include individuals from all affected Indigenous groups given safety restrictions on construction sites. Currently it is unclear what details would be required in a plan. Consultation with industry is essential to ensure that the plans can align with operational realities.

- The Federal government's Advisory and Monitoring committees and the proposed Indigenous Constitutional Rights Compliance Office do not appear to take into account the limited impacts that life-cycle operation typically has nor that post-construction monitoring is largely done through technology and by individuals with very specialized expertise. These measures also appear to be expanding the scope of the duty to consult. The duty to consult is only triggered by a Crown decision that may have a novel potential adverse impact on asserted or established rights.[2] As a result, there is currently no duty to consult for operating and maintenance activities unless they require additional Crown permits and those Crown permits would result in a novel adverse impact. Routine maintenance and operating activities are contemplated by the prior Crown approvals and need to be conducted in order to ensure pipeline safety. They are often time-sensitive and engagement with the parties that might be affected (Indigenous communities included) by the work should be limited to the specific locations and activities contemplated.

- **While CEPA supports the aggregation of capacity resources where appropriate, we do not support the establishment of an Indigenous Constitutional Rights Compliance Office**. This would create unnecessarily duplication and would not achieve better or desired outcomes. The determination of whether the duty to consult has been met is a legal question, which the NEB is well positioned to address as a quasi-judicial tribunal. **To the extent that there is a lack of confidence in the NEB to fulfill this role, this should be addressed by strengthening the NEB, hiring additional staff with expertise in Indigenous matters and promoting greater transparency and information sharing not establishing a separate entity that would duplicate the work of the NEB and create regulatory uncertainty.**

[2] *Rio Tinto Alcan* at paras. 42, 46-49, 52-54.

INDIGENOUS ENGAGEMENT

Indigenous Traditional Knowledge

The incorporation of traditional land-use and ecological information ("Indigenous Traditional Knowledge") into the NEB application and hearing process is necessary. CEPA member companies strive to avoid and minimize impacts of their projects on Indigenous groups and welcome all information that can assist in this endeavor. Indigenous peoples and Indigenous Traditional Knowledge are often included in project scoping, the collection and analysis of field based data, the assessment of potential environmental impacts, the identification of mitigation measures, and in monitoring programs.

This has been an area of frustration for certain Indigenous groups because they feel that the information is being collected too late and not being given sufficient weight in the process. However, one of the barriers to incorporating this information more fully into the process is the timing in which it is received and the varying quality and utility of traditional land use reports. Guidance is needed to ensure that this information is conveyed in a way that is useful, timely and can be given due weight. There should be greater public education about how this information is used to inform decision-making and how it is not limited to EA decisions and that it can be very useful in determining detailed routing post EA approvals.

- Indigenous groups have raised concerns regarding the incorporation of traditional land use and ecological knowledge in NEB recommendations.
- **Detailed guidance should be developed about what should be contained in traditional land use reports and best practices for gathering and incorporating such information and dealing with any confidentiality issues**
- **Mechanisms also need to be put in place to consolidate existing traditional land use information held by the Federal and Provincial governments.** In some cases, studies are being unnecessarily duplicated in part due to a lack of information sharing between provinces and the Federal government and between entities within the Federal government.

INDIGENOUS ENGAGEMENT

Free, Prior, and Informed Consent

CEPA believes that any incorporation of UNDRIP, and specifically the principles of "free, prior, and informed consent" (FPIC), into the NEB process should be done in a way that is consistent with our constitutional framework and Supreme Court of Canada jurisprudence on Indigenous and treaty rights. This needs to take into account that Indigenous and treaty rights, like all constitutional rights in Canada, are not absolute.[3] Any interpretation needs to be flexible in order to balance the varying rights and interest at issue, recognizing that "compromise is inherent in the reconciliation process".[4] A flexible (rather than one-size-fits-all) approach is also needed so that it can be responsive to the relevant and varying circumstances, including the strength of claim, severity of impacts, and differing positions on the project amongst affected Indigenous groups.

In the circumstances, CEPA recommends that if FPIC is incorporated into the NEB process it should be interpreted as the objective of consultation when the duty to consult is triggered but not an absolute requirement or veto. This is consistent with the view expressed by the former UN Special Rapporteur on Indigenous Rights, James Anaya, in a 2009 report:

> "In all cases in which indigenous peoples' particular interests are affected by a proposed measure, obtaining their consent should, in some degree, be an objective of the consultations. As stated, this requirement does not provide indigenous peoples with a 'veto power', but rather established the need to frame consultation procedures in order to make every effort to build consensus on the part of all concerned. The Special Rapporteur regrets that in many situations the discussion over the duty to consult and the related principle of free, prior and informed consent have been framed in terms of whether or not indigenous peoples hold a veto power that could wield to halt development projects. The Special Rapporteur considers that focusing the debate in this way is not in line with the spirit or character of the principles of consultation or consent as they have developed in international human rights law and have been incorporated into the Declaration."[5] [Emphasis added]

Given the uncertainty in this area and level of litigation on the duty to consult, CEPA also recommends that specific guidance be developed that specifies that (i) FPIC is the objective of consultation and not a veto and (ii) sets out the criteria that will be considered in assessing the adequacy of consultation and accommodation. CEPA recommends that this assessment consider at least the following criteria:

- The strength of the claim;
- The type of Indigenous right at issue, whether it is being exercised in the project area, and the uniqueness and importance of any particular use that is being impacted;
- The severity of the impact (including likelihood of impact and its magnitude, frequency, and duration)

[3] The Supreme Court of Canada has recognized that even established rights, including Indigenous title, can be infringed if certain requirements are met. While the Court held in *Tsilhqot'in* that consent must be obtained once Indigenous title is established, the absence of consent is only a veto at law in cases of unjustifiable infringements of established Indigenous and treaty rights.

[4] *Taku River Tlingit First Nation v. British Columbia (Project Assessment Director),* [2004] SCC 74 (SCC) at para. 2.

[5] James Anaya, "Report of the Special Rapporteur on the situation of human rights and fundamental freedoms of Indigenous peoples", July 15, 2009, para. 48.

- Current and prior land-uses (greenspace vs. brownfield) and whether the land is privately held;
- The efforts made by the proponent to address the concerns of Indigenous groups, including any Indigenous groups that remain opposed to the project;
- The position taken by any Indigenous groups that remain opposed to the project; and
- The positions of Indigenous groups that support and would benefit from the project, including the comparative impact that the project would have on these groups and the strength of their respective claims.

- In this and other reviews, it has been suggested that FPIC be implemented through shared decision-making. CEPA and its member companies want to increase cooperation and reduce conflict in EAs. However, we believe that shared-decision making is unworkable for reviews of linear projects given the sheer number of Indigenous groups that may be impacted, and the variable degree of these impacts. CEPA cautions against implementing systems that have been developed for very different legal and factual contexts and after extensive negotiations and give-and-take on both sides (i.e. settled land claims north of 60) or for projects that only impact one or two Indigenous groups and would potentially impact those groups to a significant degree. These processes cannot practically be scaled out for linear projects, for which legal interests in land, asserted and established Indigenous rights and land-use, and related impacts vary considerably. **Any incorporation of the principles of FPIC in the NEB process should be consistent with Canada's constitutional framework and Supreme Court of Canada jurisprudence on Indigenous and treaty rights. Any such incorporation should define FPIC as the objective of consultation, clarify that it is not an absolute requirement, and set out the criteria for assessing the adequacy of consultation and accommodation.**

PUBLIC PARTICIPATION

CEPA supports a regulatory process that offers public participation opportunities that are inclusive while recognizing the need to maintain procedural fairness, use of science and fact-based evidence and fixed timelines. Meaningful public participation is an important foundation of the NEB review process and can foster a variety of benefits, including improved projects, mutual sharing of information and learning, legitimacy of decisions and restored public trust.

Currently the NEB has a variety of tools and hearing procedures that foster meaningful public participation such as the allowance for Indigenous oral evidence, oral statements, written comments, and intervenor participation. NEB Modernization should explore ways to enhance the public's ability to participate. However, this should be done within the context of recognizing the need for procedural fairness and effective and efficient processes. An inclusive approach to public involvement that allows for timely decisions can be accomplished where scalable and flexible levels of involvement, including written submissions, expert witnesses and oral statements are accommodated.

- **CEPA believes that the standing requirements under s. 55.2 of the NEB Act are reasonable.** Amendments under Bill C-38 in 2012 limited public participation to those who are directly affected or have relevant information or expertise. These 2012 amendments provided statutory guidance to the Board that their reviews should focus on the project itself and not be a venue for the public to discuss broader issues. The standing requirements under s. 55.2 are consistent with requirements in other tribunals and allow for participation not only by those who may be directly affected by the NEB decision, but also by those with relevant information and expertise. The standing criteria allows for those who should participate in the process to do so in a meaningful way. Allowing everyone to formally participate in the process would impact the ability of directly affected persons to meaningfully participate.
- **More formal opportunities for participation such as Intervenor status should be reserved for those that have standing under s. 55.2 (either directly affected by a proposed project or have relevant expertise). However, all parties, whether they have formal standing or not, should have opportunities to be involved through flexible, scalable and appropriate processes**. The NEB would need to assign appropriate weighting to comments and statements that are not tested through the more formal hearing process.
- **There must be clearly defined timelines.** All opportunities and forums for meaningful participation must also recognize the project proponent's need for a timely decision and a clearly defined process.
- **An inclusive approach to public involvement that allows for timely decisions can be accomplished where there are varied, flexible and scalable levels of involvement.** To preserve the quasi-judicial nature of the review process, broader public participation could occur outside of the formal hearing process. CEPA recommends that:
    - **Any member of the public should be able to provide a letter of comment**. The NEB should review the letter for relevancy against the list of issues and determine if it

should be accepted on that basis. A summary of the letters of comment could be added to the record of the proceeding, recognizing that statements would be reviewed and heard by the hearing panel, but would not be considered evidence.

- **Community meetings where members of the public could make oral statements that would be recorded and transcribed should be facilitated.** As with letters of comment, the NEB should review for relevancy against the list of issues and then either accept or reject an oral statement on that basis, recognizing that any statements made in this way are not tested but would be reviewed and considered by the hearing panel and given appropriate weight

- **The NEB should engage stakeholders early in the process through consultation on the list of issues.** Earlier consultation could focus the hearing process on the most critical issues at the same time as better engaging stakeholders. Input from the public would be considered, along with comments from other stakeholders, before the final List of Issues and Hearing order is published.

- **Participant Funding Program**. Funding programs for eligible intervenors are common amongst regulatory tribunals. Tribunals typically establish criteria for participations (i.e. standing) and some of these parties are then eligible for participant funding to support their effective intervention. CEPA's views on the NEB's Participant Funding Program are consistent with its position on public participation: stakeholders who are directly affected by the outcome or offer relevant expertise and thereby qualify for intervenor status should be eligible to apply for funding. **CEPA believes that the eligibility criteria effectively balance the funding needs of those parties who are affected by the outcome against the need to allocate limited financial resources**.

KEY RECOMMENDATIONS

Two-part review:

CEPA is proposing a Two-part review for Major Pipeline Projects (large scale, cross Canada or international pipeline projects) that will separate out the broader public policy issues from the well-established, standard technical review of routing, engineering, detailed environmental and land matters. And:

A new approach to Major Pipeline Projects is needed to:

- Provide a venue for consideration of new projects in the context of broader public policies that are now, and rightly belong, outside of the NEB's mandate;
- Provide a means of establishing if a project is in the public interest test early in a project review, rather than at the very end of a lengthy, costly regulatory process; and
- Provide certainty for proponents of multi-billion dollar projects that they can proceed into the NEB's technical review with full awareness and understanding of the policy constraints and considerations associated with their project.

(Overview, page 6-8)

Environmental Assessment and Life-cycle oversight:

The NEB oversees the full life-cycle of a pipeline from the planning and approval process, construction, operations, maintenance and finally abandonment. Each step, including the EA, is part of an integrated process overseen by the full range of expertise required to ensure that pipelines are designed, constructed, maintained, operated and abandoned or decommissioned safely. The strength of this entire system is that it covers the full life-cycle of all pipelines that are under the jurisdiction of the NEB. Given the specific expertise required and the continuity of life-cycle oversight, having a separate Department or agency involved in any of these steps, including the EA, could compromise the effectiveness of full life-cycle regulation and Canada's world class pipeline safety regime. The overall result of introducing another Department or agency to conduct the EA would also heighten uncertainty, reduce the efficiency of regulatory processes, create duplication and potentially lead to disjointed or contradictory conditions of a pipeline project.

Amendments under *CEAA 2012,* the *Navigation Protection* Act and the *Fisheries* Act that achieved a one project, one review approach to reviewing pipeline projects overseen by the best-placed regulator must be preserved.

(Overview, page 3-6)

Other recommendations set out in Theme Chapters and Discussion Papers, above fall within the 5 key principles identified at the outset. They are:

I. The NEB must be an independent, quasi-judicial, expert regulator

1. The independence of the NEB must be reinforced in terms of its formal and procedural independence from the government, the depth and breadth of its expertise and the finality of decisions made within its mandate. (Overview, page 3)

2. NEB Board members should not be involved in the day-to-day operations of the NEB. (Governance and Structure – page 11)

3. The role of Chair of the NEB should be separated from that of CEO. (Governance and Structure – page 11)

4. The NEB Headquarters should remain in Calgary to support the independence of the Board from government. (Governance and Structure, page 11)

5. The NEB should remain in Calgary because it is the centre of pipeline business and it needs to be there to regulate effectively. (Governance and Structure, page 11)

6. The NEB's energy information function is not a core role of an independent, quasi-judicial regulator. It would be more appropriate that the energy information function be placed with a government Department or an outside agency similar to the US Energy Information Administration, which collects this kind of data in the United States. (Mandate, page 13)

7. Pipeline decisions under s. 52 must be depoliticized. The 2012 amendment changing the role of the NEB from making a "decision" on s. 52 applications to making a "recommendation" to Cabinet should be reversed, restoring the balance of decision making towards the NEB, a quasi-judicial regulator whose decisions are based on science, fact and evidence (Decision-making, page 17)

8. The NEB should continue to make final decisions on s. 58 applications and such decisions should not be subject to Cabinet (GIC) approval. (Decision-making, page. 17)

9. Making decisions that are in the public interest requires a fair and transparent process that is grounded in procedural fairness and due process. Procedural fairness and natural justice must be preserved, particularly in formal processes of engagement such as hearings (Decision-Making, page 17, Hearing Process, page 19, Public Participation, page 34)

10. The core principles and elements that should be reflected in the hearing process should be: procedural fairness, efficiency, science, fact and evidence based decisions, reasonable and predictable processes. (Hearing Process, page. 19)

II. The NEB must be a full life-cycle regulator, with responsibility for oversight of design and planning, the review process including environmental assessment, construction, operations, maintenance and abandonment

11. The strength of the NEB oversight is that it covers the entire life-cycle of all pipelines that are under its jurisdiction. Given the specific expertise required and the continuity of life-cycle oversight, having a separate Department or agency involved in any of the key oversight functions, including the EA, would have the potential to compromise the effectiveness of full life-cycle regulation and Canada's world class pipeline safety regime. The overall result would also heighten uncertainty, reduce the overall efficiency of regulatory processes, create duplication and lead to disjointed or contradictory conditions for a pipeline project. (Key Principles, page 5)

12. To maintain the effectiveness of the NEB's core responsibilities as a full life-cycle regulator it is fundamental to distinguish the policy making role of the government and the quasi-judicial function of the NEB. Expanding the role of the NEB to areas where there is not skills overlap is ineffective and could be counter to improving the effectiveness of the Board to fulfil its core mandate. (Mandate, page 13)

13. Permanent NEB Board members and staff fulfill full-time roles and must be on the job every day. They should be co-located to maintain efficient, cost-effective core business functions. (Governance and Structure, page 11)

14. The current mandate of the NEB is appropriately focused on pipeline safety, security and regulation through the Board's core business functions. (Mandate - page 13)

15. The NEB's mandate should not be expanded to include off-shore renewables. (Mandate, page 13)

16. The NEB's mandate should not be expanded to include transition to a low carbon economy (Mandate, page 13)

17. The core responsibilities and strengths of the NEB are related to its quasi-judicial nature and its life-cycle oversight of pipelines. These core strengths include overseeing the EA process for federally regulated pipelines as well as the role it currently undertakes with respect to secondary permits under the *Navigation Protection Act* and the *Fisheries Act*. (Mandate, page 14)

18. While consistency with EAs conducted by the Canadian Environmental Assessment Agency are important, the conduct of EAs for federally regulated pipelines should remain with the NEB as an expert, full life-cycle regulator (Mandate, page 14)

19. CEPA recommends a coordinated strategy between industry, government and environmental groups to raise awareness about the danger of intentional pipeline incursions, tampering or damage as well as the implications of impeding operations and maintenance activities. These kinds of acts should be considered serious offences and charged to the full extent of the law as a deterrent given the magnitude of safety and environmental risks associated with them (Pipeline Safety p. 21)

20. There must be greater enforcement of laws regarding intentional incursions and protests that are directly related to maintaining pipeline integrity, operation and maintenance. CEPA recommends a coordinated strategy between industry, government and willing environmental groups to raise awareness about the danger of intentional pipeline incursions as well as the implications of impeding operations and maintenance. These kinds of acts should be considered serious offences and charged to the full extent of the law as a deterrent given the magnitude of safety and environmental risks associated with them. (Pipeline Safety, page 22)

21. The NEB should increase public education and awareness by showcasing the current suite of compliance and enforcement tools available to the NEB, how they are using them and the positive impacts and changes the pipeline is making as a result. (Tools for Life-cycle Regulation, page 23)

22. The NEB should focus on goals and outcomes that enable industry-wide innovation and adaptation (Tools for Life-cycle Regulation page 23)

23. The NEB could improve publication of safety and environmental performance. (Tools for Life-Cycle Regulation, page 23)

24. If Monitoring committees are established, they need to be well-defined, non-political and must ensure that monitoring activities at not put at risk. Monitoring committees cannot have parallel processes or regulatory roles. (Tools for Life-cycle Regulation, page 24)

III. The NEB review process must be coordinated, efficient and provide process certainty

25. NEB Modernization should aim to preserve the existing level of protection of the environment, together with rigorous life-cycle oversight, while simultaneously supporting a coordinated and efficient process. To achieve this goal, it is essential that the 2012 amendments under *CEAA 2012*, the *Navigation Protection Act* and the *Fisheries Act* that achieved a one project, one review approach to reviewing

pipeline projects that is overseen by the best-placed regulator is preserved. (Key Principles, page 6, Mandate page 14)

26. The Board could delegate some technical decision-making functions to staff. In the interests of efficiency and timely decision-making, many routine matters, such a field variances could be handled by senior staff who are familiar with the projects and who are experts in the technical aspects of the decisions required. (Governance and Structure, page 12)

27. The current delineation between s.52 and s. 58 applications on the basis of pipeline length remains reasonable. (The Hearing Process, page 20)

28. Written hearings should be considered in all but the most controversial proceedings. (The Hearing Process, page 20).

29. There must be clearly defined timelines. (Public Participation, page34, The Hearing Process, page 19-20).

30. The maximum timeline for s. 58 applications where a hearing is not required should be 9 months. (The Hearing Process, page 20)

31. The maximum timeline for s. 52 applications should not exceed 15 months (Hearing Process, page. 20)

32. The standing requirements under s. 55.2 of the NEB Act, are reasonable (Public Participation, page 34)

33. More formal opportunities of participation such as Intervenor status should be reserved for those that are have standing under s. 55. 2 (either directly affected by a proposed project or have relevant expertise). However, all parties, whether they have formal standing or not, should have opportunities to be involved through flexible, scalable and appropriate processes. (Public Participation, page 34-35)

34. An inclusive approach to public involvement that allows for timely decisions can be accomplished where there are varied, flexible and scalable levels of involvement. This can include letters of comment and community meetings. Principles of procedural fairness must be preserved. (Public Participation, page 34-35)

35. The NEB should engage stakeholders early in the process through consultation on the list of issues. (Public Participation, page 35)

36. Eligibility criteria for the Participant Funding Program should effectively balance the funding needs of those parties who are affected by the outcome against the need to allocate limited financial resources. (Public Participation, page 35)

IV. The NEB process is guided by government policy, but is not the appropriate venue to address broader public policy issues

37. The Two-part Review Process should be adopted – see key recommendation above (Key Principles, page 6-8)

38. The quasi-judicial, technical review process of the NEB is not the proper venue to address broader public policy issues. (Overview, page 6)

39. Clarity regarding the scope of factors and issues that are relevant to the Board's public interest determination is needed (Public Interest, page 15)

40. Policy guidance on broader public policy issues is needed. Providing greater clarity on the broader public policy issues would allow the NEB review and public interest determination to focus on the factors that are directly related and relevant to a pipeline application. (Public Interest, page 15-16)

41. The NEB review process and public interest determination is not the appropriate place to resolve broad overarching issues such as climate change. Broad policy objectives such as climate change should be pursued via comprehensive national strategies, not on a project by project basis. (Public Interest, page 16, Mandate, page 13)

V. The roles and responsibilities of the Federal government, industry, Indigenous groups and the NEB related to consultation and accommodation in the NEB process must be clarified.

42. Indigenous participation in pipeline safety should be increased. CEPA recommends a coordinated strategy between industry, government, post-secondary institutions and Indigenous communities for training with a job in the line of sight in pipeline safety operations, including planning, monitoring, incident response and related employment (Pipeline Safety p. 22)

43. The Federal and Provincial governments should work with Indigenous groups to establish more effective processes outside of project reviews to discuss, prioritize, and expeditiously resolve Nation-to-Nation issues (Indigenous Engagement, Separate Processes, page 25)

44. For Major Pipeline Projects, the Federal government should engage Indigenous communities early in the process to identify whether there are issues that cannot be addressed within a project review and require a separate Nation-to-Nation process (Indigenous Engagement, Separate Processes, page 25)

45. Consultation by the Federal government for Major Pipeline Project reviews requiring deep consultation should be done at the outset of the project, be sustained, and better coordinated with proponents. (Indigenous Engagement, Clarifying Roles, page 26)

46. The Federal government should ensure than any effort to implement Nation-to-Nation dialogue on project reviews is done in a way that does not undermine or devalue relationships between Indigenous groups and industry. (Indigenous Engagement, Clarifying Roles, page 26)

47. Proponents should receive greater guidance on Indigenous consultation that clearly sets out their responsibilities, the role of the Federal government and the NEB, and factors that will be considered in assessing the adequacy of consultation. (Indigenous Engagement, Clarifying Roles, page 26)

48. Indigenous groups should be provided greater guidance to outline what the duty to consult is focus on (impacts to asserted or established Indigenous or treaty rights) and the reciprocal obligations on Indigenous groups to participate in this process. (Indigenous Engagement, Clarifying Roles, page 27)

49. Capacity funding requests need to be reasonable and tied to reasonable work plans for understanding and responding to the decision-at-issue. (Indigenous Engagement, Clarifying Roles, page 27)

50. The Federal government or NEB should develop a set of objective, consistent and transparent criteria to identify Indigenous groups that will need to be consulted for a particular project. (Indigenous Engagement, More Coordinated and Consistent Approaches, page 28)

51. The Federal government should work better with the provincial governments to ensure better information-sharing on asserted and established Indigenous and treaty rights and traditional land use. (Indigenous Engagement, More Coordinated and Consistent Approaches, page 28)

52. While CEPA supports the aggregation of capacity resources where appropriate, it does not support the establishment of an Indigenous Constitutional Rights Compliance office. To the extent that there is a lack of confidence in the NEB to fulfill this role, this should be addressed by strengthening the NEB, hiring additional staff with expertise in Indigenous matters and promoting greater transparency and information sharing not establishing a separate entity that would duplicate the work of the NEB and create regulatory uncertainty. (Indigenous Engagement, Monitoring Activities and Involvement in Full Life-cycle, page 29)

53. Any requirements for Indigenous monitoring of pipeline construction activities and involvement in post-construction life-cycle regulation activities should maintain the decision-making role of the NEB, be appropriately tailored to the nature of the Indigenous interests impacted and take into account pre-existing monitoring arrangements, logistical and safety limitations, any required technical expertise, and the need to ensure timely maintenance and repair of operating pipeline.(Indigenous Engagement, Monitoring Activities and Involvement in Full Life-cycle, page 30)

54. Detailed guidance should be developed about what should be contained in traditional land use reports and best practices for gathering and incorporating such information and dealing with any confidentiality issues. (Indigenous Engagement, Indigenous Traditional Knowledge, page 31)

55. Any incorporation of the principles of FPIC in the NEB process should be consistent with Canada's constitutional framework and Supreme Court of Canada jurisprudence on Indigenous and treaty rights. Any such incorporation should

define FPIC as the objective of consultation, clarify that it is not an absolute requirement, and set out the criteria for assessing the adequacy of consultation and accommodation. (Indigenous Engagement, Free Prior, and Informed Consent, page 32-33).