canadian energy pipeline association | association canadienne de pipelines d'énergie

Canadian Energy Pipeline Association

Submission to the Expert Panel Review of Environmental Assessment Processes

22 DECEMBER, 2016

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Introduction

The Canadian Energy Pipeline Association (CEPA) represents Canada's 12 major transmission pipeline companies who operate approximately 119,000 kilometers of pipeline in Canada and transport 97 per cent of this country's daily crude oil and natural gas in a safe, environmentally sustainable and efficient manner.

CEPA is fully committed to the regulatory review process underway, including this review and the related *National Energy Board Modernization*, *Navigation Protection Act* and *Fisheries Act* reviews. CEPA believes that this review process is a pathway to develop an improved regulatory framework that will continue to build public confidence and ensure that Canada remains competitive. As an outcome of this review, the pipeline industry seeks an Environmental Assessment ("EA") process that continues to be based on science, facts and evidence. It must meet increasing demands for public engagement, be fair, transparent, timely and coordinated. Achieving this outcome can only be done in partnership with all levels of government, including Indigenous governments, stakeholders and communities across Canada.

CEPA recognizes the broad mandate of the Expert Panel to provide recommendations on improving federal EA processes in order to build public confidence, work to get resources to market and develop infrastructure projects responsibly in the twenty-first century. As part of our submission, CEPA has provided detailed background on each of the Expert Panel's Discussion Themes that have framed this review and public consultations over the past several months. However, at the outset we would like to highlight two critical matters that fundamentally inform all of our positions and views on each of the Themes the Panel has identified. These observations are based on the pipeline industry's extensive experience with EA and project reviews.

First, to introduce a new approach for decision making and EA within the NEB's integrated assessment of environmental, safety, technical and socio-economic interests. We believe this new approach will continue to build public confidence and lead to a better process for project proponents, Indigenous communities and public stakeholders.

Second, our steadfast support for maintaining a one project one review approach to EA that is overseen by the best-placed regulator, which for federally regulated pipelines is the National Energy Board ("NEB").

The current NEB review process

The current NEB review process, including the EA under the *Canadian Environmental Assessment Act 2012* ("CEAA 2012") is one of the most rigorous and robust regulatory systems in the world. It is transparent, science and evidence based, and grounded in sound administrative legal principles that have worked effectively for decades.

While this process is robust and has served the public interest for nearly sixty years, public expectations around energy decisions have been changing.

Now, more than ever, the public wants to be directly involved in important decisions and are less inclined to trust the processes by which these decisions are made. This can create particular challenges for large-scale, cross-Canada or international pipeline projects ("Major Pipeline Projects"). These projects can extend over thousands of kilometers and 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 such as climate change, upstream and downstream effects of projects, Canadian energy policy, Indigenous rights and title as well as other personal, local or regional concerns. All of these broader public policy issues are beyond the scope of CEAA 2012 and the NEB mandate and are not possible to resolve in project reviews. Against this backdrop, Major Pipeline Project reviews have become increasingly complex and challenging.

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. At the end of a lengthy and expensive process, companies are finding that these broad public policy issues still remain unresolved. Left unresolved, these issues can heavily politicize a Cabinet decision. That decision then becomes a proxy for the unresolved climate, energy, federal-provincial issues and disputes relating to Indigenous rights and title. The net effect is longer reviews, significantly greater regulatory uncertainty and intolerable risk.

Project proponents must be able to justify their investment decisions. Because Canada is not the only supplier of natural gas and crude oil, we face significant international competition and opportunities that are time limited. Simply put, if risks associated with regulatory processes prove to be unmanageable and too unpredictable, companies may no longer be prepared to invest in getting Canadian resources to the best market. This impacts current and future investment in resource development and the broader benefits that these projects can provide.

A proposed solution for Major Pipeline Projects – a two-part review

Public confidence in EA has become impaired in part because broad public policy issues have not been addressed at the political level and cannot be addressed satisfactorily through project reviews. To help remedy this, CEPA is proposing a two-part review for Major Pipeline Projects and will be advancing this concept more fully in the NEB modernization review. The two-part review separates out the factors that feed a 'national interest determination' from the well-established, standard technical review of routing, engineering, detailed environmental and land matters.

The first part of the review would be a type of sustainability assessment or strategic level undertaking by the federal government that would gauge public policy considerations and consider whether the project is in the national interest – the question of "if" the project should proceed. The issues that would be addressed in the first phase would be broad policy issues such as climate change, the need for new infrastructure, regional or cumulative social and economic impacts, overarching Indigenous issues and overall national energy policy. If it is found to be in the national interest, the project would then proceed to a more detailed technical assessment in the second part of the review. 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.

The issues reviewed 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).

The second part of the review would be a project review that would be a thorough review of the

technical aspects of a project. This would include environmental and socio-economic assessment, together with the detailed technical assessment of the engineering and design and detailed route. The project assessment would also consider project-specific mitigation measures to address routing considerations raised by landowners, Indigenous communities and other stakeholders directly impacted by the proposed project. Part two would assess "how" a project could proceed. 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.

CEPA believes this proposed concept would set the foundation for increased public trust in the federal EA and NEB review process. Specifically, the implementation of the first part would separate the broad public policy issues from the project review, provide a transparent and public venue to debate these issues and allow the EA to achieve its intended purposes of assessing the potential environmental effects and supporting mitigation strategies. 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 Major Pipeline Project reviews. The two-part review process itself does not fill these policy gaps but rather, provides a more appropriate forum to discuss where individual projects fit into broader policy considerations while at the same time reducing capital risk due to uncertain regulatory processes.

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 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. Under a two-part review, these important national issues would be considered before a project proponent enters into a multi-year technical review. Part one would take these issues out of the project EA 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 to the nature of 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 subject to a two-part review process. This point needs to be underscored because smaller projects, whether under provincial or federal jurisdiction, do not necessarily have the same perceived significant impact on issues of national concern. For those projects, the current review process within the NEB is working effectively.

Numerous details would need to be addressed, including the circumstances under which a two-part review is triggered, scope of each part, stakeholder participation and Governor in Council (GIC) decision making. CEPA will be addressing these ideas more fully in the NEB modernization review and as the government coordinates its comprehensive response to the recommendations of environmental and regulatory processes across the four connected reviews underway.

CEPA believes that if a two-part review process as described above is introduced for Major Pipeline Projects, the EA process under CEAA 2012 itself will perform more effectively because it can focus on the issues it is designed and equipped to address.

The Role of the NEB for Pipeline EAs

The second overarching matter that CEPA would like to highlight is the NEB's strengths as a lifecycle regulator and our support for maintaining EA responsibilities within the NEB for federally regulated pipelines. In recognition of those strengths, CEAA 2012 identified the NEB as a Regulatory Authority to conduct EAs. This provided greater clarity for pipeline proponents. Previously, pipeline projects could require an assessment from the NEB as well as other responsible authorities or provincial jurisdictions. This resulted in considerable uncertainty and duplicative processes, leading to unnecessary delays, costs and complexities without better environmental outcomes.

The NEB has decades of experience considering potential environmental effects of pipelines. As a lifecycle 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. The NEB considers whether the proponent plans to follow standard and proven mitigation methods that are specific to pipelines. As a life-cycle regulator, it applies its unique knowledge of the history of success of these mitigation methods and uses this information to determine whether or not the project is likely to cause significant adverse environmental effects.

As an independent quasi-judicial regulator, the NEB conducted EAs long before CEAA 2012 and even prior to CEAA 1992. The EA requirements are much broader under the NEB Filing manual[1] than current CEAA 2012 requirements, requiring information that goes beyond what CEAA 2012 assesses. This information and knowledge is incorporated, along with its assessment of potential environmental impacts, into the NEB's overall recommendation.

As a lifecycle regulator, the NEB is well positioned for rigorous EA follow-up and compliance enforcement, which includes post-approval conditions and a robust program for ongoing inspections and audits. This oversight lasts for the full life of the pipeline and even afterward when the line is decommissioned and no longer in service. Moreover under the *Pipeline Safety Act*, unanimously supported in the last session of Parliament, the NEB has enhanced powers and tools to impose post-approval project-specific conditions

CEPA strongly supports maintaining EA responsibilities within the NEB as the best-placed regulator to conduct a coordinated, efficient and thorough review. Adding additional Regulatory Authorities or additional regulatory processes is inefficient, more costly and may involve fragmented consultations that can confuse the public and Indigenous communities. Lack of coordination between different agencies or processes often results in delays and makes conflict more likely. Maintaining the principles of "one-project-one-review" is at the core of regulatory efficiency and excellence.

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[1] National Energy Board Filing Manual, Release 2016-01: http://www.neb-one.gc.ca/bts/ctrg/gnnb/flngmnl/flngmnl-eng.pdf.

NEB as a Single Regulator for Pipelines

At the Panel Presentation in Calgary, the Expert Panel asked for additional background on what the impact would be of having another agency, other than the NEB, conduct EAs for pipeline projects.

In its 2004 report to the Canadian Environmental Assessment Agency, *NEB Substitution under the CEA Act: NEB/CEA Agency Discussion Paper*, the NEB suggested that having the NEB conduct EAs on behalf of the CEAA for pipeline projects would :

- minimize potential duplication where the NEB has responsibility to assess a project under two separate processes;
- minimize procedural redundancy;
- allow the Agency resources to be more focused on other federal EAs where a dedicated review body does not exist;
- reduce unnecessary complexity and uncertainty related to regulatory processes for the NEB and its regulated industries; and
- be responsive to the need for efficient and effective EAs.

After conducting a pilot project where the NEB process was substituted for the separate CEAA review, the CEA Agency published a report in 2009 on its own analysis of the pilot and found that it largely met the expectations for successful substitution, concluding that "the criteria and conditions that were initially established for substituting the NEB hearing process for an environmental assessment review panel were met."[2]

At that time, it was concluded, by the CEA Agency itself, that having the NEB conduct EAs for pipelines is a better process. The 2009 report concluded with the following comments:

> It should be noted that whether the review process be a substituted one, or a joint review between two or more federal authorities, the overarching consideration is that the process should be consistent with the purposes of the *Canadian Environmental Assessment Act.* Key among these purposes is that **unnecessary duplication is eliminated** and that there are opportunities for timely and meaningful public participation throughout the environmental assessment process [emphasis added][3]

Since the pilot, numerous additional steps have been taken to make the process even more effective, including the establishment of the Major Projects Management Office ("MPMO") to coordinate all federal agencies involved in the review process, granting the MPMO authority to

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[2] Substitution under the Canadian Environmental Assessment Act: A Report on the Evaluation of the Substitution of the National Energy Board Review Process for a Canadian Environmental Assessment Act Review Panel for the Emera Brunswick Pipeline Project, the Canadian Environmental Assessment Agency, February 2009. http://www.ceaa-acee.gc.ca/E5C188AA-2D80-483C-8207-4B84437250E5/report-eng.pdf

[3] Ibid.

oversee the Crown's duty to consult with Indigenous groups and providing additional participant funding.

If another agency, whether the CEA Agency or an altogether new agency, is given responsibility to conduct the EA for pipelines under a revised CEAA, the overall EA experience would revert back to the previous inefficient and duplicative process. The NEB would still have its own mandate to consider environmental effects and would still require much of the same EA information to review construction methods and to assess potential conditions. Requiring a second EA would increase the potential for procedural duplication and require Intervenors, public participants and Indigenous groups to participate in two separate and comprehensive processes. This would further tax the limited capacity of Indigenous groups in particular and could make multiple regulatory processes very challenging and open to different outcomes. As a lifecycle regulator, the NEB develops conditions of approval and then oversees condition compliance, including all environmental mitigation, remediation and monitoring requirements. Having a separate regulator involved in any of these steps would be less efficient and likely less effective given the specific expertise required. The overall result would heighten uncertainty of project review and timing, extend timelines, reduce the overall efficiency of regulatory processes and lead to disjointed or contradictory conditions for a pipeline project.

Maintaining the NEB as the single best placed regulator continues to allow for a comprehensive approach to project review and to conditions, follow up and monitoring. A lifecycle approach by a single regulator is inherently more efficient and effective. It is more efficient because the same staff can be involved in oversight of both construction and operations. It is more effective because the staff of a single lifecycle regulator will have full exposure to all aspects of pipeline construction and operation and therefore develop enhanced expertise in the interactions of the environmental aspects of both construction and ongoing operations.

Regulatory Capture

At the Panel Presentation in Calgary, the Expert Panel asked CEPA to provide comments on regulatory capture as it relates to the NEB.

There have been submissions within this Expert Panel review that have suggested that the NEB is not well suited to conduct EA and recommendations that modernized EA legislation should utilize a single agency, whether existing or new, to be responsible for EA across all project types. Part of the concern is the perception of regulatory capture within both the NEB and the Canadian Nuclear Safety Commission ("CNSC").

Regulatory capture is based on a theory that if an industry, firm or interest group is able to capture the regulator by whatever means, the regulator can then be swayed to make biased decisions in their favour. A related capture theory is that a long standing relationship between the regulator and the companies that it regulates can impair the regulator's ability to objectively evaluate projects or regulate actions of the companies it oversees.

The experience of pipeline companies is that the NEB makes decisions in the public interest based on independent science. Our collective experience is that the NEB is not at all biased in favour of the industry it regulates. There has been no credible evidence of regulatory capture presented and furthermore, other submissions to the Panel that are critical of the NEB fail to account for the

NEB's integrated assessment of environmental, safety, technical and socio-economic interests and especially the NEB's stringent lifecycle oversight of the pipelines that it regulates.

Contrary to some suggestions that the outcome is pre-determined, industry experience is that approving projects in and of itself is not any sort of proof of regulatory capture. The reality for proponents is that they will not put forward project proposals that are not likely to be approved under established rules that are clear and well understood. Projects that are not likely to be approved will either not be submitted, will be refined after consultation, or will be withdrawn before proceeding all the way through the regulatory review given the enormous costs associated with technical assessments and the regulatory process.

More common evidence of regulatory capture might include: favourable bias to proponents during reviews and hearings, unfettered access to regulatory staff at all levels by proponents, a "hands off" approach to pipeline operations and evidence of industry unduly influencing regulations that affect how it is governed. These indicators are simply not reflective of the experience with the NEB.

A more practical sign of capture is to assess whether a regulator adds conditions and requirements that reflect information revealed during the review process including input from stakeholders and Indigenous groups. The experience of the pipeline industry is that the NEB has imposed an increasing number of conditions which must be met prior to construction, during construction or throughout the pipeline's operation. For instance, 209 conditions were imposed on Enbridge's Northern Gateway Pipeline Project, 157 conditions were imposed on Kinder Morgan's TransMountain Expansion, 89 conditions were imposed on Enbridge's Line 3 Replacement Project, and 45 conditions were imposed on TransCanada's North Montney Mainline Project (Gas).

The NEB has also shown a significant level of flexibility to Intervenors in allowing them to apply to participate and file submissions past published deadlines. The same leniency has not been shown for project proponents for filings or for deviating from hearing schedules.

Pipeline company access to NEB staff is heavily moderated with formal meeting requests and published meeting minutes. Once an application is submitted, the NEB will not meet with a project proponent to discuss the project except through the hearing process, which is in the public domain.

Overall, the NEB process for reviewing pipeline applications is one of the most transparent regulatory processes in Canada. Hearings are public, all relevant information related to the hearing process is published on the NEB website, oral hearings are webcast, and Intervenors can ask questions and cross-examine witnesses on the evidence supporting a pipeline application. Decisions and recommendations include detailed findings and reasons for conclusions. To suggest that the regulator is captured is simply not borne out by the facts.

Key Objectives of CEAA Reform

CEPA member companies propose to invest up to $50 billion in pipeline infrastructure projects in Canada over the next five years. Many of these projects have been in the planning and development stage for years. To bring these projects to realization, companies need to have a competitive investment climate. They will choose to invest their capital in other jurisdictions if

they see the Canadian regulatory system imposing process uncertainty, additional risks, costs and delays.

CEPA recognizes that the responsibility to create this investment confidence comes hand-in-hand with building public confidence in regulatory processes that lead to sustainable outcomes. 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.

PANEL QUESTIONS – CANADIAN ENERGY PIPELINE ASSOCIATION PERSPECTIVE

The following represents CEPA's views on a number of questions that have been asked by the Expert Panel. CEPA has not attempted to answer each and every question, but has provided context and background with respect to areas where CEPA member companies have relevant experience and expertise.

PANEL THEME A: ENVIRONMENTAL ASSESSMENT IN CONTEXT

Panel Questions:

- *To what extent do current federal EA processes enable development in Canada that considers the environment, social matters and the economy?*
- *What outcomes do you want federal EA processes to achieve in the future?*
- *How can federal EA support investor certainty, community and environmental wellbeing, the use of best available technology, certainty with respect to the protection of Aboriginal and treaty rights and timely decision making?*
- *How should federal EA processes address the Government of Canada's international and national environmental and social commitments such as sustainable economic growth and climate change?*

Desired outcomes

The federal EA process should achieve two important objectives: building public confidence in the regulatory review process and maintaining and preserving investor confidence to ensure that Canada remains competitive. To advance these two important objectives, future federal EA should:

- Ensure that processes are fair and transparent, coordinated, clear, efficient, comprehensive, and based on science and evidence. In particular, EA should avoid duplication, outline clear accountabilities, contain transparent rules and processes, ensure procedural certainty for project proponents, allow for meaningful participation from those who have valuable contributions to make and balance the need for timeliness with other objectives.
- Clearly articulate the purpose of EA and recognize its limitations. The overarching purpose of EA is to protect the components of the environment that are within the legislative authority of Parliament from significant adverse environmental effects caused by a designated project. EAs are not equipped to resolve broader public policy issues that are beyond the competent scope of project EA. These issues are not within the project proponent's ability to assess, create uncertainty that is unrelated to the project, and should be dealt with by mechanisms that are more suited, and accountable, to complex public policy decisions.
- Reduce duplication. Pipeline projects have faced multiple processes administered by different jurisdictions and duplicative processes by different entities within the same jurisdiction. Often the outcomes are largely the same. By reducing the need to repeat the same assessments with the same outcomes, scarce resources could be better employed in areas with the greatest concern.

Investor Certainty

CEPA member companies propose to invest up to $50 billion in pipeline projects over the next 5 years. Many of these projects have been in the planning and development process for years and are ready to go infrastructure investments. All of these projects will be built with private capital. This represents thousands of jobs, when unemployment is reaching levels not seen since the 1980s.

To build these important projects we need to continue to have a competitive investment climate. Companies will chose to invest their capital in other jurisdictions if they see the Canadian regulatory and fiscal system imposing process uncertainty, additional risks, costs and delays that are not inherent in other more competitive jurisdictions.

For investors to have confidence to make these significant investments in infrastructure projects, they must have a clear understanding of the process to be followed, including the time required to secure the rights to develop a project. For EAs, this means that the process and information requirements of EA must be unambiguous. The process must be transparent. The potential conditions imposed to mitigate potential effects must be based on science, fact and evidence and must take into consideration the practicality and economic viability of the conditions.

Predictability with respect to whether potential adverse environmental effects are likely to be found significant is needed for potential investors to measure and weigh risk before entering into the EA process. Project proponents do not want to put forward projects that, under known and predictable rules, are not likely approvable. With adequate understanding of the information required and the test to be met, proponents will be in a better position to assess what project to pursue, or not pursue. The arbitrary notion that effective EA requires that some projects that are submitted for approval should be rejected or denied for arbitrary reasons would have a serious chilling effect on investor certainty.

International and National Climate change commitments

The appropriate way to address climate change has been an unresolved issue in Canada that has at times resulted in conflicts within project reviews. In the absence of strategic policy guidance or a venue to debate public policy issues such as climate change, project EAs have become a place to be heard and to influence government decisions on broader climate change matters.

Individual project EAs are not the appropriate place to resolve these broad overarching issues.

Canada's international and national environmental commitments should be addressed through national policy instruments. Canada has made significant progress in advancing its international greenhouse gas ("GHG") reduction 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 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 project EA and for Major Pipeline Projects would better fit into part one of a two-part review that is described in pages 4-6 above.

EA is a planning tool that is intended to inform decisions. As such, Canada's climate change goals and commitments should guide what information needs to be gathered within project EAs.

Federal EAs should then be the fact gathering tool that provides decision makers with science based information that allows decision makers to make decisions that will take into account Canada's commitments and known policy framework. An understanding of that policy framework is equally important to project proponents in order to be able to predict, at the outset of project planning and design, whether a project is compatible with Canada's pan-Canadian framework to reduce GHG.

While the EA process must align with broader public policy priorities including climate change objectives, it should be recognized that individual projects have a limited impact on national objectives. Broad policy objectives should be pursued via comprehensive national strategies, not on a project by project basis.

PANEL THEME B: OVERARCHING INDIGENOUS CONSIDERATIONS

Panel Questions:

- *How can federal EA processes better reflect and incorporate the multiple ways in which Indigenous Peoples may interact with federal EA, including as potentially affected right holders, proponents of development, self-governing regulators and partners?*
- *How is the need to address potential impacts to potential and established Aboriginal and treaty rights best incorporated into the federal EA process?*
- *What is the best way to reflect the principles of the United Nations Declaration on the Rights of Indigenous Peoples, including the principles of Free, Prior and Information Consent and the right to patriciate in decision-making in matters that would affect Indigenous rights, in federal EA processes?*
- *What role should Indigenous traditional knowledge play in federal EA and what are some international best practices?*
- *How can the practices and procedures associated with federal EAs, as well as the process itself, support the Government of Canada's goal of renewing the nation-to-nation relationship with Indigenous Peoples and moving towards reconciliation?*

CEPA and its member companies recognize and respect the legal and constitutional rights of Canada's Indigenous peoples and their unique cultures and traditions. CEPA member companies have invested significant time and resources to build and sustain positive relationships with many Indigenous groups that are near existing and proposed pipeline operations. These relationships and associated pipeline projects have provided significant and tangible benefits to many Indigenous communities through increased training, education, and employment, as well as procurement, construction, and other business opportunities.

Our member companies are committed to engaging in meaningful consultation with Indigenous groups who may be impacted by their respective pipeline projects. The pipeline industry works to avoid or minimize any impacts to Indigenous rights and aims to obtain the support of affected Indigenous groups where possible. The lack of clarity and consistency provided by the federal government regarding roles and responsibilities of proponents and the Crown on Indigenous consultation and accommodation can make this process challenging. It is also challenging because project reviews have become a forum in which to advance Indigenous concerns that are unrelated to or go well beyond individual projects and cannot be effectively addressed within EA processes. These challenges cause unnecessary delays and create significant uncertainty for proponents and investors.

The Unique Circumstances of Linear Projects

Before addressing CEPA's specific concerns, 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. CEPA respectfully requests the panel to consider this unique context when assessing the feasibility of any recommended changes proposed for Indigenous consultation.

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 Metis groups for Energy East and Kinder Morgan and Enbridge each consulted with over 100 different First Nations and Metis groups for their respective Trans Mountain and Northern Gateway projects.

While this is not a simple undertaking, our member companies have been successful in building support for their projects amongst many, but not all, Indigenous groups. Changes that build confidence in Canada's EA processes may be helpful in obtaining the 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 Canada's oil sands or natural gas fields. 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 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 unnecessary duplication. CEPA and its members propose the following changes below that we believe will assist in meeting these important objectives.

Separate Processes Are Needed for Broader Nation-to-Nation Issues

An enhanced approach to EAs and related Indigenous consultation must first recognize the reasonable limits of project reviews and what Indigenous issues they can and cannot reasonably address. The proposed two-part review would help, but it is not the full answer to this challenge. This is because certain Indigenous concerns cannot be effectively addressed in the context of project reviews. This includes issues that are unrelated to the approval at issue, 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. This also includes issues that go beyond individual projects like cumulative effects on Indigenous and treaty rights and climate change, for which proponents can only reasonably be expected to deal with the additional impacts from their respective projects.

While these issues can be significant for Indigenous groups, they all require broader government action that goes beyond what proponents can do. These issues should be recognized and dealt with as Nation-to-Nation issues rather than proponent issues. In order to do so, the federal and provincial governments need to take concrete action to establish alternative effective processes to discuss and resolve these Nation-to-Nation issues.

For Major Pipeline Projects, the federal government also needs to engage Indigenous communities much earlier in the process in order 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 EA process and, in so doing, help advance the government's broader goals of advancing reconciliation and developing a renewed Nation-to-Nation relationship.

Clarifying Roles and Responsibilities

The duty to consult is a Crown duty but, in practice, governments can and do rely heavily on proponents for Indigenous consultation and accommodation. CEPA and its member companies support the federal government delegating to or relying upon proponents to fulfill certain aspects of the duty to consult. 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.

That said, there needs to be much greater clarity about the roles and responsibilities in consultation and accommodation as between the federal government, industry, review panels or regulatory tribunals, and Indigenous groups. CEPA will address each below with the exception of review panels and regulatory tribunals, which it intends to raise in the NEB Modernization Review given that this issue centers around the role of the NEB.

With respect to the role of proponents, it is currently unclear where the respective roles of the Crown and proponents begin and end. Guidance is needed for proponents to outline in detail what they are expected to do, what the federal government remains responsible for, and what factors the federal government will consider in assessing the adequacy of consultation and accommodation. This could be dealt with through formal delegation letters at the outset of the project and/or through specific policy guidance from the federal government.

With respect to the role of the federal government, their involvement for Major Pipeline Projects requiring deep consultation needs to be earlier (at the outset of the project), sustained, and better coordinated with proponents to ensure that issues are dealt with in a timely and consistent manner and that discussions do not proceed on parallel but disconnected tracts. This has been a major challenge in the past with the Federal government creating new processes mid-way through or after reviews are completed without clear mandates.

On this issue, CEPA and its member companies would like to ensure that any steps by the federal government 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 or create unnecessary duplication or uncertainty. Our member companies want to develop direct and positive relationships with Indigenous groups near their projects and this is something that the federal government should be encouraging. These relationships help to advance reconciliation and it is important given the long operational life of many projects which will go well beyond the Crown's initial involvement.

Finally, with respect to Indigenous groups, there should be 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 the process. This requires Indigenous groups to raise concerns early and with specificity, identifying the specific Indigenous or treaty right at issue, where it is exercised, and how it may be impacted by the project. It is very challenging for proponents to assess impacts and examine potential mitigation measures without this specific information, which is not always being provided.

More Coordinated and Consistent Approaches to Key Issues

CEPA member companies often require both provincial and federal approvals for pipeline projects. Unfortunately the federal government sometimes takes different positions than the provinces on key issues in Indigenous consultation. This has created challenges, particularly where these issues arise after the federal review process is well underway. CEPA will highlight two particularly problematic issues for its member companies.

First, the federal and provincial governments are not always on the same page 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. It was entirely unclear what led the federal government to change its view and this created significant challenges given how late this was in the process. While new information may come to light in consultation that requires a reassessment of the depth of consultation required, the federal government needs to do a better job at assessing 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 right of way or pipeline facility or on the opposite end of a particular province. There are also instances where the federal government has dramatically increased the number of Indigenous groups that need to be consulted (i.e. up to 40 additional indigenous groups, many of which are unlikely to be impacted) or added new Indigenous groups through a series of periodic decisions over a two year period including up to two weeks before a decision.

These decisions were not triggered by some change in the project and were not typically accompanied with a rational explanation as to why these groups need to be consulted and how the

federal government made this determination. This approach to this issue creates significant difficulties for pipeline proponents. It also unnecessarily taxes the capacity of Indigenous groups when they are consulted unnecessarily about a project that will have no impact on them. The federal government needs to 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.

Other Overarching Indigenous Considerations

Given the questions raised by the panel in its overarching Indigenous Considerations, CEPA would like to make submissions on two additional issues: (i) incorporating free, prior, and informed consent in federal EA processes and (ii) the role of Indigenous traditional knowledge in federal EAs.

Free, Prior, and Informed Consent

CEPA and its member companies believe that any incorporation of FPIC into federal EAs 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.[4] Any interpretation should also be flexible 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 FPIC be interpreted as the objective of consultation 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]

[4] 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.

[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.

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)
- 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 reasonableness of 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.

CEPA understands that several participants in this process have recommended that FPIC be implemented through shared decision-making in federal EAs. 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.

Traditional Indigenous Knowledge

CEPA and its member companies support the incorporation of traditional land-use and ecological information ("Indigenous Traditional Knowledge"). 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. CEPA member companies often include Indigenous peoples and Indigenous Traditional Knowledge in project scoping, the collection and analysis of field based data, the assessment of potential environmental impacts, identification of mitigation measures, follow up and monitoring programs.

CEPA recognizes that 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. In order to address these issues along with the challenges that companies face in incorporating this information, CEPA recommends two changes.

First, CEPA recommends the development of detailed guidance 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. In the experience of our member companies, these reports are of widely varying quality and utility. Guidance is needed to ensure that this information is conveyed is a way that is useful, timely and can be given due weight. Guidance is also needed to clarify for Indigenous groups that the use of traditional land use and ecological knowledge is not limited to EA decisions and that this information can be very useful in determining detailed routing post EA approvals.

Second, CEPA recommends that the federal and provincial governments work to consolidate their respective collections of traditional-land use information. This will help to identify where there is existing information that could be used or updated in order to avoid expensive and duplicative studies. CEPA recognizes that the reports themselves may be confidential and thus cannot be made publicly available. However, it recommends that the federal government collect and consolidate the studies that various departments and agencies have and list all traditional land use studies that have been done for each Indigenous group on Aboriginal Treaty Rights Information System (ATRIS). This will allow industry proponents to have more informed discussions with Indigenous groups about the utility of relying upon prior studies and to help identify earlier in the process where rights are being exercised.

PANEL THEME C: PLANNING ENVIRONMENTAL ASSESSMENT

The Expert Panel Asked:

- *Under what circumstances should federal EA be required?*
- *For project EAs, do you think the current scope and factors considered are adequate?*
- *Are there other things (effects, factors, etc.) that should be scoped into EA?*
- *Under which circumstances should EA be undertaken at the regional, strategic or project level?*
- *Who should contribute to the decision of whether a federal EA is required?*

Before examining specific questions regarding what should trigger a federal EA and what should be examined and considered in that EA, it is necessary to first define the overall purpose of EA. CEPA believes that the fundamental purpose of EA is to inform decision makers of the likely environmental effects of a proposed project, to minimize or avoid adverse environmental effects and to incorporate environmental factors into decision making. Over time, however, EA has increasingly focused on broader issues such as whether a project is sustainable or within the public interest, as well as the detailed, technical elements related to the likely environmental effects. This has resulted in increased complexity and uncertainty, growing timelines and a lack of public confidence in the decision making process. EA is not equipped to deal with these broader policy considerations.

Triggers vs Project List

Under CEAA 2012, only "designated projects" require an EA. The previous legislation, CEAA 1992, required EAs for projects that had a federal "trigger" by touching on certain aspects of federal jurisdiction such as when the federal government was the proponent, provided financial assistance to the project, disposed of interests in federal lands to enable a project to proceed or issued a prescribed statutory instrument or permit. This broad triggering approach required detailed regulations such as the Inclusion List, the Exclusion List, Comprehensive Study List and Law List to clarify when a federal EA was required and when it wasn't.

CEPA supports maintaining the CEAA 2012 "designated project" approach, together with the thresholds contained within the Federal Regulations Designating Physical Activities. These regulations identify the activities and projects that constitute the "designated projects" that may require an EA by the NEB, the Canadian Nuclear Safety Commission ("CNSC") or the CEAA. Under s. 14(2) of CEAA 2012, the Minister also has the power to require an EA for a non-listed project. These changes eliminated the uncertainty associated with triggering under CEAA 1992 and focused reviews on significant developments where impacts are most likely.

For the pipeline industry, it should be noted that the Regulations Designating Physical Activities require an EA for the construction, operation, decommissioning or abandonment and operation of any new pipeline with a length of 40 km or more. It should also be noted that under the authority of the *National Energy Board Act* ("NEB Act"), the NEB conducts EAs for **all** pipeline projects, including those that are less than 40 km. Therefore all federally regulated pipelines are subject to an EA under CEAA 2012 or under the NEB Act.

Prior to CEAA 2012, provincially regulated pipelines that did not cross a provincial boundary could still trigger a federal EA under CEAA 1992 if the project required an authorization listed in the former *Law List Regulations*. This often occurred when ancillary approvals from a Department such as Fisheries and Oceans Canada or Transport Canada were required during the course of construction. This could trigger a duplicate assessment over and above the respective statutory test that would need to be met for those permits, leading to uncertainties and potential delays.

Scope and Factors

The next consideration for the Expert Panel, once it determines when and if a federal EA is required, is to consider the scope of the environmental factors that should be addressed within the federal EA. This issue has attracted significant public and political attention in the past several years, particularly as it relates to pipelines and specifically in consideration of climate change.

Under CEAA 2012, the definition of "environment" was broadly defined and remained the same as in CEAA 1992. However the term "environmental effect" was amended to focus on matters "that are within the legislative authority of Parliament" such as fish, aquatic species at risk, migratory birds, transboundary impacts and Indigenous peoples. Factors to be considered were clearly identified in s. 19(1) and (2) of CEAA 2012, which includes many of the same factors found in CEAA 1992, with the exception of the removal of the "need for the project" and "alternatives to the project". Together, the two changes to the definition of "environmental effect" and the list of factors to consider have been viewed by many commentators to have reduced the nature and scope of Federal EA. For the pipeline industry, however, it should be noted that there has been no narrowing of scope. In pipeline reviews, the EA is only one part of and consideration within a comprehensive quasi-judicial review of a pipeline project by the NEB. Within that review, the regulator continues to examine a much broader scope, including the need for the project, the economic feasibility, the overall safety factors, and any public interest that may be affected by the approval or dismissal of an application. Section 19(1)(j) of CEAA 2012 also enables the Responsible Authority or the Minister to take into account "any other matter" considered appropriate. Given this flexibility, CEPA believes that CEAA 2012 appropriately defines the scope of effects and factors to be considered in federal EA.

Suggestions have been made within this Expert Panel Review that federal EA should evolve to become more of a "sustainability assessment" that looks at whether a project will result in positive contributions to sustainability, in particular whether that project will have a positive contribution to meeting international climate change commitments. CEPA would be concerned with a type of sustainability assessment that could greatly increase federal intrusion into provincial jurisdiction, result in decisions that the federal government does not have jurisdiction to enforce or act on and require the proponent to scope in factors that are beyond the specific project and that it is not equipped to assess or mitigate. Furthermore a sustainability assessment that requires a Responsible Authority to determine whether a project's potential GHG emissions is consistent with Canada meeting its International GHG reduction commitments, is problematic. As noted in page 12-13 above, this issue must be considered within the pan-Canadian framework for emissions reduction, which is outside of the scope of federal EA. As such, project federal EA should continue to focus on the environment and environmental effects within the federal jurisdiction.

Regional and Strategic EA

CEPA has emphasized that there are broader public policy issues that continue to come up in project EA that are beyond the competent scope of project level assessments and beyond what proponents can be expected to deal with. These issues are outside the definition of "environmental effects" and the delineated factors to be considered in CEAA 2012. However, these are often the very issues that the public want to be heard on. For Major Pipeline Projects, CEPA is proposing a two-part review that is described in pages 4-6 above to deal with some of these issues. In general, however, more extensive use of Strategic Environmental Assessment ("SEA") or Regional Environmental Assessment ("REA") or other similar instruments or processes could provide one means to have some of these broader issues addressed earlier in the process. While not a solution to addressing all of these issues, more strategic guidance could result in greater clarity and guidance for project planning and assessment, resulting in a more focused project review. It can also provide a more appropriate venue for the public to be heard on issues that are beyond the scope of a single project and allow the project EA to focus on project specific environmental effects.

CEPA notes that there are various definitions of SEA and REA. CEAA 2012, the Canadian Council of Ministers of the Environment (CCME) document and provincial laws provide different definitions. There is further confusion with other similar instruments, including regional studies, baseline studies and strategic assessment studies.

For the purposes of this review, CEPA understands that, broadly speaking:

- SEA is a process that contributes to informed decisions by incorporating environmental considerations into the development of government policies, plans and programs that are not limited to a particular region. The Cabinet Directive on the Environmental Assessment of Policy, Plan and Program Proposals sets out the expectations of Ministers and Cabinet on when a SEA should be conducted and what it should consider.

- REA is a process designed to assess the potential environmental effects, including cumulative effects, for a particular region. It is designed to evaluate the cumulative effects to provide a better understanding of the area.

CEPA believes that SEA is one potential means for dealing with policies, planning and associated emerging or uncertain areas of public policy at an earlier stage. SEA can be a useful source of information for federal decision-making. REA could also be a better suited alternative to assessing cumulative effects of existing and future activities in a particular geographic area than project EA. However, there are numerous practical difficulties with both SEA and REA including how to conduct a regional assessment in a multi-jurisdictional context where the cooperation of provincial governments and Indigenous authorities are required, how REA relates to broad land use planning and how it is triggered. Of particular concern to project proponents is the potential for delay. Project EA should not be delayed until work is completed on REA or SEA, which could take years, given the multi-jurisdictional context.

PANEL THEME D: CONDUCT OF ENVIRONMENTAL ASSESSMENT

Panel Questions:

- *Who should be responsible for conducting federal EA? Why?*
- *What should be the role(s) of the proponent, Indigenous Peoples, the public, environmental organizations, experts, the government and others in the planning of, collection, analysis and review of EA related science including community and Indigenous traditional knowledge?*
- *How can EA processes be improved to ensure a timely, yet thorough process has been conducted?*

CEPA supports EA processes that build public confidence, increase regulatory certainty and ensure that Canada remains a predictable and competitive business environment. This requires a process that is clear, efficient and comprehensive. In particular, the process should be science, fact and evidence based, be conducted by the best placed regulator, avoid duplication, outline clear accountabilities, contain transparent rules and processes, allow for meaningful participation from those who have valuable contributions to make and balance the need for timeliness with other objectives.

Responsible Authorities

Under CEAA 2012, there are now three Responsible Authorities that conduct EAs for designated projects, the Canadian Environmental Assessment Agency, the NEB and CNSB. The NEB already had established quasi-judicial review processes prior to CEAA 2012, and even prior to CEAA 1992, with a mandate to oversee projects throughout their lifecycle, from project design, review, construction, operation and decommissioning. For reasons outlined more extensively in pages 6-10 above, in the strongest possible terms, CEPA and its member companies support maintaining the role of the NEB in conducting EA processes for all federally regulated pipeline projects.

Role of scientific knowledge, community knowledge and Indigenous traditional knowledge

CEPA believes that public confidence in EA is enhanced when decisions are informed by the application of the best information reasonably available. To ensure that the best information is made available, EA must embrace and give appropriate weight to several lines of evidence including scientific knowledge, community knowledge and Indigenous Traditional Knowledge. This information informs conclusions about the predicted environmental impacts of a project, the effectiveness of planned mitigation and the justification of a project.

Each type of evidence provides a range of information at all stages of EA, from initial scoping, terms of reference, collection of baseline data, predicting potential environmental impacts, developing mitigation measures, assessing risks and consequences, and designing follow-up and monitoring programs throughout the lifecycle of a pipeline project. Science and expert evidence provides a basis to predict environmental effects in a structured framework that can be quantitatively characterized. Indigenous Traditional Knowledge and community knowledge can make important contributions to understanding local and regional socio-cultural, economic and biophysical conditions that are often not available to science- based research.

Indigenous Traditional Knowledge, community knowledge and scientific and expert knowledge should be pursued during initial project scoping and development in order to bring forward concerns that can be used to understand and predict potential impacts of the project. A failure to understand the potential impact of a project and to consider what a focused EA requires can lead to prolonged review and potentially undermine the public confidence in any decision that follows.

Timelines and predictable review processes

One of the most important improvements to achieve a timely, robust EA is to address the fact that there are issues that are beyond the scope of project EA and beyond what can reasonably be expected to be dealt with by project proponents. These important broader public policy issues must be resolved at an earlier stage and in advance of extensive, lengthy and expensive technical engineering and EA. By dealing with some of these issues in advance, project review can be enabled to more efficiently and effectively deal with predicting and mitigating potential adverse environmental impacts.

Mandatory timelines have been helpful, particularly when compared to significant unnecessary delays that were experienced prior to CEAA 2012. It is important to ensure that reviews are conducted efficiently, and on a timely basis that provides greater certainty to project proponents. CEPA member company experience has suggested that in many cases the timelines were actually shorter and more predictable before CEAA 2012 introduced mandatory timelines. While establishing mandatory timelines, CEAA 2012 also introduced opportunities for time extensions and time outs, which had the effect of increasing uncertainty in some cases. In spite of mixed experiences with CEAA 2012 timelines, CEPA recommends that firm timelines should be maintained in any revised EA legislation. Having maximum timelines manages the expectation of all participants in a project review and provides a degree of protection against endless delays.

PANEL THEME E: DECISION AND FOLLOW-UP

Panel Questions:

- *What types of information should inform EA decisions?*
- *What would a fair, transparent and trustworthy decision-making process look like?*
- *Who should participate in the implementation of follow-up and monitoring programs and how should that participation be encouraged or mandated?*
- *Are enforceable conditions the right tool to ensure that the Government of Canada is meeting is EA objectives and, if so, who should have a role in compliance and enforcement?*
- *Given that EA decisions are made in the planning phase of proposed actions, how should these decisions manage scientific uncertainty?*

Science and Evidence to Guide EA Decisions

Public trust in EA decisions is largely dependent on confidence that the decision is based on the application of the best knowledge and information reasonably available. As outlined in Theme D above, CEPA believes that to ensure that the best information is made available EA must embrace several lines of evidence including scientific knowledge, community knowledge and Indigenous Traditional Knowledge. The Responsible Authority must be informed by and have an understanding of the project scope, magnitude, geographic extent, duration and environmental and socio-economic context of the potential environmental effects, as well as the appropriate mitigation measures identified and whether those effects are justified in the circumstances.

Information to inform EA decisions should include environmental baseline data, an analysis of the potential interactions between the project activities and the environment, consideration for concerns of interested parties, engineering design and mitigation measures.

Fairness and Transparency

Public confidence in decisions made by Responsible Authorities is also is largely dependent on whether the process is fair and transparent. Similarly, proponents require processes to be fair and transparent in order to provide the degree of certainty needed to make investment decisions.

A fair and transparent process needs to be laid out in a clear and understandable manner, with clearly defined goals, objectives and timelines for each phase. There must be a clear definition of the roles of all parties, including the government, Indigenous communities, the public and the project proponent. There must be a publicly available mechanism to share information with all parties and the public. Appropriate opportunities for public input and participation must be given and decisions must be transparent and provide reasons.

Public confidence also requires accountability and transparency in decision making processes. Decisions should include reasons, with justification of the final decision. Those reasons should pay particular attention to the evidence and factors that form the basis of the decision, including relative weight given to those factors.

CEPA believes that the quasi-judicial, integrated assessment of environmental, safety, technical and socio-economic considerations by the NEB, as an independent regulator, meets these important fairness and transparency objectives.

Follow up and monitoring

CEAA 2012 defines "follow up program" as a program to verify the accuracy of the EA and to determine the effectiveness of any measures taken to mitigate the adverse environmental effects of a project. More specifically, a follow up program is used to:

- Verify predictions of environmental effects identified in the EA;
- Determine the effectiveness of mitigation measures in order to modify or implement new measures where required;
- Support the implementation of adaptive management measures to address previously unanticipated adverse environmental effects;
- Provide information on environmental effects and mitigation than can be used to improve and/or support future EA including cumulative environmental effects assessments; and
- Support environmental management systems used to manage the environmental effects of projects.

CEPA believes that a follow-up program is important to confirm the accuracy of conclusions of the EA, the effectiveness of mitigation measures and the outcome of a finding of no significant adverse effects. For the pipeline industry, one example of a follow-up program is the post-construction reclamation and monitoring that the pipeline proponent undertakes. The information gathered is critical to continual improvement and therefore follow up should be science based and executed by knowledgeable personnel. While this can be augmented with additional expertise from impacted communities, field experts and Indigenous communities, it must be based on expertise. Within the pipeline industries, regulators must have accountability for auditing implementation and compliance with follow up programs.

Enforceable Conditions

Enforceable conditions of approval are appropriate tools to ensure that environmental objectives are being met. Compliance and enforcement should be conducted by the agencies that have jurisdiction over the subject matter of the condition. Within the pipeline context, federally regulated pipelines are subject to lifecycle oversight by the NEB which has the necessary expertise, jurisdiction, mandate and resources to effectively regulate pipelines.

Indigenous communities often express an interest and capacity to be involved in the enforcement of conditions. While greater inclusion of Indigenous communities in monitoring may have positive consequence, enforcement of conditions must remain within the context of a regulator. Having a patchwork of quasi-regulators for linear projects that can extent thousands of kilometers can result in inconsistencies in enforcement and less desirable environmental and safety outcomes.

PANEL THEME F: PUBLIC INVOLVEMENT

Panel Questions:

- *What do you think meaningful, effective and inclusive participation in the EA process look like?*
- *To what extent are the current opportunities for public participation in federal EA processes adequate?*
- *To what extent do you feel your views are considered in EA?*
- *What information do you need during an EA to allow you to effectively participate? What capacity support should be provided and at what stage in the process would that support enable meaningful engagement*

Meaningful public participation is an important foundation of effective EA and can foster a variety of benefits, including improved projects, mutual sharing of information and learning, legitimacy of decisions and restored public trust. Although public participation is one of the underlying purposes of CEAA 2012 and is enshrined in s. 4(1)(e) of the purpose section "to ensure that opportunities are provided for meaningful public participation during the environmental assessment", there has been some criticism relating to the opportunities for participation and the outcomes of their involvement.

Principles of Meaningful Public participation

CEPA believes that meaningful and effective public participation includes the following goals and principles:

- Opportunities for public participation should be varied, flexible and provide many levels of opportunities for participation that are scalable and appropriate to the circumstances and the level of impact a project has on the participant. This includes the ability to provide comments on initial scoping, the List of issues and terms of reference, written comments, oral statements, participate as an Intervenor, comment on draft conditions and engage with the regulator throughout construction and operation of a project. It can also include forums such as community advisory boards that create occasions for mutual learning and encourage dialogue.
- Procedural fairness and natural justice must be preserved, particularly in formal processes of engagement such as hearings. At a minimum, this will require that project proponents have the ability to address the comments and arguments made against the project. It will also require 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.
- More formal opportunities of participation such as Intervenor status should be reserved for those that are either directly affected by a proposed project or have relevant expertise. However, all parties, whether they have formal standing or not, must have opportunities to be involved through flexible and appropriate processes including the ability to provide comments and statements.

- Participation should occur early in the process. This can help incorporate concerns into the design of the project, to better identify environmental consequences and to mitigate potentially negative impacts.
- Adequate and appropriate notice must be given in order for the public to be able to be meaningfully involved.
- Information must be easily accessible to the public and available in plain, easy to understand language. All information that is submitted must be easily accessible to the public, released as quickly as practical, available online and in one location.
- Capacity support is often required for participants to effectively and meaningfully participate. Funding should be available for the public to access, tailored to the size of the project and provide clear methods and criteria for providing support.
- The decision making process must be transparent. For the public to be able to accept decisions, it is important to understand how those decisions were made and how their input was reflected in that decision. Decisions should reflect the factors that are considered in reaching those decisions, including input received from the public.
- All opportunities and forums for meaningful participation must also recognize the project proponent's need for a timely decision. There must be clearly defined timelines and a clear definition of the roles of all parties, including the government, the public and the proponent.

The EA process should be designed to encourage meaningful public participation. Allowing the diverse views of stakeholders to be heard can increase the knowledge base in order to better identify environmental consequences. It can improve the quality of the decision and ultimately help legitimize the process and build public trust. 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 live statements are accommodated.

PANEL THEME G: COORDINATION

Panel Questions:

- *To what extent can the Government of Canada coordinate with other jurisdictions (eg provincial and/or Indigenous governments) while maintaining process integrity in the conduct of federal EA?*
- *To what extent is the current approach to substitution and equivalency effective?*
- *Do you think duplication between the federal EA process and the EA process of other jurisdictions exists? If yes, what are ways in which duplication could most effectively be reduced while maintaining process integrity?*
- *How can Indigenous Peoples' inherent jurisdiction best be reflected and respected in the federal EA process?*

Coordination between federal, provincial and Indigenous Jurisdictions

Federally regulated pipeline projects often cross multiple provinces, are subject to multiple decision making authorities and face duplicative processes. Multiple and duplicative processes between jurisdictions and within the federal jurisdiction are inefficient, more costly for project proponents and more confusing for the public and Indigenous participants. Inadequate coordination is not only a burden on project proponents, but does not lead to better environmental outcomes. Those involved in EA, including the project proponent, governments, Indigenous Communities, and the pubic have limited capacity to participate. Unnecessary duplication strains this limited capacity and can lead to less focused reviews that do not enhance environmental results. Layers of processes can also lead to conflict between those processes and confusing and conflicting requirements. From the project proponent's perspective, this inefficient processes result in delays, confusion, increased costs and an overall deterioration of the investment climate

Encouraging and enabling coordination should be a key feature in any re-design of EA legislation.

Notwithstanding good intentions from governments to better coordinate reviews and specific provisions contained within CEAA 2012 to enable that, the pipeline industry has not necessarily experienced better outcomes. Over the past three years, the pipeline industry has seen increased, duplicative provincial processes in federally regulated pipeline project reviews. For instance, Enbridge's Line 9B Reversal Project faced an additional Parliamentary Commission hearing by the Quebec provincial government after a lengthy federal hearing was completed. Although the Quebec government was a formal Intervenor in the federal hearings, at the end of the federal process it announced that it would hold its own hearings. The Parliamentary Commission held 2 additional weeks of public hearings and imposed a further 18 conditions, on top of the 30 conditions imposed by the federal regulator, including creating an oversight committee composed of federal, provincial and project representatives and a direction that the project proponent provide the provincial government with pipeline inspection data so that it could run its own line integrity assessment.

TransCanada's Energy East Pipeline Project was also faced with duplicative provincial processes when the Ontario provincial government asked the provincial regulator, the Ontario Energy Board (OEB), to consult with the public and review the project to help inform the provincial government's position when it appeared before the federal regulator as an Intervenor. The OEB consultation

and review lasted several months, while the provincial regulator travelled to towns and cities in Ontario and had meetings with First Nation and Métis communities.

Kinder Morgan's TransMountain Expansion Project underwent a federal EA and a separate EA over 2 years later by the BC Environmental Assessment Organization following a BC Supreme Court decision related to Enbridge's proposed Northern Gateway project that said that the province cannot assign EA responsibilities solely to the NEB. This required additional studies, consultations and processes after the federal process was completed.

While these issues are beyond the scope of project EA reform and will require political leadership to resolve, the overall lack of cooperation and coordination between jurisdictions demonstrates the need to find flexible, enabling mechanisms and incentives, both politically and from a practical perspective, to encourage better coordination at the beginning of review processes.

Substitution and Equivalency

CEPA supports the CEAA 2012 changes that facilitated substitution. This approach helps realize the objective of "one project-one review" that CEPA has long supported and that has been endorsed by the Canadian Council of Ministers of the Environment.

The provisions for substitution under CEAA 2012 provided that where both federal and provincial EAs were required, there could be a single review process (the provincial one) and two decisions (federal and provincial). It should be noted that substitution under CEAA 2012 is only allowed for EAs that would be conducted by the Canadian Environmental Assessment Agency. It does not apply to EAs conducted by the NEB or the CNSC. The substitution provisions also do not apply to an EA that has been referred to a review panel. To that extent, substitution, when considered in the context of federally regulated pipelines, does not allow a provincial process to be substituted for an NEB process.

In addition, to date, only one province, British Columbia, has pursued a substitution MOU with the Federal government for projects in the province.

In the current structure of CEAA 2012, the effects of duplication could be mitigated by continuous improvements to coordination, substitution and equivalency provisions, as well as managing the interplay between EA and associated federal authorizations under the *Fisheries Act* and the *Navigation Protection Act* through a single window approach, maintaining principles of "one project-one review" under the NEB as the best placed regulator. Maintaining this single window approach is at the core of regulatory efficiency and excellence.