
APPENDIX 1

INTERVIEW GUIDE

FOR INTERVIEWS CONDUCTED AS PART OF RESEARCH FOR “HOW TO RESTORE PUBLIC TRUST AND CREDIBILITY AT THE NATIONAL ENERGY BOARD”

BACKGROUND

As part of the research process, the author completed several interviews with people who have experience with NEB processes. The questions below served as a guide to the interview process.

Attributes of an Effective Energy Regulator

To provide context for the interviews, the author reviewed an extensive literature on the topic of the regulatory effectiveness, in particular related to the energy sector. Although there are a number of ways to describe the attributes of an effective regulator, she decided to use the following list, as this manner of organizing the attributes is relevant to the NEB, a quasi-judicial energy regulator, which has adjudicative, regulatory, and advisory responsibilities related to its mandate.

- 1 Independence:** The NEB functions independently of the political branch of the federal government.
- 2 Conflict of Interest:** The NEB is free of conflict of interest, both real and perceived. The NEB has in place effective procedures to identify and avoid potential conflicts of interest for its staff, executive, and Board Members.
- 3 Transparent and Inclusive Processes:** The NEB’s review processes are transparent, inclusive, and flexible. The NEB’s decisions are based on evidence that can be tested in a public forum, and are informed by the input from people whose rights and interests could be affected by the decision. There are opportunities for people whose rights and interests could be affected by energy activities within the NEB’s jurisdiction to be involved and consulted throughout the regulatory lifecycle.
- 4 Performance Management and Adaptability:** The NEB has an articulate performance management system to identify desired regulatory outcomes. The NEB’s regulatory effectiveness is measured and evaluated on a regular basis. The NEB makes changes to its performance where effectiveness has not met the desired outcome. The NEB shares information on its effectiveness and the effectiveness of regulated industry publicly, in an accessible manner.
- 5 Capacity:** The NEB has the technical capacity, including but not limited to its human resources and information systems, to achieve its desired regulatory outcomes.
- 6 Enabling Factors:** There are certain factors outside of the NEB’s control that are necessary for the NEB to be effective. The factors include, and are not limited to, the Federal Government providing policy direction for energy-related matters and meeting its own legal obligations related to decisionmaking (i.e., fulfilling the Crown’s duty to consult with Aboriginal people).

INTERVIEW QUESTIONS

The following questions were developed to guide our interviews with participants. The questions are arranged according to the attributes of an effective energy regulator described previously in this document. As well, four general questions are posed, two at the beginning and two at the end of the guide.

Lastly, certain questions have a preamble to provide additional context.

General

Preamble: From the Expert Panel's terms of reference: "*The Government has signaled a commitment to modernize the NEB...*" Prime Minister Justin Trudeau made this commitment during his election campaign in response to criticisms that the NEB's review process is "broken".

Q1 To what extent do you believe the NEB's review process is broken? What areas of the NEB's review process and/or its other processes or functions could be improved?

Preamble: "Trust is a two-way street"

Q2 Please comment on the public's role in creating/maintaining a trusted energy regulator.

Independence

Preamble: The word "independent" does not appear once in the NEB's enabling legislation, the *National Energy Board Act (NEB Act)*, yet the NEB defines itself as an "*independent federal, quasi-judicial regulatory tribunal established in 1959 to promote safety and security, environmental protection, and economic efficiency in the Canadian public interest within the mandate set by Parliament for the regulation of pipelines, energy development, and trade.*" Independence is widely recognized as one of the hallmarks of an effective regulator.

Q3 Which practices of the NEB enable it to operate independently of the political arm of the federal government? Which processes require coordination with the Federal government?

Q4 How have the changes to the *NEB Act* introduced in 2012 as part of Bill C-38 supported or detracted from the NEB's ability to act independently of the political arm of the federal government? The three specific changes to which I am referring include i) the change from the NEB rendering a decision to it providing a recommendation to Governor in Council (GiC); ii) GiC's ability to override an NEB recommendation; and iii) GiC's ability to influence the terms and conditions recommended by the NEB through its reconsideration process.

Q5 How does the NEB's advisory role to the Minister of Natural Resources Canada affect its ability to act independently, or the perception that the NEB is independent? Are there situations that arise with respect to the NEB carrying out its advisory role that may conflict with its independence?

Q6 With respect to finances, how independent is the NEB's management of its budget? For example, if a previously unidentified risk arises outside of the typical budget cycle and the NEB needs additional funding or needs to re-allocate existing funding, what flexibility does the NEB have to manage its budget?

Conflict of Interest

Q7 What processes does the NEB have in place to identify conflicts of interest for staff, the executive, and Board Members? Is this part of the NEB's risk management process?

Q8 What processes does the NEB have in place to avoid potential conflicts of interest for staff, the executive, and Board Members? How are consequences enforced if a staff, executive, or Board Member is found to have violated these processes?

Preamble: During the Trans Mountain Expansion Project proceeding, members of the public and intervenors alleged that the NEB is a captured regulator, biased toward the interests of the industry it regulates. Based on a review of the literature, it can be difficult to measure the existence or degree of regulatory capture – it is not black and white.

Q9 What evidence supports or contradicts the perception that the NEB is a captured regulator?

Preamble: There are certain benefits to NEB staff, executive, and Board Members having close or previous relationships with the energy industry in the sense that the NEB staff/executive/Board Members may gain a better technical understanding of the regulated industry through their relationship. The downside of this close relationship is the NEB staff/executive/Board Members may become, or be perceived to become, biased and lenient toward the regulated industry.

Q10 What tools does the NEB use to first, identify the circumstances amenable to regulatory capture, and second, to avoid these circumstances from occurring?

Q11 What tools could the NEB implement to prevent the negative aspects of regulatory capture, but enable the positive aspects, such as better technical competence for NEB staff?

Q12 It appears that a review of the NEB's Governance Manual is pending. What is the purpose of the review? What changes are anticipated? When will these changes be announced and implemented?

Q13 What processes are in place by the Minister of Natural Resources Canada and GiC to identify potential conflicts of interest during the appointment process for Board Members, temporary Board Members, and the Chair? What aspects of the appointment process are public?

Q14 How are potential violations of the NEB's Governance Manual resolved? What are the consequences if a violation is found to have occurred? What are the grounds for dismissal? In the past, when have these grounds been enforced and who enforces them?

Transparent and Inclusive Processes

Q15 How have the changes to the *NEB Act* introduced in 2012 in Bill C-38 supported or detracted from the NEB's ability to make decisions? The two changes to which I am specifically referring include i) mandatory time limits on the NEB's review process; and ii) the requirement for the NEB to screen participation in the review process by determining if potential participants are directly affected and/or have relevant information or expertise?

Q16 What flexibility do NEB Panels have to resolve conflicting evidence? Are they able to commission their own independent research to provide clarification? What other procedural tools do they have?

Q17 How do NEB Panels determine which procedural tools to use to support a review process? How are these aligned with the NEB's desired outcomes?

Q18 How does the NEB engage citizens, landowners, Aboriginal communities, and other stakeholders throughout the regulatory lifecycle? What improvements could the NEB make to provide more/better/different opportunities to engage throughout the regulatory lifecycle?

Q19 What are the challenges to engaging citizens, landowners, Aboriginal communities, and other stakeholders throughout the regulatory lifecycle? (e.g., level of interest; time commitment; resourcing).

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- Q20 How does the NEB integrate Aboriginal Traditional Knowledge and Traditional Ecological Knowledge into its decisionmaking processes and throughout the regulatory lifecycle (i.e., during the inspection process)?
- Q21 In your opinion, who/which agency or level of government is best positioned to define the “public interest”?
- Q22 What factors need to be in place to make it appropriate or acceptable for an agency or level of government to define the “public interest” and to make decisions that are in the public interest?
- Q23 How could the NEB improve the transparency of its public interest determination? Are there alternative tools or decisionmaking frameworks that have been explored to support the NEB’s public interest determination?
- Q24 What tools and/or processes does the NEB use to gauge the “evolving nature” of the Canadian public interest?

Performance Management and Adaptability

- Q25 What outcomes does the NEB aim to achieve with its adjudicative, regulatory and advisory programs (i.e., a performance management framework)?
- Q26 How and how often does the NEB evaluate its performance in achieving these outcomes?
- Q27 What are the NEB’s challenges in achieving its outcomes?
- Q28 How are the lessons learned during the evaluation process identified and then acted on?
- Q29 How does the NEB share its performance management framework and the evaluations of its performance with the public?
- Q30 How does the NEB communicate its expectations for performance to regulated companies?
- Q31 Section 2.6.4 of the NEB’s Governance Manual states the NEB has an “*established approach to the identification, assessment, monitoring, and management of risks.*” What process does the NEB use to identify risks related to its mandate? How does this process relate to or support the NEB’s desired outcomes? How does the risk process inform the NEB’s role in adjudicating energy projects? What risks have been identified?

Capacity

- Q32 What are the NEB’s challenges in maintaining its technical expertise in the topical areas related to its mandate? Are there certain areas of expertise that are more challenging than others to maintain? If yes, which?
- Q33 Members of the public have expressed skepticism about the NEB’s technical capacity to carry out environmental reviews. How would you respond? What measures could the NEB take to address the perception it does not have the technical capacity to undertake environmental reviews?
- Q34 What is the current composition of NEB staff by level and expertise? How does the NEB determine it has sufficient capacity on relevant topics? What measures does the NEB have to backstop gaps in its expertise?

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- Q35 How has the mix of expertise at the NEB changed over the last 5-10 years compared to the volume and complexity of the work, NEB initiatives, and number of regulated companies? Is there an area of technical competence where the NEB is focused on improving?
- Q36 What training do Board Members receive related to their roles/responsibilities and how to make recommendations that are in the public interest?
- Q37 What are the NEB's challenges related to information management and the systems needed to carry out the NEB's mandate? How does the NEB plan to address these challenges, in addition to the information provided in the Departmental Performance Report 2015-2016?

Enabling Factors

- Q38 To what extent do the Minister of Natural Resources and ministry staff understand the NEB's unique role and processes?
- Q39 To what extent does the presence of (or absence of) policy direction from the government support or detract from i) the NEB's ability to deliver on its mandate, including its recommendations on energy projects; and ii) the public's understanding of and acceptance of NEB recommendations and subsequent GiC decisions?
- Q40 How has the Crown reconciled its duty to consult with Aboriginal people with the NEB's process as one of the tools used to fulfill the Crown's duty to consult? How has the Crown's approach changed in light of the Federal Court of Appeal's decision on the Northern Gateway Project (2016 FCA 187)? What improvements could be made to the NEB's process, the Crown's process, or both, to better inform the Crown's process to fulfill its duty to consult with Aboriginal people?

Conclusions

- Q41 Are there any other areas related to the effectiveness of the NEB you would like to explore?
- Q42 Given the Federal Government's commitment at COP21 in December 2015 to reduce greenhouse gas emissions, what are the opportunities to expand/adapt the NEB's mandate, or to replicate the NEB's model to support the fulfillment of this commitment?

APPENDIX 2: SUMMARY OF RECOMMENDATIONS FOR NEB MODERNIZATION PANEL

The following table is a summary of the 23 recommendations discussed in the *Commentary* as well as how they relate to the six themes addressed in the Expert Panel on NEB Modernization Review (the NEB Modernization Panel).^a

Recommendation	Alignment with Expert Panel Themes
<p>Recommendation 1: The federal government should restore the functional and perceived independence of the NEB's decisionmaking authority for pipeline applications involving more than 40-kilometres of pipeline by:</p> <ul style="list-style-type: none"> • requiring it to make a decision whether to approve such an application and then forwarding that decision to cabinet for consideration, and • removing any mechanism for cabinet to override such an NEB approval except through the Federal Court of Appeal. 	<p>3) Decisionmaking roles, including on major projects</p>
<p>Recommendation 2: The federal government should rescind the one-size-fits-all time-limit requirements on NEB reviews and on the cabinet process. As well, it should remove the extraordinary powers of the NEB chair and the minister to alter a panel's timeline or make-up. To support an efficient regulatory process, the federal government should instead require each panel to determine the timeline for each review, depending on factors such as the nature and complexity of the project, the procedural steps selected and the number of interveners involved.</p> <p>However, the federal government should retain provisions in the <i>NEB Act</i> and other enabling legislation allowing the board to determine who is eligible to participate based on the criteria of being directly affected and/or having relevant expertise related to the project under review.</p>	<p>3) Decisionmaking roles, including on major projects</p> <p>6) Public participation</p>
<p>Recommendation 3: The NEB should ensure that any timelines set for the review of an application, irrespective of whether they are legislated, are consistent with its Departmental Results Framework, which sets out the NEB's regulatory outcomes and support the efficient delivery of the regulatory process for all participants.</p>	<p>3) Decisionmaking roles, including on major projects</p>

a The Expert Panel on NEB Modernization's six themes are: 1) governance and structure; 2) mandate and future opportunities; 3) decisionmaking roles, including on major projects; 4) compliance, enforcement and ongoing monitoring; 5) engagement with Indigenous peoples and 6) Public participation. Although there is not perfect alignment between the *Commentary's* recommendations and the Expert Panel's themes, Column 2 shows which theme is most closely aligned with each recommendation.

Recommendation	Alignment with Expert Panel Themes
<p>Recommendation 4: If it has not already done so, the NEB should ensure members of the public who are involved in a regulatory review and who are party to private meetings with board members, NEB executive, or NEB staff divulge any direct contractual or indirect sub-contractual arrangements they have with NEB-regulated companies prior to the meeting.</p>	<p>1) Governance and structure 6) Public participation</p>
<p>Recommendation 5: If it has not already done so, the federal government should review and update its hiring process for temporary and permanent board members to ensure that nominees are not concurrently advising or providing evidence to an NEB-regulated company in a proceeding. If a new temporary or permanent board member has had past business relationships with NEB-regulated companies, this should be proactively and publicly disclosed in accordance with the <i>Conflict of Interest Act</i>.</p>	<p>1) Governance and structure</p>
<p>Recommendation 6: To avoid a perception of bias, the NEB should update its Code of Conduct to include a requirement prohibiting new staff previously employed by a regulated company or by a consulting firm representing a regulated company from reviewing applications from that company for a period of time, such as one year. Furthermore, if new staff previously worked for a regulated industry on a specific project that is part of, or related to, a proceeding before the NEB, the new staff should be prohibited from advising the panel on the proceeding.</p>	<p>1) Governance and structure</p>
<p>Recommendation 7: The NEB and the federal government should transparently clarify the consequences to any board member, NEB executive or staff if a conflict of interest has been found to occur; i.e., beyond those penalties set out in s.52 of the <i>Conflict of Interest Act</i>. (See the Alberta Energy Regulator’s Conflict of Interest Policy and Procedures for options).</p>	<p>1) Governance and structure</p>
<p>Recommendation 8: The federal government should examine whether it is necessary to mandate in legislation the location of the NEB’s headquarters as well as the requirement for all permanent board members to reside in or near Calgary, Alberta. As well, the Federal government should examine the opportunities and challenges with the NEB’s headquarters located in Calgary, Alberta, ensuring that, where possible, the challenges associated with the location have been identified and addressed.</p>	<p>1) Governance and structure</p>
<p>Recommendation 9: When there is a dispute over evidence, the NEB should identify and implement alternative hearing tools to allow for a robust examination, ensuring that the evidence is fact based. Alternative hearing tools could include a public technical conference within the proceeding, hiring a third-party to review the evidence and present findings on the hearing record, or allowing for oral cross-examination on certain evidence or issues.</p>	<p>3) Decisionmaking roles, including on major projects</p>

Recommendation	Alignment with Expert Panel Themes
<p>Recommendation 10: As part of its ongoing review of the information required for facilities applications in the Filing Manual, the NEB should engage interested stakeholders in a discussion and review of the methodology for the economic analyses required in a facilities application.</p>	3) Decisionmaking roles, including on major projects 6) Public participation
<p>Recommendation 11: The NEB should allow evidence based on the use of proprietary models only if the risks and assumptions of the model can be verified either through direct evidence, through verification by an independent third party, or as otherwise directed by the NEB.</p>	3) Decisionmaking roles, including on major projects
<p>Recommendation 12: The NEB should implement a mechanism for ongoing public engagement, with an initial focus on local and Aboriginal communities affected by NEB-regulated facilities, on the range of issues under its mandate. One model suggested is a network of external advisory committees, which could be designed and established on a topical and/or regional basis (Leggett, Sheila pers. comm.). A representative from each advisory committee in the network would report into a Chair's external advisory committee, providing feedback to the Chair of the NEB on relevant issues on an ongoing basis (Leggett, Sheila pers. comm.). The idea of an ongoing advisory committee could build on the NEB's experience with its Land Matters Group; however, the NEB would need to select a mechanism suitable for the region and context. Another model is the multi-stakeholder advisory committee recently launched by the Alberta Energy Regulator (AER 2017).</p>	5) Engagement with Indigenous peoples 6) Public participation
<p>Recommendation 13: The NEB should engage regulated industry in its efforts to update/revise its audit protocols in order to address issues related to clarity and consistency of compliance. The NEB's audit program should reflect best practices in management system audits and include audit protocols focused on compliance instead of on management-system effectiveness. Lastly, the NEB's audit program should be aligned with the NEB's Departmental Results Framework.</p>	4) Compliance, enforcement and ongoing monitoring
<p>Recommendation 14: The NEB should invest in further staff training and development with the goal of increasing the quality and consistency of its audit methodology. It should also ensure it has a sufficient number of trained auditors to carry out its audit workload in a timely manner.</p>	4) Compliance, enforcement and ongoing monitoring
<p>Recommendation 15: To increase the transparency of information exchanged between the NEB and the minister, ministerial requests for policy-related advice should be made public at the time of the request. Similarly, all advice initiated by the NEB should be made public at the time it is provided to the minister.</p>	2) Mandate and future opportunities
<p>Recommendation 16: The federal government should examine whether a conflict of interest exists between the NEB's adjudicative and advisory roles. If no conflict is found, and the NEB retains both roles, the NEB should review its methodology for energy-market reports to ensure there is sufficient opportunity for interested stakeholders to test and provide input into the methodology.</p>	2) Mandate and future opportunities

Recommendation	Alignment with Expert Panel Themes
<p>Recommendation 17: Given that the NEB is developing a Departmental Results Framework, it has an opportunity to publicly share information on the logic of its performance-management framework including, for example, information linking the NEB's outcomes, targets, indicators and activities. Therefore, the NEB on an annual basis should publicly share its plan to evaluate programs.</p>	1) Governance and structure
<p>Recommendation 18: The NEB should establish an independent body to evaluate its Departmental Results Framework to ensure neutrality in accordance with the Treasury Board Policy on Results. (One model for an independent evaluation function is that used by international financial institutions such as the Asian Development Bank or Inter-American Development Bank.)</p>	1) Governance and structure
<p>Recommendation 19: The NEB should continue to publicly share the results of its formal evaluations, highlighting what specific improvements it will undertake.</p>	1) Governance and structure
<p>Recommendation 20: The federal government, with the cooperation of Treasury Board, should identify and remove all impediments to the NEB's hiring and contracting requirements so as to attract the most appropriate candidates for technical roles, as well as consultants for short-term contracts. Although cost must be a factor in selecting employees and contractors, it should not be a barrier to attracting and retaining experienced people.</p>	1) Governance and structure
<p>Recommendation 21: The federal government, through the minister of natural resources, should continue the public dialogue about an integrated Canadian energy strategy it started with the Pan-Canadian Framework on Clean Growth and Climate Change. The outcome would be a transparent energy policy framework, providing the foundation on which the NEB and other energy regulators could make decisions. Although the Minister is in the best position to decide how to engage stakeholders, one mechanism of engagement could involve establishing working groups across Canada to engage in a constructive dialogue, expanding on a recommendation in Eyford (2015; pages 42-43) and the mechanism used in the development of the Framework. Representatives in these working groups could include, for example, Aboriginal leaders, Federal and provincial representatives, representatives from local authorities (i.e., regional districts, municipalities, counties, etc.), landowners, and industry. The outcome would be a transparent energy policy framework, providing the foundation on which the NEB and other energy regulators could make decisions.</p>	2) Mandate and future opportunities
<p>Recommendation 22: While waiting for clarity from the Supreme Court of Canada, the federal government should provide clarity about the roles and process to support the Crown's duty to consult for NEB processes when the MPMO is not involved.</p>	2) Mandate and future opportunities 5) Engagement with Indigenous peoples
<p>Recommendation 23: In conjunction with Recommendation 2, the federal government should remove legislated time limits to carrying out its duty to consult Aboriginal peoples by removing the mandatory time limit in the <i>NEB Act</i> for cabinet to review NEB recommendations and make a decision, while still respecting the efficient use of time and resources in the regulatory-review process.</p>	5) Engagement with Indigenous peoples