
TO: CITY MANAGER **DATE:** 2016 July 16

FROM: DIRECTOR ENGINEERING **FILE:** 33200 10
DIRECTOR PLANNING AND BUILDING

**SUBJECT: FEDERATION OF CANADIAN MUNICIPALITIES NATIONAL
MUNICIPAL ENERGY INFRASTRUCTURE TASK FORCE**

PURPOSE: To provide the Federation of Canadian Municipalities National Municipal Energy Infrastructure Task Force with comments on areas where improvements should be considered to the environmental assessment and National Energy Board processes that forms part of the federal review and approval of major pipeline projects.

RECOMMENDATION:

1. **THAT** a copy of this report be forwarded to:
 - a) Mr. Matt Gemmel, Policy Advisor, Federation of Canadian Municipalities, 24 Clarence Street, Ottawa, Ontario, Canada, K1N 5P3; and
 - b) the Environment Committee.

REPORT

1.0 INTRODUCTION

The recent commitment by the federal government to improve the environmental assessment and National Energy Board (NEB) processes that form part of the federal review and approval of major pipeline projects has led the Federation of Canadian Municipalities (FCM) to establish a National Municipal Energy Infrastructure Task Force to ensure that FCM's work in this area reflects shared national concerns and perspectives. The Task Force, which will be reporting to the FCM's National Board of Directors through the Standing Committee on Environment Issues and Sustainable Development in September 2016 will, in part:

- Identify areas of shared concerns related to the review, approval and operation of federally regulated pipelines and related infrastructure in Canada;
- Provide input and advice on the modernization of the federal environmental assessment and NEB review process; and

- Provide input and advice on FCM's advocacy in relation to the communications and meetings with the federal government representatives regarding pipelines and related infrastructure.

Burnaby has particularly strong interests and experience in this regard, and can make a valuable contribution. The purpose of this report is to provide the FCM's National Municipal Energy Infrastructure Task Force with comments on areas where improvements should be considered to the environmental assessment and National Energy Board processes that forms part of the federal review and approval of major pipeline projects.

2.0 LACK OF NATIONAL ENERGY STRATEGY

In reviewing the mandate and scope of the FCM National Municipal Energy Infrastructure Task Force, it is noted that the FCM does not specifically reference the need for a larger strategy or planning process – in advance of environmental assessment or tribunal review of specific projects. A wider process – one not proponent-driven – is needed to determine what pipeline capacity is in the national interest. Only then should consideration on specific projects or specific routes be subjected to review.

In such a larger discussion, the positive interests and the concerns of municipalities should be fully considered, and municipalities have a real role in decision making given that the project outcomes have local impacts on areas of municipal responsibility. Only then and only in that context should proponent-driven proposals be evaluated, as against one another. The real public interest ought to be determined within a larger context, and not in an adversarial role before a tribunal owing duties to a private sector proponent.

3.0 OTHER PROPOSED IMPROVEMENTS TO THE ENVIRONMENTAL ASSESSMENT AND NATIONAL ENERGY BOARD PROCESSES RELATED TO THE APPROVAL OF MAJOR PIPELINE PROJECTS

Some specific areas where improvements to the environmental assessment and NEB processes related to the approval of major pipeline projects should be considered by the Task Force include:

3.1 Panel Members

Burnaby's experience with the Trans Mountain Expansion Project NEB hearings illustrated the problem with having a Panel appointed from NEB members. The NEB showed a lack of concern for Burnaby's municipal interests (which was particularly stark in their casual willingness to override Burnaby's concerns on drilling in the Burnaby Mountain Conservation Area).

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NEB members are appointed primarily for energy expertise and professional background, often from other provinces, with little familiarity – and little interest – in local concerns. Burnaby has called upon the NEB to be completely revamped in terms of members representing the public interest.

- Under the *National Energy Board Act*, R.S.C., 1985, c. N-7 (“NEB Act”), NEB Panels have exceptional and almost unlimited powers. Although they purport to represent public interests, the appointment process and their daily work suggest a focus on the energy industry, and a susceptibility to ‘industry capture’.
- Prior to 2012, the norm on a major project was appointment of a “Joint Panel”, with a dual concern for mandates under the NEB and Canadian *Environmental and Assessment Acts*, and with outside members appointed with environmental or credible public backgrounds.

A return to a more diverse, ‘public focused’ Joint Panel is to be encouraged, with credible community composition. For projects with substantial impacts on major metropolitan areas, municipal government or public representation should be provided.

3.2 Participation of the Public in Pipeline Reviews

Burnaby’s experience with the NEB hearing for the Trans Mountain Expansion Project is that the current test for participation of the public in an NEB hearing under the NEB Act is overly restrictive and prevents a great number of members of the public from being able to have their voices heard in relation to pipeline projects that will impact their communities.

According to Section 55.2 of the NEB Act only those people that are 1) directly affected by the granting or refusing of the application or 2) have relevant information or expertise may participate in a hearing will be heard. Thus, anyone who wants to make a submission regarding an application must first establish, to the satisfaction of the NEB, that they fit within either (1) or (2). The NEB’s decision on who may participate is conclusive.

The current test for participation under the NEB Act came in with the 2012 amendments to the NEB Act. Prior to those amendments, participation in major pipeline reviews was much broader and allowed anyone who was interested to make submissions to the panel.

A return to a broader test for participation is needed to ensure that the voices of all the citizens are heard in relation to major pipeline projects. Only hearing from a very restricted segment of the population in relation to projects that will have wide reaching effects, has the potential to produce a skewed result, and does not enable the panel to determine whether the project is in the broader public interest of all citizens.

3.3 NEB Hearings

Currently, the NEB is the master of its own procedure and, under the NEB Act, can decide what steps have to be taken in relation to the hearing and review of pipeline projects. Thus, what constitutes a “public hearing” can vary from project to project. This resulted in an unjustifiable situation where for the tolling hearing for the Trans Mountain Expansion Project there was cross-examination of the evidence, but for the main hearing on whether the Project was in the public interest there was no cross-examination of the evidence.

There needs to be guidance placed in the NEB Act for the steps that must be taken for a “public hearing” for a project, and those steps at a minimum must include the proper testing of evidence through cross-examination.

Further, for major projects with a lot of participants, the NEB could provide for a simplified, and inevitably less rigorous, review process in order to review the Project within the legislated timeline.

3.4 Scope of Factors that the NEB Must Consider

The NEB Act is very discretionary in relation to what the NEB must consider in relation to the issuance of certificates of public convenience and necessity for pipeline projects. In fact, the NEB Act does not set out any factors that the NEB “must” consider, the NEB Act only sets out factors in s. 52(2) of the NEB Act that the NEB “may” consider, including “any public interest that in the Board’s opinion may be affected by the issuance of the certificate or the dismissal of the application”.

Burnaby’s experience with the Trans Mountain Expansion Project is that the highly discretionary provisions in the NEB Act do not provide enough guidance on the factors that the NEB must consider in its review of pipeline projects. The NEB panel has complete discretion into what factors that it considers relevant to the public interest, which resulted in the review of the Trans Mountain Expansion Project in an over emphasis on the economic benefits of pipeline projects, at the expense of environmental concerns and community risks.

Further, the NEB unilaterally set the scope of the factors for the environmental assessment for the Trans Mountain Expansion Project and the list of issues to be considered in the review under the NEB Act, without consulting the public or any of the intervenors in the hearing.

There needs to be greater input from affected parties and regulation of the factors that are to be considered in the NEB review of major projects under the NEB Act. It cannot be

left to the discretion of the NEB panel, as to what factors are considered or emphasized in project reviews.

3.5 Routing and Municipal Bylaws

Burnaby's experience with the treatment of the City's legitimate concerns in respect of routing, planning and infrastructure issues and other matters of legitimate but local concern in the Trans Mountain hearings was highly unsatisfactory.

NEB's willingness to override Burnaby's concerns, relying upon and citing its own statutory grant of extensive, almost unlimited powers under section 12 and 13 of the NEB Act was problematic. This was compounded by the proponent's reliance and Court acceptance of an unrestricted federal power under the "interjurisdictional immunity" principle for interprovincial undertaking such as pipelines and "federal paramountcy" provisions in constitutional law. The substantial powers given to the NEB for oil and pipelines was created in 1959 and it is arguable that an unrestricted doctrine of exclusive federal power in pipelines is no longer appropriate in the 21st Century, and the principles of 'cooperative federalism' are far more appropriate.

In the 21st Century, municipalities should be recognized as a third order of government, with significant democratic powers, and with a primary role in respect of projects within their boundaries. The NEB Act should be amended to specifically provide that municipal bylaws must be respected, except where impossible to comply or no reasonable alternative is available.

Where major projects such as pipelines must be routed through municipalities, the NEB Act should provide that the proponent has a duty to design the routing of the project in a manner that accommodates all reasonable municipal concerns. The NEB should require the proponent to demonstrate that the project has been designed in conjunction with the municipality.

There needs to be further guidance placed on the broad powers given to pipeline companies under s. 73 of the NEB Act for setting the route for major pipeline projects and for carrying out studies for that route. Pipeline companies should have to make every effort to accommodate reasonable municipal concerns and municipal bylaws in setting the routes for pipeline projects. In relation to areas that have been restricted in use or protected by municipal bylaws or otherwise, for example the Burnaby Mountain Conservation Area that was designated for park and recreation use by referendum, the NEB Act should provide for a special approval process that pipeline companies have to undertake in order to route a pipeline through those areas.

Further, there should be guidance in the NEB Act for the procedure for accessing municipal lands, as there is guidance for Crown lands. As municipalities are a level of government, access to their lands should be guided by legislation and not at the discretion of pipeline companies.

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3.6 Municipal Infrastructure and Costs

Costs associated with participation in a federal review process and those resulting from any unrecoverable burden placed on municipal services and infrastructure by a federally regulated project must not be unfairly imposed on local governments.


Cities of Burnaby, Surrey, Coquitlam, Abbotsford and Township of Langley had completed an assessment of additional costs incurred by each municipality to operate, maintain and construct municipal infrastructure impacted by Kinder Morgan's existing and proposed Trans Mountain Expansion Project. Based on the assessment, the projected additional costs that the subject municipalities would incur over a 50 year period was found to exceed \$93,000,000.

The current NEB position that requires the pipeline company to only accommodate infrastructure conflicts at the time of construction, and imposes on the municipality the additional costs of future construction and interference should be repealed.

Furthermore, the additional costs related to emergency response capacity and servicing costs should not be downloaded to municipalities – it should be a project cost, allocated to users and considering the national scope of the project. The evidence of Burnaby that it did not have sufficient emergency response capacity to protect neighbourhoods from the expanded tank farm on the Trans Mountain Pipeline was ignored by the NEB.

4.0 CONCLUSION

The recent commitment by the federal government to improve the environmental assessment and National Energy Board (NEB) processes that form part of the federal review and approval of major pipeline projects has led the Federation of Canadian Municipalities (FCM) to establish a National Municipal Energy Infrastructure Task Force to ensure that FCM's work in this area reflects shared national concerns and perspectives. Burnaby has particularly strong interests and experience in this regard, and the comments as identified in Sections 2 and 3 of this report may be of value for consideration by the Task Force in its report to the FCM Board in September 2016.



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