
TO: CITY MANAGER **DATE:** 2016 November 15

FROM: DIRECTOR ENGINEERING **FILE:** 33000 00
DIRECTOR PLANNING AND BUILDING

**SUBJECT: REVIEW OF THE FEDERAL ENVIRONMENTAL ASSESSMENT
PROCESS**

PURPOSE: To provide comments on the Federal Environmental Assessment Process for Council's consideration and endorsement for submission to the Federal Environmental Assessment Process Expert Panel.

RECOMMENDATIONS:

1. **THAT** Council endorse the comments and recommendations as outlined in this report.
2. **THAT** a copy of this report be forwarded to:
 - a) Chair, Federal Environmental Assessment Process Expert Panel;
 - b) Burnaby MP's and
 - c) the Environment Committee.

REPORT**1.0 INTRODUCTION**

The Minister of Environment and Climate Change (the "Minister") has established an Expert Panel to review Canada's environmental assessment processes to regain public trust and to:

- restore robust oversight and thorough environmental assessments of areas under federal jurisdiction, while working with provinces and territories to avoid duplication;
- ensure decisions are based on science, facts and evidence and serve the public's interest;
- provide ways for Canadians to express their views and opportunities for experts to meaningfully participate; and
- require project advocates to choose the best technologies available to reduce environmental impacts.

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As a part of the public engagement process, the Expert Panel comprising of Ms. Johanne Gelinas, Panel Chair and Mr. Doug Horswill, Mr. Rod Northey and Ms. Renee Pelletier as members have been holding meetings across Canada. For Council's information, the Panel will be present in Vancouver on December 12 and 13, 2016 to receive public presentations and hold public workshop. Comments from the public are also accepted on-line. The Expert Panel will provide its recommendations to the federal Minister of Environment and Climate Change in early 2017.

The purpose of this report is to provide comments on the Federal Environmental Assessment Process for Council's consideration and endorsement for submission to the Expert Panel.

2.0 COMMENTS ON THE FEDERAL ENVIRONMENTAL ASSESSMENT PROCESS

The City supports the goals set out by the Minister to strengthen and improve the federal environmental assessment process, and ensure that those goals are meaningfully incorporated into any legislative amendments.

The current *Canadian Environmental Assessment Act* and related environmental review process has weakened environmental protection as it only includes "designated" projects for review, narrowly defines "environmental effects", and mandates arbitrary time limits for completion of the environmental assessments of highly complex projects.

2.1 Pipeline Projects

The City's comments on the federal environmental review focuses largely on the regulation of pipeline projects and the need to submit these projects to rigorous science-based environmental review processes that serve the public interest, as opposed to the interest of pipeline companies. In the City's experience, the federal regulation of pipeline projects is one of the areas that has most starkly illustrated the shortcomings of the current environmental assessment process, and undermined the public's confidence in the federal environmental assessment process. Major pipeline projects are proving to be an extremely controversial issue in Canada, and the current lack of oversight has been a focus of that debate, and featured heavily in the recent review of the Trans Mountain Expansion Project with many intervenors criticizing the National Energy Board (NEB) regulatory review process as merely a rubber stamp for industry, as opposed to a stringent and fair review process.

Pipeline projects cannot remain solely within the jurisdiction of the NEB to review, and must be assessed by a panel with environmental expertise in issues that concern the Canadian public interest, including local and municipal issues.

Any amendment to the environmental assessment processes must take the control out of the hands of the proponents, who are innately self-interested and driven by profit, and ensure that projects are proposed and developed in a manner that serves the interests of all Canadians, and

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reduces environmental impacts and risks to the public to the greatest extent possible. To this end, the City encourages the federal government to take a strong stance on the direction of the energy industry in Canada, and insist on robust environmental assessment oversight of proposed pipeline projects, prior to any consideration for approval.

2.1.1 Background

The vesting of sole responsibility in the NEB for reviewing pipeline projects was the result of legislative amendments in 2012 – that made significant changes to the *National Energy Board Act* (the “NEB Act”) and repealed the previous *Canadian Environmental Assessment Act*, and replaced it with the *Canadian Environmental Assessment Act*, 2012 (the “2012 Amendments”). The 2012 Amendments were an attempt by the old federal government to streamline the approval process for pipelines. This streamlining has resulted in a focus on getting resources to market as quickly as possible, with as little process as possible, as opposed to ensuring that the impacts and risks of projects to the public and the environment, do not outweigh the benefits; and that projects are designed in a manner that minimizes impacts and risks to the greatest extent possible.

The 2012 Amendments significantly changed the process for reviewing and approving proposed interprovincial pipeline projects, and resulted in the removal of joint reviews undertaken by the NEB and the Canadian Environmental Assessment Agency (“CEAA”). As a result of these amendments, the NEB has been left to consider whether pipeline projects are in the public interest of Canadians, without the necessary expertise to consider the broad public and environmental interests at stake.

The removal of the review of pipeline projects from CEAA also had a number of incidental effects in that the review of pipeline projects were then subject to the strict timelines under the NEB Act, the stringent requirements for public participation in the hearing under the NEB Act and the complete discretion of the NEB as to what constitutes a public hearing.

2.1.2 Expertise of the Review Panel

The review of the environmental assessment processes must ensure that pipeline projects and other major federal projects are subject to review by a panel that has expertise in environmental issues and issues of concern to the Canadian public, and that these issues are given proper priority in the assessment. It is highly inadequate that a NEB panel be tasked with considering the broad and multi-faceted public interest that is at stake in reviewing major pipeline projects. The NEB has expertise in the energy sector. That is only one aspect of the public interest at issue when reviewing these types of major projects.

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

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Area, and in their inflexibility in considering routes that did not accord with Trans Mountain's preferences). The result in the NEB hearings for the Trans Mountain Expansion Project was that economic concerns, and proponent preferences, were prioritized over the potential harm to the environment and risks to the public. The potential catastrophic human and environmental consequences with respect to accidents and malfunctions associated with the Project were dismissed without proper review or consideration, due to the apparent economic "need" for the Project.

The magnitude of the public interest at stake in relation to pipeline projects – which directly bisect many municipalities, and create considerable environmental and human risk – is immense. The desire to push interprovincial pipeline projects through a review process as quickly as possible cannot be allowed to undermine the rigour of the review. The environmental assessment legislation must provide for the appointment of a panel with both expertise in the energy sector and broader issues relevant to the public interest, including environmental issues, local community issues and aboriginal issues.

Prior to the 2012 Amendments, the norm on a major pipeline project was appointment of a joint review panel, with a dual concern for mandates under the *National Energy Board Act* and the *Canadian Environmental Assessment Act*, and with independent members being appointed with environmental expertise. A return to a more diverse, more public focused joint review panel should be included in the legislative review, with credible composition, and with a limited role for the NEB that is confined to its area of expertise.

However, even prior to the 2012 Amendments, joint panels often did not include a member that had expertise in dealing with matters of local concern, such as municipal bylaw conflicts, the provision of municipal services and municipal costs. For projects with substantial impacts on major metropolitan areas, a member should be appointed with municipal government expertise.

The City recommends amending the *Canadian Environmental Assessment Act* so that there be a provision in the legislation that is triggered when a major project, including pipeline projects, is proposed for the appointment of an independent joint review panel to hold a public hearing on the project, with expertise in environmental issues, local issues and aboriginal issues. The NEB's role in the joint review should be limited to dealing with technical energy issues under the NEB Act, not with environmental issues, local issues or matters that concern the public interest, which should properly fall under the environmental assessment legislation.

2.1.3 Scope of Factors to be Considered

Evaluating the "need" for any major pipeline or federal project, should presumably evaluate that need against a wide range of social and environmental criteria to determine whether it is in the "public interest". The environmental assessment legislation must facilitate and mandate the consideration of the broad interests at stake for major projects, including the consideration of environmental and socio-economic effects of upstream activities and of all downstream uses, including greenhouse gas emissions and the effects on climate change.

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The NEB Act is currently 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”. The “public interest” is not defined in the NEB Act. The *Canadian Environmental Assessment Act* is also limited in the factors that must be taken into account, and the lists of factors in s. 19(1) do not explicitly include matters of local concern, or broader considerations of cumulative effects, sustainability or climate change.

The City’s experience with the Trans Mountain Expansion Project is that the highly discretionary provisions in the NEB Act, and the factors within the *Canadian Environmental Assessment Act*, do not provide enough guidance on the factors that a panel must consider in its review of projects. The NEB under the current legislation 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 for the Trans Mountain Expansion Project, 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 scope of factors that are to be considered in the review of major projects. It cannot be left to the discretion of the panel, as to what factors are to be considered, and the scope of those factors, in project reviews.

Any amendments to the environmental assessment legislation should include a more comprehensive list of factors that must be taken into account in the review of major projects, including the following:

- *Need for the project* – the “need for the project” should not just take into account economic considerations, or proponent commitments, but also consider the local, regional, and national interests, and alternative projects.
- *Alternative projects* – if there is determined to be a need for a project, the legislation must facilitate consideration of alternative projects that would satisfy the same need, and what project best serves the needs of the Canadian public, and has the least environmental impacts and risks.
- *Alternative means of carrying out the project* – there must be a more stringent requirement for proponents to endeavor to propose the means of carrying out a project with the least environmental effects and the least risk to the public. This should include the proposal of alternate routes for a project and alternate locations for a project.

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- *Public interest* – the public interest to be considered should be defined and broadly set out the considerations that must be considered before a project can be determined to be in the public interest. Those considerations should expressly include impacts to local and municipal interests.
- *Municipal interests* – even though major federal projects are interprovincial, the majority of the impacts are usually concentrated at the local level. The express consideration of impacts to municipal interests, such as infrastructure conflicts, bylaw conflicts, provision of municipal services, and costs to municipalities should be incorporated into the factors to be considered in the review of major projects.
- *Sustainability* – Clear principles, goals and criteria of sustainability need to underpin the process from the start, considering environmental, social and economic sustainability. The process needs to shift from an “approval process” that simply mitigates impacts to one that truly serves the best interests of the public and the environment.
- *Science based* – Review processes and decisions should be well supported by science. The triggers for environmental assessment should be determined based on their potential to have significant effects on ecosystems and species. Criteria and thresholds need to be defined accordingly. Furthermore, the range of environmental effects subject to consideration also needs to be well supported by science, and not arbitrarily limited.
- *Environmental effects* - the consideration of “environmental effects” should include effects to all aspects of the environment: land, water, air, all living organisms, and interacting natural systems.
- *Climate change* – Climate change is recognized as possibly the world’s most pressing and critical environmental (as well as socio-economic) issue and should be a key component of environmental assessment. Greenhouse gas emission effects, including upstream and downstream emissions must be estimated and considered as factors in review and approval. The failure to mandate the consideration of climate change in modern day Canada is unacceptable – particularly given the recent commitments at the United Nations Conference on Climate Change to reduce global temperature rise to 1° C.¹

¹ United Nations Framework Convention on Climate Change, Adoption of the Paris Agreement - FCCC/CP/2015/L.9/Rev.1 (12 December 2015) online: <http://unfccc.int/resource/docs/2015/cop21/eng/l09r01.pdf>

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The federal government's platform specifically addressed this issue, noting that "we will also ensure that environmental assessments include an analysis of upstream impacts and greenhouse gas emissions resulting from projects under review."²

- *Cumulative effects* – the environmental effects of a particular project should also be considered in light of the effects of other past, present and future activities and impacts.

2.1.4 Public Participation and Hearings

The City'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 projects that will impact their communities.

The current test under the NEB Act for allowing people to participate in a hearing is set out in s. 55.2 of the NEB Act. Section 55.2 provides that people may participate in a hearing or make submissions only when they; 1) are directly affected by the granting or refusing of the application or, 2) have relevant information or expertise. 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 and other major federal projects. 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.

There are no procedural requirements in the legislation for public hearings. Thus, what constitutes a public hearing can vary from project to project. In the City's experience with the Trans Mountain Expansion Project, this meant that 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. 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 in the environmental assessment legislation for the steps that must be taken for a "public hearing" for a project.

² Kyle Bakx, NEB changes stance, may consider GHGs in pipeline proposals, CBCnews (14 November 2015) online: <http://www.cbc.ca/news/business/neb-climate-change-pipelines-1.3318104>


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Those steps must include the full participation of the public and proper testing of evidence through cross-examination. The legislated timeline for the review of projects should be abolished so that the process for reviewing a project reflects the size of the project, the public concern with the project and the potential risks and impacts of the project. Allowing the timeline for the review process to be tailored to the project, will allow complex projects to be scrutinized through full community consultation and full public hearings. It will also allow the time for participation by every interested member of the public in the hearing process.

Given that a panel should be tasked with determining whether a project is in the public interest of Canada, any Canadian resident must have the ability to comment on the project in a fair and rigorous review process. Only then will the review panel have the ability to analyze the public interest of all Canadians – not just a select few.

3.0 CONCLUSION

The current *Canadian Environmental Assessment Act* and related environmental review process has weakened environmental protection and as such, the City supports the goals set out by the Minister to strengthen and improve the federal environmental assessment process, and ensure that those goals are meaningfully incorporated into any legislative amendments. In the City's experience, the federal regulation of pipeline projects is one of the areas that has most starkly illustrated the shortcomings of the current environmental assessment process, and undermined the public's confidence in the federal environmental assessment process. It is the City's hope that the comments and recommendations made in this report are considered seriously by the Expert Panel and recommended for amendment to the CEAA.


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