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**CEPA Presentation**  
**Expert Panel: Review of Environmental Assessment Processes**  
**November 21, 2016**

**I. Introduction**

The Canadian Energy Pipeline Association (CEPA) represents Canada's 12 major transmission pipeline companies who transport 97 per cent of this country's daily natural gas and onshore crude oil production.

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. We are active participants in the Multi-Industry Advisory Committee (MIAC) and believe 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 is based on evidence and science. 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 will also make a further written submission outlining our position on a variety of issues raised by the Expert Panel in its Discussion document. For the purposes of this presentation, we will focus on two critical matters. First, our steadfast support of maintaining a one project one review approach to pipeline reviews. Second, 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.

**II. 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.

While this process is robust, we recognize that, as with all processes, circumstances evolve.

In the current setting, decisions regarding large-scale, cross-Canada or international pipeline projects ("Major Pipeline Projects") are viewed by the public to have enormous impact now and for future generations. The public want to be involved in these decisions and want to be more involved



in related broader 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 interests. All of these broader public policy issues are beyond the scope of CEEA 2012 and the NEB. The challenge of addressing these interests in project reviews is amplified for linear pipeline infrastructure projects that can extend over thousands of kilometers and can impact local, regional and national interests. Competing interests from different geographic regions, levels of government, Indigenous Peoples, and impacted communities must be dealt with. Against this backdrop, we know these projects will never be universally supported, but important decisions about resource development and all its related issues must still be made.

The current review processes for Major Pipeline Projects have served well in the past, but have not always kept pace with these growing expectations and the broad public policy issues with which these projects intersect.

In this context, hundreds of millions of dollars can be spent by proponents to prepare complex route-specific environmental and engineering assessments, finalize complicated commercial negotiations to secure shipper commitments, and undertake multi-year engagement with Indigenous groups, private landowners and other affected communities only to have broad public policy issues remain unresolved. Left unresolved, these issues can heavily politicize a project specific Cabinet decision. A project specific decision then becomes a proxy for other unresolved climate, energy, federal-provincial issues and disputes relating to Indigenous rights and title. The net effect is longer reviews and significantly greater regulatory uncertainty.

Project proponents must be able to justify investment decisions through market assessment, shipper support and financial backing from third parties. 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 for Major Pipeline Projects, companies may no longer be prepared to invest in getting Canadian resources to the best market.

### **III. A proposed solution – a two-part review**

Public confidence in reviews of Major Pipeline Projects 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-specific decisions. 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 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, potential adverse impacts on Indigenous and treaty rights and overall national energy policy. If 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 assessment 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 process 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 EA, provide a transparent and public venue to debate these issues and allow the EA to achieve its intended purposes. The successful implementation would require the government to take action to fill in those policy gaps that are currently being debated in the context of pipeline-specific regulatory reviews. The 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 reduce capital risk due to uncertain regulatory processes for project proponents.

The evolving difficulty within the current review process is demonstrated by the recently released



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 long technical review. Part one would take these issues out of the project specific 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 subjected 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.

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.

CEPA believes that a two-part review would remove the “extra freight” from project EA and provide a fair and transparent assessment process that includes broad public participation, balances important environmental issues and economic opportunities as well as provides greater certainty and investor confidence for pipeline proponents.

#### **IV. Efficient and effective EAs**

The 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.

CEPA believes that if a two-part review process as described earlier is introduced for Major Pipeline Projects the EA process under CEAA 2012 itself will continue to perform effectively. More specifically, CEPA is of the view that the general approach of EAs under CEAA 2012 provides the necessary information for regulators to both understand a project’s potential environmental

impacts and to develop mitigation strategies to address these impacts. CEPA's follow-up submission addressing the Panel's specific questions will go into more detail about the current EA process.

## V. The Role of the NEB for Pipeline EAs

In recognition of its strengths as a lifecycle regulator for pipelines, CEAA 2012 gave the NEB responsibility for conducting EAs of NEB regulated projects. This provided greater clarity for pipeline proponents. Previously, pipeline projects often required an assessment from the NEB as well as other responsible authorities or other jurisdictions. This resulted in considerable uncertainty and duplicative processes, leading to unnecessary delays, costs and complexities.

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.

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 assessment also considers whether the proponent plans to follow standard and proven mitigation methods that are specific to pipelines. As a best-placed 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. The current NEB process conducts EAs using facts, science and Indigenous traditional knowledge and traditional land use information and incorporates this knowledge, along with its assessment of potential environmental impacts, into its 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.

Overall, the EA and broader project review process needs to be coordinated, transparent, consistent, inclusive and accessible to Indigenous peoples and the public. It must follow predictable timelines and must adhere to principles of natural justice and procedural fairness. Maintaining the overall process within the NEB, including project EAs, while following the guiding principle of "one-project-one-review" will best enable a regulatory process that achieves these principles and objectives.



## **VI. Project EA for provincially regulated pipelines**

Prior to CEAA 2012, provincially regulated pipelines that did not cross a provincial boundary could still trigger a federal EA under CEAA 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.

One of the goals of effective regulation must be to reduce duplication and ensure a more efficient and predictable process. Provisions of CEAA 2012 effectively instituted a “one-project-one-review” approach to pipelines that helped to place the conduct of the environmental assessment with the regulatory authority best suited to review the project. By reducing the need for different jurisdictions to conduct the same assessment, resources can be better deployed in those areas of greatest concern, leading to better outcomes for the environment, the public and the proponent.

## **VII. Overarching Indigenous considerations and opportunities**

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 numerous Indigenous groups that are near existing and proposed pipeline operations.

These relationships and associated pipeline projects have provided significant and tangible benefits to Indigenous communities through increased training, education and employment, as well as procurement, construction, and other business opportunities.

Pipeline 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.



CEPA will be providing detailed written submissions on how the federal government can address these issues and enhance Indigenous consultation within EA processes and procedures. However, as a foundational issue, we believe that an enhanced approach 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 in some regard, but it is not the full answer to this challenge. This is because certain Indigenous issues such as historic grievances and disputes over Indigenous rights and titles, cannot be effectively addressed in the context of project-specific review,. These are nation-to-nation issues rather than proponent issues.

The federal and provincial governments need to take concrete action to establish alternative effective processes that can resolve nation-to-nation issues that go beyond individual projects and what proponents can be reasonably expected to address. For Major Pipeline Projects, the federal government also needs to engage Indigenous communities much earlier in the process in order to identify whether issues that cannot be addressed within a project review and require separate nation-to-nation processes. This 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.

## **VIII. Conclusion**

The most effective and efficient regulatory framework for all stakeholders is one that is fair and transparent, coordinated, clear, efficient, comprehensive, and based on science and evidence. In particular, the process should 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. CEPA supports any efforts the government makes to achieve this outcome.

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 chose to invest their capital in other jurisdictions if they see the Canadian regulatory system imposing process uncertainty, additional risks, costs and delays. Equally important, to enable this investment and to provide proponents, investors and lenders the confidence they need, the federal government must make a clear and bold statement about the importance of developing resources and getting them to world markets.

We recognize that the responsibility to create investment confidence comes hand-in-hand with building public confidence in regulatory processes that lead to sustainable outcomes. We would ask



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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.

In conclusion, CEPA believes that the two-part review process it is proposing will provide a sensible path forward for undertaking regulatory reviews for Major Pipeline Projects. This approach balances the needs of proponents for managing project risks with the needs of other stakeholders to ensure that the regulatory review is comprehensive and covers issues important to Canadians.