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May 17, 2017

89552/2 and 16531/159

National Energy Board
Suite 210, 517 Tenth Avenue SW
Calgary, Alberta T2R 0A8

Attention: Sheri Young
Secretary of the Board

Dear Ms. Young:

Re: Energy East Pipeline Ltd. (Energy East) and TransCanada PipeLines Limited (TransCanada) (collectively, the Applicants)
Energy East Project, Asset Transfer and Eastern Mainline Project (the Projects)
Comment Process on draft Lists of Issues and draft Factors and Scope of the Factors for the Environmental Assessments pursuant to the Canadian Environmental Assessment Act, 2012 (*CEAA 2012*) [EA Factors Documents]
Applicants Request for Change of Date for Filing Their Comments and Reply

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We are counsel to the Applicants in respect of the Projects.

By letter dated May 10, 2017, the National Energy Board (Board or NEB) sought public input on draft Lists of Issues and draft EA Factors Documents relating to the Projects, and directed that any comments be filed by May 31, 2017. The Board stated that "[a]nyone may comment on one or all" of the documents setting out the Lists of Issues and EA Factors,[1] required that copies of filed comments be sent to the Applicants,[2] and indicated that comments made by previous participants through the Participation Portal will automatically be sent to the Applicants.[3] It did not, however, provide an opportunity to the Applicants to respond to the comments filed by others.

As detailed below, the Applicants have a legal right to reply. The purpose of this letter is to ask the Board to exercise its discretion to change the comment process to provide an opportunity to the Applicants to respond to the comments filed by others.

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[1] National Energy Board letter dated May 10, 2017 to "All interested parties" re Comment Period on the draft Lists of Issues and EA Factors Documents (Board Letter), page 3.
[2] Board Letter, page 4.
[3] Board Letter, page 4, footnote 3.

The Applicants propose that the Board set Wednesday, June 21, 2017 as the date for filing of Applicants comments on the Lists of Issues and the EA Factors Documents, including their reply to comments filed by others by May 31, 2017.

Provision to the Applicants of a fair opportunity to consider and respond to filed comments would be in accordance with the rule of law, including the rules of natural justice that apply to the Board, and would be in compliance with the statutory mandate of the Board. Refusal to provide such a fair opportunity would violate the doctrine of fairness, prejudice the Applicants, and constitute an appealable error of law.

National Energy Board Principles and Practice

The Board is a creature of statute. Its mandate and powers are both established and constrained by the wording of its enabling statutes—*The National Energy Board Act,*[4] *CEAA 2012* and other legislation. Its powers are derived from the relevant legislation, either expressly or by necessary implication.[5] Clearly, the Board has the power to initiate a process to obtain comments to inform a decision on the scope of a quasi-judicial process to consider applications that are before it.

Fundamental principles of natural justice and procedural fairness bind the Board in carrying out its quasi-judicial duties. Such principles apply to any public body making a decision that affects the rights, privileges or interests of any party when carrying out its decision-making responsibilities. The Board decision that establishes the scope of the hearing will affect the rights and interests of the Applicants.

Rules of Natural Justice

As noted in the Board's *Governance Manual,* the Board acts as a quasi-judicial tribunal when it exercises adjudicatory functions with respect to applications that come before it.[6] The *Governance Manual* specifically states that with respect to adjudicative decision-making (and making recommendations to the Minister for section 52 certificate applications), the Board is bound by the statutory mandate in the *NEB Act* and other legislation, and by the rules of natural justice.[7]

The rules of natural justice are twofold—the rule against bias (the decision must be made by an independent and impartial decision maker) and *audi alteram partem*, referred to as the right to a fair hearing (a party must be given an adequate opportunity to be heard before a decision is made affecting that party's interest).[8]

The fundamental right to a fair hearing was affirmed by the Federal Court of Appeal in respect of the NEB in *Flamborough (Town) v. Canada (National Energy Board)*:

> *...the denial of a right to a fair hearing must always render a decision invalid... The right to a fair hearing must be regarded as an independent,*

[4] R.S.C., 1985, c. N-7 (*NEB Act*)
[5] See *ATCO Gas& Pipelines Ltd. v. Alberta (Energy & Utilities Board),* 2006 SCC 4 at paras. 35-38 for a description of regulatory tribunal jurisdiction by the Supreme Court of Canada.
[6] National Energy Board, *Governance Manual* (December 2016) (*Governance Manual*), at p. 8.
[7] *Governance Manual,* at pp. 13, 38-39 and 45. See also *National Energy Board Reasons for Decision Sumas Energy 2, Inc., EH-1-2000, Facilities,* (*Sumas Energy 2*) March 2004, at pp. 6-7
[8] See, e.g. on the NEB website: https://neb-one.gc.ca/prtcptndncfq-eng.html#q4. See also *Sumas Energy 2* at pp. 6-7.

> *unqualified right in the sense of procedural justice which any person affected by an administrative decision is entitled to have.*

The duty of fairness attaches to any decision made pursuant to a statutory authority that affects the rights of a person. At a minimum, the duty of fairness requires that, before a decision is made that is adverse to a party's interest, that party is entitled to know the case to be met and has an opportunity to respond to that case.[9] It is well established in law and NEB practice that applicants have a right to reply to positions taken by other parties during the Board process. The right to reply is one aspect of the discharge by the Board of its duty of fairness to applicants.

It is, of course, the Board's task to determine what weight to give to any particular comments, and no party can know in advance how the Board will do so. The right to reply, however, gives the Applicants the opportunity to provide a balance to the perspective from which the comments should be viewed.

Requiring the Applicants to provide comments on the Lists of Issues and the EA Factors Documents on May 31, 2017, simultaneously with the comments of others, would deprive the Applicants of any opportunity—let alone a reasonable opportunity—to be heard on the positions of others, or to provide a balanced perspective to the Board.

By way of example, a case in point is the Board's stated particular interest in hearing comments on if and why the issues listed in Part C of Appendices 1 and 3 should be included in the Lists of Issues and/or in the *CEAA 2012* environmental assessments.[10] Two of the issues listed in the Part Cs relate to greenhouse gas (GHG) emissions.[11] While certain parties have already provided unsolicited communications to the Board that propose inclusion of GHG emissions issues,[12] the Applicants cannot possibly anticipate how those or other commenters will seek to justify a deviation by the Board in this case from the existing legal and policy realities which preclude its consideration of those issues. Those legal and policy realities make the assessment of GHG emissions the obligation of the Canadian government, not the Board. The Board proposal to unilaterally remove that obligation from the Canadian government and to impose it upon itself (and the Applicants) is a serious matter. A right of reply is necessary so that the Board will hear both sides of the argument on its proposal.

In this context, it should be noted that the legal reality is that the NEB has in previous decisions declined to consider upstream and downstream GHGs or federal and provincial GHG policy and legislation in the context of pipeline projects,[13] an approach that has been ratified by the Federal Court

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[9] See, e.g. Sara Blake, *Administrative Law in Canada*, 5th ed. (LexisNexis, 2011) at 11.

[10] Board Letter, page 3.

[11] With respect to the Energy East Project, see Appendix 1 to Board Letter dated 10 May 2017, Pages 6 and 7 of 10: "1) The potential impacts of the Project on Canada's greenhouse gas (GHG) emissions." and "4) The potential impacts that government GHG strategies, policies, laws, and regulations (including ceilings and pricing) may have on the availability of oil supply and markets underpinning the need for the Project and its economic and financial considerations." With respect to the Eastern Mainline Project, see Appendix 3-Board Letter dated 10 May 2017, pages 5 and 6 of 7.

[12] See, e.g. Environmental Defence Canada letter to the Board dated May 3, 2017.

[13] See, e.g. *Hearing Order OH-002-2013-Enbridge Pipelines Inc. Application for the Line 9B Reversal and Line 9 Capacity Expansion Project pursuant to section 58 and Part IV of the National Energy Board Act, Procedural Update No. 1—List of Issues and Application to Participate form,* pages 7 and 5. See also the NEB decisions on Enbridge Northern Gateway (https://apps.neb-one.gc.ca/REGDOCS/File/Download/2395827), the Trans

of Appeal.[14] While the Board is not strictly bound by precedents or the principle of *stare decisis,*[15] it has stated that it strives to achieve continuity, consistency and a degree of predictability. There has been no change in law or government policy or regulatory policy that would justify departing from the previously stated (and judicially endorsed) approach to dealing with upstream and downstream GHG emissions.

The policy reality is that GHG emission assessments are the purview of the Canadian government, not the Board, as detailed in the Canadian government's Interim Measures for Pipeline Reviews[16] (Interim Government Measures) and the consequent Memorandum of Understanding between Environment and Climate Change Canada (ECCC) and the Board which went into effect with the signature of Michael Martin, Deputy Minister of ECCC, on August 8, 2016.[17] If the lists of issues for the Projects include the analyses of upstream GHG emissions such analyses will be completely redundant and unnecessary. Further, the first principle of the Interim Government Measures includes the statement that project reviews will continue under the legislative framework that was then current. Consideration of Canadian or provincial laws or regulations enacted since January 2016 would be a violation of the Interim Government Measures.

Duty of Fairness in Procedural Decisions

It is settled that the Board is the master of its own procedure. However, in determining procedure, the Board is required to comply with the rules of natural justice, including the requirement that a party whose rights will be affected by any decision of the Board must be provided with a full and fair

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Mountain Expansion Project Ruling 25 (https://neb-one.gc.ca/REGDOCS/File/Download/2431830) and *National Energy Board Report, Enbridge Pipelines Inc., OH-001-2013, Facilities* January 2014, page 80, Appendix 1 List of Issues.

[14] *ForestEthics Advocacy Association v. Canada (National Energy Board),* 2014 FCA 245.

[15] *National Energy Board Reasons for Decision Maritimes & Northeast Pipeline Management Ltd. RH-1-2000, Tolls,* August 2000, page 39.

[16] In January 2016 the Canadian Government issued five principles to guide its decision-making process on major oil and gas projects and announced Interim Measures for Pipeline Reviews (Interim Government Measures). The fifth principle was that GHG emissions linked to projects under review will be assessed.[16] The Interim Government Measures, which were implemented as part of the Canadian government's efforts to restore public trust in the environmental assessment process, not only confirm that the government of Canada (and not the NEB) will assess upstream GHG emissions associated with large pipeline projects, but they specifically address the assessment of GHG emissions associated with the Energy East Project. Since the introduction of the Interim Government Measures, the DECC (1) issued a proposed methodology for estimating upstream GHG emissions associated with major oil and gas projects, (2) has reviewed the GHG emissions associated with several oil and gas projects, and (3) has made the results public (see NOVA Gas Transmission Ltd. 2017 NGTL Expansion (Sept, 2016), Enbridge Line 3 Replacement Program (Nov, 2016), Trans Mountain Expansion Project (Nov, 2016),NGTL Towerbirch Expansion Project (Mar, 2017)). The Interim Government Measures remain in place and remain applicable to the Energy East Project and Eastern Mainline Project. Consequently, the DECC will be assessing the respective upstream GHG emissions associated with each of the Projects.

[17] National Energy Board, *Memorandum of Understanding between Environment and Climate Change Canada and the National Energy Board for the Establishment of a Public Engagement Process for the Assessment of Upstream Greenhouse Gas Emissions related to the Energy East Project:* www.neb-one.gc.ca/bts/ctrg/mmrndm/2016nvrnmntclmtchngcnd-eng.pdf.

opportunity to be heard.[18] Whatever process is chosen by the Board must comply with the duty to be fair.[19]

The Applicants are aware that the Board has taken the position in at least one case that a preliminary, procedural decision does not attract the duty to be fair.[20] That position, however, was premised on the "preliminary decision" being defined as a decision that only gives rise to a more extensive proceeding in which the affected party is given a full opportunity to defend his or her interests.[21] The rationale for the absence of a duty to be fair in a "preliminary decision" is therefore that the interest of the party may be protected fully later. The determinations of the List of Issues and the EA Factors, however, are not such decisions. The interest that is required by law to be protected in this case is the interest of the Applicants in a Board decision that will determine the scope of the proceeding, and therefore the scope of the evidence that the Applicants will be required to adduce and defend. This is not an interest that can be protected in the subsequent process. That being so, the Board owes a duty of fairness to the Applicants in the comment process.

Conclusion and Request

The Applicants request that the Board exercise its discretion to change the comment process by setting June 21, 2017 as the date by which the Applicants may provide their comments on the Lists of Issues and the EA Factors Documents, including their responses to comments filed by others by May 31, 2017. To do so would effect compliance with the Board's duty to be fair. To refuse to do so would be a denial of natural justice, prejudice the Applicants and constitute an appealable error of law.

Yours very truly,

C. Kemm Yates

[18] See, e.g. *Therrien (Re),* 2001 SCC 35, [2001] 2 S.C.R. 3 at para. 82; *Moreau-Bérubé v. New Brunswick (Judicial Council),* 2002 SCC 11, [2002] S.C.R. 249 at para 75; *Nicholson v. Haldimand-Norfolk Regional Board of Commissioners of Police,* [1979] 1 S.C.R. 311, (1978) 88 D.L.R. (3d) 671 (S.C.C.); *Cardinal v. Kent Institutions,* [1985] 2 S.C.R. 643 at 656; *Martineau v. Matsqui Institution Disciplinary Board (No. 2),* [1980] 1 S.C.R. 602.

[19] See, e.g. *National Energy Board Reasons for Decision re TransCanada PipeLines Limited Application for Review and Variance of MH-002-2013 Hearing Process*, August 26, 2013, (MH-002-2013 Decision), page 8.

[20] MH-002-2013 Decision, pages 7-8.

[21] MH-002-2013 Decision, page 8, citing Macaulay & Sprague, Practice and Procedure Before Administrative Tribunals, Volume 2 (Carswell: Toronto, Looseleaf current to 2013), at 9-20.16 (11)-(13).