

0August 24, 2017

Natural Resources Canada  
580 Booth Street  
Ottawa, Ontario K1A 0E4

Attention: Minister James Carr  
Deputy Minister Christyne Tremblay

**Re: Discussion Paper on Environmental and Regulatory Reviews**

This letter is submitted in response to the Government of Canada's request for comments on the Discussion Paper on Environmental and Regulatory reviews. The signatories to this letter, Dennis J. McConaghy and Harold N. Kvisle, are retired Canadian energy executives with extensive engineering and business experience in upstream oil and gas, energy infrastructure, energy markets and regulatory proceedings:

Over the past 15 years Dennis McConaghy has played a senior leadership role in many of the major hydrocarbon pipeline projects in Canada, notably the existing Keystone oil pipeline, the proposed Keystone XL oil pipeline, the approved but unbuilt Mackenzie Valley natural gas pipeline and the approved but unbuilt BC pipelines to service LNG development (refer to Attachment 1). McConaghy has publicly commented on both Canadian carbon policy and energy development policy, including authorship of a published book on the Keystone XL experience entitled "Dysfunction – Canada After Keystone XL", <https://www.amazon.ca/Dysfunction-Canada-after-Keystone-XL/dp/1459738195>. His commentaries and podcasts can be found on his website, <https://doce.ca/>. He directly participated in the NEB Modernization Panel process, strictly as a concerned Canadian with relevant experience to share with the Panel. (Attachment 3).

Over the past 25 years Hal Kvisle has served as CEO of TransCanada Corporation, Talisman Energy and Fletcher Challenge Energy Canada, and currently serves as non-executive board chair of ARC Resources, a leading Canadian unconventional gas developer (refer to Attachment 2). Kvisle has worked closely with both Liberal and Conservative federal governments to improve and simplify regulatory processes and climate change policy, including serving as an official delegate to the Copenhagen Conference of Parties in 2009. Kvisle also participated in the NEB Modernization Panel process, strictly as a concerned Canadian with relevant experience to share with the Panel.

We were heartened when the NEB Modernization Panel conceptually endorsed a key recommendation that we and several industry colleagues and organizations had made:

**That the NEB regulatory process would be significantly improved if the Government of Canada could determine, early in the process, that a major infrastructure project is or is not in the public interest, subject to a fulsome and satisfactory technical and environmental review by the National Energy Board.**

In our direct experience, billions of dollars have been invested in enormously detailed technical and regulatory submissions, usually approved by the NEB, only to learn at the end of the process that political and social considerations would prevent the Government of Canada from issuing full and final approval. For example:

- TransCanada and its industry partners invested hundreds of millions of dollars in the enormously complex Mackenzie Valley regulatory process over more than five years, only to learn at the end of that process that the Federal Cabinet would not provide financial support to the Aboriginal Pipeline Group in respect of its carried interest in the project. The need for federal support was clear from the outset, but the decision to withhold that support did not come until after regulatory approval was received.
- Enbridge and its industry partners invested hundreds of millions of dollars in the Northern Gateway regulatory process, again over more than five years, only to learn at the end of that process that the Federal Cabinet would not support the export of waterborne crude oil off Canada's west coast.
- TransCanada has more recently embarked on a project to convert a natural gas pipeline to crude oil service and extend that pipeline from Ontario to New Brunswick (the "Energy East" project). Detailed regulatory submissions and regulatory proceedings will require the investment of more than \$500 million. Energy East would be enormously beneficial to western Canada's upstream energy sector, and to those who know how to build and operate pipelines, there are no technical or environmental "show stoppers" for this project. The issues are political and social, largely in Quebec, and those issues can and should be addressed and resolved prior to a detailed regulatory review. Does the Government of Canada support the economically desirable Energy East project and will the Government of Canada get behind the project, or not? These social and political questions can be resolved up front, with actual regulatory approval subject to a thorough regulatory and environmental review.
- While not directly relevant in the Canadian context, the Keystone XL pipeline demonstrates that regulatory processes in the United States are similarly subject to political and social interference at the end of detailed regulatory reviews. In the case of Keystone XL, TransCanada incurred a financial writedown of more than \$4 billion as a result of President Obama's politically motivated rejection of a highly desirable pipeline, connecting Canadian crude oil production to the largest and best refining market in the world, along the USA Gulf Coast.

**Our proposal for a two-stage process, seeking the political, social and strategic support of the Government of Canada up front, followed by detailed regulatory reviews as stage two, was supported by key industry players and associations and ultimately embraced in the report of the NEB Modernization Panel.**

The NEB Modernization Panel agreed that projects clearing the first stage political, social and strategic review could then be submitted to formal regulatory review, where NEB regulators could do what they were always intended to do – set reasonable conditions on the actual construction and operation of a proposed project, consistent with existing statutes, accepted risk tolerances, accommodation standards and with appropriate consideration of cumulative effects. <https://www.nrcan.gc.ca/19667>

We were deeply disappointed that the recently released Government of Canada discussion paper set aside this key recommendation of the NEB Modernization Panel. The concept of a two-stage regulatory process was the most significant recommendation of the Modernization Panel – its rejection casts doubt

on whether there is any interest within the Trudeau cabinet to actually redress the serious dysfunction in Canada's federal regulatory process for major energy infrastructure projects. The expenditure of hundreds of millions of dollars on well-intentioned energy projects is a major and unacceptable burden for world-class infrastructure companies like TransCanada and Enbridge, and that is just the tip of the iceberg. As discussed by Kvisle at the Modernization Panel hearings, the lack of access to both USA and international markets is causing a roughly \$10 per barrel discount on the wellhead price of Canadian oil, as barrels "compete" for the right to enter pipelines running at capacity. On more than three million barrels per day, that equates to a loss of more than \$10 billion annually. The impact on western Canadian wellhead revenues, producer cashflows, provincial royalties and federal income taxes is far greater than the significant losses suffered by pipeline companies. Canada cannot compete for energy capital investment if such losses are allowed to continue.

Consider the four main proposals contained in the Government of Canada discussion paper:

[https://www.canada.ca/en/natural-resources-canada/news/2017/06/discussion\\_paperreleasedonreviewofenvironmentalandregulatoryproc.html](https://www.canada.ca/en/natural-resources-canada/news/2017/06/discussion_paperreleasedonreviewofenvironmentalandregulatoryproc.html) :

1. *Establishing a single government agency responsible for assessments of federally designated projects. The review would go beyond environmental impacts to also consider social, health and economic aspects of a project and require a gender-based analysis. Joint assessments will be undertaken with the life cycle regulator for major energy transmission, nuclear and offshore oil and gas projects. Each review will draw on carefully reviewed scientific evidence, Indigenous knowledge and available data on the cumulative effects in the region where the project is planned.*

- o **Our Comment:** This proposal involves greater redundancy, cost and complexity, and for what purpose? No substantive case exists for removing the National Energy Board (NEB) as the lead regulatory agency for major hydrocarbon infrastructure projects under federal jurisdiction. No credible critique exists that the recommendations for approval of projects such as the Northern Gateway and TransMountain oil pipelines or the Mackenzie Valley natural gas pipeline were not consistent with what any comparable world class regulator would have concluded. Adding redundant regulators to an already overly-complex process is not helpful; in fact, it will add to a lengthy list of reasons why upstream energy developers and pipeline companies are "giving up" on Canada.

No credible evidence exists that the NEB is incompetent or lacks the integrity to carry out its existing mandate, inclusive of environmental assessments. In our experience, there is no basis to the contention that Canadian regulatory processes lack the "trust and confidence" of most Canadians. Anti-development activists have loudly proclaimed a lack of trust and confidence, but where is the evidence that most Canadians mistrust the NEB? Activists opposed to all forms of hydrocarbon development might consider the NEB ineffective, simply because it approves sound projects in accordance with its actual mandate.

2. *Requiring an early planning phase to foster greater collaboration and engagement between proponents, Indigenous peoples, stakeholders, the public and federal and provincial governments. This will build a common understanding of interests and issues and provide greater clarity and certainty to proponents.*

- Our Comment: This appears to be engagement for the sake of engagement. How would such an early engagement process relate to the existing approval process? How open ended is it intended to be? There is no record that proponents of major infrastructure projects have failed to consult legitimate stakeholders on potential impacts and opportunities or, secondly, failed to provide reasonable offers of accommodation. The track record of Canada’s major pipeline companies is exemplary in this regard.

We note that pipelines constructed under provincial jurisdiction in Alberta, BC and Saskatchewan, where there is clear provincial support for energy development, trigger far less “stakeholder objection” than those submitted for federal approval. What we need is early review and support by the Government of Canada, not multiple phases of “collaboration and engagement”.

3. *Early and regular engagement and partnership with Indigenous peoples based on recognition of Indigenous rights and interests from the outset, seeking to achieve free, prior and informed consent through processes based on mutual respect and dialogue.*

- Our Comment: Canadians have already the potential to meaningfully participate in regulatory hearings, and most fulsomely if they are directly impacted stakeholders. Moreover, the duty to consult has been recognized and embraced by project proponents. No fair review of the historical record would suggest otherwise (notably, recent court decisions have noted a failure to consult by the Government of Canada, not a failure on the part of proponents). Recently, it has become clear that consultation is not the same as accommodation. It is essential that what constitutes reasonable accommodation be clarified as a matter of national policy, and that could be done effectively and efficiently under the first phase of a two-phase regulatory process, as embraced by the NEB Modernization Panel.

To invoke language like “partnership” without any elaboration of what is being suggested is problematic. “Stakeholders” and “impacted parties” are not by definition “partners” in any conventional business context. Risks and rewards are fundamentally borne by investors in pipeline projects and by firm shippers on those pipelines. We agree that legitimate stakeholders must be provided reasonable accommodation, but that accommodation is rarely, if ever, in the form of costless equity participation.

4. *Restoring lost protections and incorporating modern safeguards to the Fisheries Act and the Navigation Protection Act.*

- Our Comment: Are these statutes now intended to potentially trump regulatory findings that thoroughly reviewed projects are in the public interest? Do those who enforce those statutes do so without any regard to a finding of public interest by the formal regulatory process? Such statutes should be subsumed into the regulatory process to be led by the life cycle regulator, not as additional hurdles that could undo a fundamental finding that a project is in the Canadian public interest.

We would encourage the Government of Canada to consider the following realities:

- The economic contribution of hydrocarbon production in Canada, in terms of GDP and export revenues, is extremely important to our well-being as a nation. Managed effectively, growing crude

oil and natural gas production exported to our most favorable continental and global markets will create enormous economic value for Canada.

- Virtually all major hydrocarbon infrastructure projects that actually seek regulatory approval are fundamentally economic: if they weren't, private sector players would neither propose them nor support them through firm shipping commitments. Projects that come before the Government of Canada and/or the NEB are almost always sound economic projects, of real value to Canada. It is tragic when high quality projects with real economic benefits are killed not by commercial, technical or environmental shortcomings but by the extent, delay and inefficiency of the regulatory process itself.
- Before 2005 the regulatory process was not a material risk to prevent major infrastructure projects from proceeding. The regulatory process typically applied conditions on operations and construction that conformed to industry standards and generally-accepted risk tolerances, with most major projects exceeding all environmental standards. The pre-2005 regulatory process ensured that project proponents would reasonably accommodate directly impacted stakeholders, typically via land access payments, route adjustments or special mitigation measures.

Unfortunately, the regulatory process has now evolved to the point where the process itself is a material risk to project proponents, committed shippers and financial investors. The possibility of an expensive and failed regulatory process has in many cases become the highest single risk of infrastructure development.

There are of course significant commercial and technical risks to the development of energy infrastructure, but our major infrastructure companies handle them well:

- Attracting long term shippers (who could lose billions in committed tolls if the market does not want the service provided)
- Building technically complex pipelines through mountains, under major rivers, through northern Canada and across the Canadian shield (which Canadian companies do better, worldwide, than any of our competitors)
- Operating safely and efficiently over the very long term (our Canadian track record speaks for itself, particularly in respect of long-life pipeline integrity)
- Arranging billions of dollars in financing and maintaining the confidence of the Canadian and international financial community.

It is a sad commentary on Canadian politics, bureaucracy and regulation that the regulatory process itself is the largest risk faced by energy infrastructure companies. Emphatically, this is not the fault of the NEB; rather, this risk arises because successive Canadian governments have failed to clarify government policy in critical areas including the pace and scale of resource development, the extent of aboriginal rights, and the intertwined circumstances of hydrocarbon consumption (not production) and climate change.

Considering the foregoing realities, we offer the following recommendations:

1. Implement the two phase major project approval process that we proposed and that was conceptually endorsed by the NEB Modernization Panel, with the following basic elements:

- The fundamental alignment of a major infrastructure project with the public interest would be affirmed or denied in phase one, with the final phase one decision made at the federal political level, and not by the regulator. That decision would be delivered within 12 months of the filing of appropriate project materials by the proponent.
  - If a project is determined to be in the public interest in phase one, it would then proceed to phase two for formal and thorough regulatory review. Phase two would establish conditions for the construction and operation of the project; would ensure compliance with acceptable norms of accommodation and risk tolerance for directly impacted stakeholders; would ensure compliance with accepted standards of environmental protection; and would duly consider cumulative effects.
  - Phase two determinations would be made by the regulator in the context of a finding of public interest in phase one.
  - Phase two would be contained to no more than 24 months, from formal regulatory filing to final decision, with conditions.
  - We expect that the cost to a proponent for phase one of a major infrastructure project could be kept within a range of tens of millions rather than hundreds of millions of dollars.
2. Phase one would address public policy issues rather than detailed regulatory matters. For example:
- Is the project aligned with national carbon policy, or not? Does the project (and related upstream/downstream projects) conform to existing regulations, fiscal regimes and mandates that form part of Canada's carbon policy? Clarify that Canadian carbon policy does not pre-empt incremental hydrocarbon production or the infrastructure needed to support its market access.
  - Is the country prepared to accept the risks of potential spills, ruptures or other incidents impacting adjacent communities and environments, consistent with Canadian and global standards, or not? Do we have absolute zero tolerance? Is that our national policy?
  - As a matter of policy, do proponents have traditional rights to access and cross both private and public lands to carry out their projects, or not? Said more directly, do Canadian aboriginals have some special veto on such projects proceeding that is not otherwise available to other Canadians?
  - Do individual provinces have a veto on a federal determination of the public interest for a project that traverses that province's borders carrying resources produced in another province, regardless of the distribution of national benefits and mitigated risks?

The economic impact of continued regulatory dysfunction would be enormous: the opportunity to create massive national value from our oil sands and unconventional natural gas endowments may languish on the sidelines, given our inability to build pipelines to both continental and international markets. We must improve our federal regulatory processes to enable western Canadian oil and gas producers to compete against resurgent American competitors and sophisticated global players. We must reflect upon the regulatory dysfunctions of the past decade and move forward in a way that protects our social and environmental interests while supporting economic development. Misguided signals to capital markets have long term consequences, and we need to change course before our upstream energy sector is "written off" by global energy companies and capital markets.

The government should commit itself to perfecting the re-invention of Canada's regulatory process for major energy infrastructure projects on the basis of the two phase process endorsed by the NEB

Modernization Panel. To not pursue such a course will only add to our existing regulatory dysfunction and impair our future economic prosperity.

Thank you for the opportunity to share our views on these issues of great importance to Canada's economic future.

Respectfully submitted,

Original signed by D.J. McConaghy

Dennis J. McConaghy

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Original signed by H.N. Kvisle

Harold N. (Hal) Kvisle

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Attachments:

1. CV of Dennis J. McConaghy
2. CV of Harold N. Kvisle
3. Kvisle / McConaghy submission to the NEB Modernization Panel, February 15, 2017

## Attachment 1: Dennis McConaghy Biographical Highlights

Dennis McConaghy is a native of Alberta, currently resident in Calgary. Career highlights include:

- More than 30 years of technical and leadership experience in the Canadian energy industry, spanning the period roughly from 1980 to the present, holding prominent commercial executive positions over the last twenty years.
- Directly led the commercial development of the Keystone XL pipeline systems within TransCanada Pipelines from its conception in 2006 to the finalization of commercial agreements in 2008.
- Was part of the senior executive group with TransCanada that pursued the regulatory approval of Keystone XL from 2008 to 2014.
- Accountable for development of corporate strategy within TransCanada, with particular emphasis on how TransCanada would respond to both the emerging oil sands opportunity and the challenge represented by the global intention to deal meaningfully with the climate change risk.
- Retired in late 2014, roughly a year before the actual Keystone denial.
- Currently a visiting fellow at the public policy and energy studies schools at the Ivey Business School at the University of Western Ontario.
- An adjunct fellow at the Niskanen Center, a Washington DC based think tank, focused on carbon and energy policy.
- Participated, post retirement, in various initiatives to foster compromise between Canadian environmental activists and the Canadian energy industry.

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## Attachment 2: Harold (Hal) Kvisle Biographical Highlights

Hal Kvisle is a native of Alberta. He began his career in the Canadian energy sector at age 17, and has worked for Canadian and international energy companies for more than 40 years. He has held executive leadership positions in the oil and gas, utilities and power generation industries over the past three decades.

Mr. Kvisle currently serves as board chair of ARC Resources Ltd, and as a board member of Cona Resources and Finning International. He previously served as a board member of several Canadian companies, including the Bank of Montreal, Talisman Energy, Methanex Corporation, Fletcher Challenge Canada, Norske Skog Canada and PrimeWest Energy.

Mr. Kvisle was chief executive officer of Talisman Energy from 2012 to 2015 and chief executive officer of TransCanada Corporation from 2001 to 2010.

Prior to joining TransCanada in 1999 he was the founder of Fletcher Challenge Energy Canada, leading that company through its exceptional growth period from 1990 to 1999. Prior thereto, Mr. Kvisle held engineering, finance and management positions with Dome Petroleum Limited from 1975 to 1988.

Hal Kvisle holds a Bachelor of Science in Engineering from the University of Alberta and a Master in Business Administration from the Haskayne School, University of Calgary. He served as Board Chair of Mount Royal University from 2002 to 2007 and currently serves on the advisory council of the Canadian Centre for Advanced Leadership at the Haskayne School, University of Calgary.

Mr. Kvisle served for many years as a board member and national board chair of the Nature Conservancy of Canada, and currently serves as co-chair of a national fundraising campaign for that organization.

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Attachment 3: Kvisle / McConaghy Submission to the NEB Modernization Panel, February 15, 2017

February 15, 2017

National Energy Board Modernization

Submission to the Expert Panel, as verbally delivered by Dennis McConaghy

Submitted by: Harold N. Kvisle; Dennis J. McConaghy

1. Background to the Submission

1.1 Harold (Hal) Kvisle served as CEO of TransCanada Corporation from 2001 until his retirement in June 2010. Dennis McConaghy served as EVP Business Development of TransCanada Corporation from 2001 until his retirement in 2014. Biographies for Kvisle and McConaghy are attached.

1.2 This submission reflects the professional experience and views of Kvisle and McConaghy and may not reflect the current position of TransCanada Corporation.

1.3 Kvisle and McConaghy were intimately involved in all major pipeline projects and regulatory initiatives undertaken by TransCanada during their time with that company, including:

- National Energy Board (NEB) regulatory applications for expansions, modifications and tolling approvals for the TransCanada Canadian Mainline.
- Alberta Energy and Utilities Board (AEUB) regulatory applications for expansions, modifications and tolling approvals for the Nova Gas Transmission (NGTL) system.
- Applications to transfer regulatory jurisdiction of NGTL from the Alberta EUB to federal NEB and other federal regulatory agencies.
- Applications for NEB approval to extend the NGTL system across the Alberta-BC border to provide service to natural gas producers in British Columbia.
- Applications (with Imperial Oil et al) for NEB and other federal approvals to construct the Mackenzie Valley natural gas pipeline.
- Applications for NEB and other regulatory approvals to construct the Keystone Pipeline for the movement of Canadian oil production from Hardisty Alberta to the Canada-USA border in southern Manitoba.
- Applications for NEB, other federal and various Quebec regulatory approvals to construct an LNG import terminal at Gros Cacouna, Quebec.
- Commercial development of TransCanada's participation in two major LNG projects to the BC coast, (Petronas and Shell consortia), via the provision of major pipeline infrastructure from the Montney play in northeast British Columbia to Prince Rupert and Kitimat.
- Participation in the commercial development of the Energy East crude oil pipeline project.

## 2. Regulatory Dysfunction

2.1 A number of environmental, aboriginal and non-Canadian activists contend that Canadians have “lost confidence” in the regulatory processes followed by the National Energy Board and other Canadian energy regulatory agencies. On what basis the “loss of confidence” arises is unclear, other than apparent disgruntlement with virtually all the major hydrocarbon infrastructure approvals the NEB has rendered over the last ten years.

2.2 Conversely, Canadian energy companies and Canadians with professional experience in energy regulatory matters have also “lost confidence” in the existing regulatory process followed by the National Energy Board, other federal agencies, and notably, the federal Cabinet.

2.3 Dennis McConaghy has recently published the book “Dysfunction, Canada after Keystone XL”, describing the regulatory dysfunction surrounding the American approval process for the Keystone XL Pipeline. Many of the regulatory challenges identified in that book also apply to NEB and other regulatory processes in Canada.

2.4 Proponents of Canadian energy pipeline projects are required to prepare and submit vast amounts of technical, economic, environmental and other information, often at a cost of hundreds of millions of dollars. Sometimes these expensive regulatory submissions result in efficient hearings, efficient decision-making and the issuance of regulatory permits in a reasonable timeframe. Unfortunately, more often than not, the process proves to be inefficient and inconclusive. Even those hearing that result in positive decisions take far too long, cost far too much and trigger unnecessary animosity between legitimate proponents and activist opponents. Today’s federal approval process creates too much risk for proponents, and in the worst case culminates in final decisions by politicians that are at odds with the recommendations of NEB regulators.

2.5 Consider the Mackenzie Valley natural gas pipeline project. Seven years of regulatory proceedings at a cost of more than \$500 million did eventually result in regulatory approval. However, construction has not commenced because the Government of Canada has not provided loan guarantees or other financial assistance to enable northern Canadian aboriginal groups to fund and own about a third of the project. That disabling cabinet decision occurred at the end of the regulatory process, despite repeated indications, throughout the process, that the Government of Canada would facilitate aboriginal ownership. In addition, the North American natural gas market changed dramatically near the end of the seven year regulatory process – under a two year regulatory process the project would have been up and running before emerging shale gas developments “swamped the market”. Of note, both the NEB process and the CEAA process vastly exceeded Government of Canada guidelines for the duration of regulatory reviews; after painfully long deliberations, both processes ultimately resulted in regulatory approval. Political decisions and inordinate regulatory delays prevented a major national interest project from proceeding.

2.6 Consider the Northern Gateway crude oil pipeline project. A similar five year regulatory process at a cost of more than \$500 million did result in both NEB and CEAA recommendations for approval. In

fact, approval was provided by the Harper government in mid-2014, subject to satisfaction of specific regulatory conditions. The proponent made substantial progress over more than two years in satisfying those required conditions. Unfortunately, the current Trudeau government set aside all that regulatory process and progress and dismissed the project on its political determination that "The Great Bear Rainforest is no place for a pipeline and the Douglas Channel is no place for oil tanker traffic." No reference to the actual technical record, no specifics to what was actually deficient in the required mitigations, no reference to the loss value to the country and no financial compensation to the company that complied with all aspects of Canadian regulatory process only to be denied political approval at the eleventh hour. Again, government fiat very late in the game.

2.7 Consider the Keystone XL crude oil pipeline project. A multi-billion dollar eight-year regulatory process in Canada and the USA resulted in all key regulatory approvals, including three positive and supportive environmental assessments prepared and provided by the Obama administration's own Department of State. The proponent demonstrated adequate supply, strong markets, strong shipping commitments, sound technical design, strong environmental protection and strong right-of-way landowner support. Sadly, after eight years of expensive process the Obama administration denied the required presidential approval to cross the US border, to preserve Obama's "global environmental credibility" prior to the Paris climate conference in late 2015.

2.8 For historical context, consider the original construction of the Alberta Gas Trunk Line, now known as NGTL. The government of Alberta considered the strategic and economic merits of an extensive Alberta natural gas gathering system, and took the strategic decision to support the construction of that system before extensive spending on regulatory proceedings.

2.9 As well, consider the original construction of the TransCanada Pipelines. The government of Canada through Minister C.D. Howe considered the strategic and economic merits of a cross Canada gas transmission system, and took the strategic decision to support the construction of that system before extensive spending on regulatory proceedings.

### 3. Shortcomings of the Current Regulatory System

Proponents of Canadian (and American) energy pipeline projects are increasingly reluctant to submit important hydrocarbon infrastructure projects for federal regulatory review. The cost of Canadian federal regulatory proceedings has risen to unbearable levels, and the regulatory approval of even the most sensible project is highly uncertain. Important energy infrastructure will not be constructed if capable proponents cannot see some reasonable likelihood of regulatory approval at reasonable cost.

Political opinions such as "the Great Bear Rainforest is no place for a pipeline and the Douglas Channel is no place for oil tanker traffic " are no substitute for thorough, professional and expensive regulatory proceedings. Its important that proponents hear the views of the federal cabinet at an early stage, rather than at the end of lengthy and expensive regulatory proceedings.

Similarly, opponents of major energy infrastructure projects express frustration that lengthy and detailed technical reviews do not provide an efficient and purposeful forum for confronting fundamental public policy issues that are important to them, and in their view, "in play". Some examples: are

aboriginal interests being advanced? Have climate change issues been properly considered? Do we want any level of spill or rupture risk in certain geographies?

#### 4. For Consideration: A Two-Phase Approach to Regulatory Review

Kvisle and McConaghy encourage the Expert Panel to consider a two-phase regulatory approach in the case of major energy infrastructure:

Phase One would address the question of “national interest” from a high level: would Canada benefit from the proposed project, and is the proposed project in the national interest? The Phase One process would be adjudicated by the NEB, culminating in a recommendation to Cabinet based a submission that would conform to the current guidelines for Pre-Application Project Descriptions and an evidentiary process that would gain input from relevant parties on the major public interest issues in play with respect to the proposed project. Examples of such issues:

- Are there net economic benefits to Canada? Does the project improve or detract from Canada’s overall economic competitiveness? Is the distribution of economic benefits reasonable and appropriate?
- Is the project consistent with existing Canadian policy, practice and legal precedent in respect of inter-provincial trade?
- Is the proposed pipeline route fundamentally acceptable? In broad terms, is there a better route for the project?
- Are proposed accommodations for relevant aboriginal communities and other legitimately impacted landowners and communities consistent with accepted practice, and reasonable for the specific circumstances of the project?
- Are there significant and unique environmental impacts from the project, beyond the scope of existing environmental mitigation practice? Are there reasons to set higher environmental standards than currently exist in Canadian law?
- Are there unique engineering challenges? Are the engineering challenges so great or uncertain that the project should be rejected?
- Does the project conform to existing government policy? Are there areas where government policy must be clarified, advanced or otherwise resolved before a decision can be taken?
- Are there any otherwise unidentified “showstoppers” in respect of the project, that have not been addressed?
- Considering the foregoing and other relevant factors, is the project in Canada’s national interest?

We propose that the Phase One national interest determination be completed within 12 months of submission. The recommendations of the NEB would be approved or rejected by the Government of Canada within 90 days of submission. The Phase One approval would be subject to a successful Phase Two review and approval; the more detailed assessments under Phase Two could impose additional social, environmental, technical or economic conditions on the project.

Of critical importance, no further political involvement would occur in the regulatory process. A Phase One finding of public interest would not, except in exceptional circumstances, be revisited by subsequent governments. Phase Two regulatory determinations would be entirely within the authority of the NEB.

Phase Two would not be initiated until the Phase One national interest decision has been released by the Government of Canada. If conditions imposed by Phase One are not acceptable to the proponent the project would not proceed to Phase Two. If Phase One conditions are acceptable the proponent would prepare and submit a detailed application, similar to the comprehensive applications submitted to the NEB for major energy projects today.

Phase Two would consider the project in detail, through a process similar to that followed by the NEB today. Proponents would need to satisfy the NEB with respect to technical design, construction, environmental compliance, safe operations, toll design, economic viability, contractual underpinning, landowner compensation and a host of other requirements that are part of the NEB process today. Satisfaction of all conditions attached to a Phase One approval would be required prior to Phase Two approval.

## 5. Other Regulatory Considerations

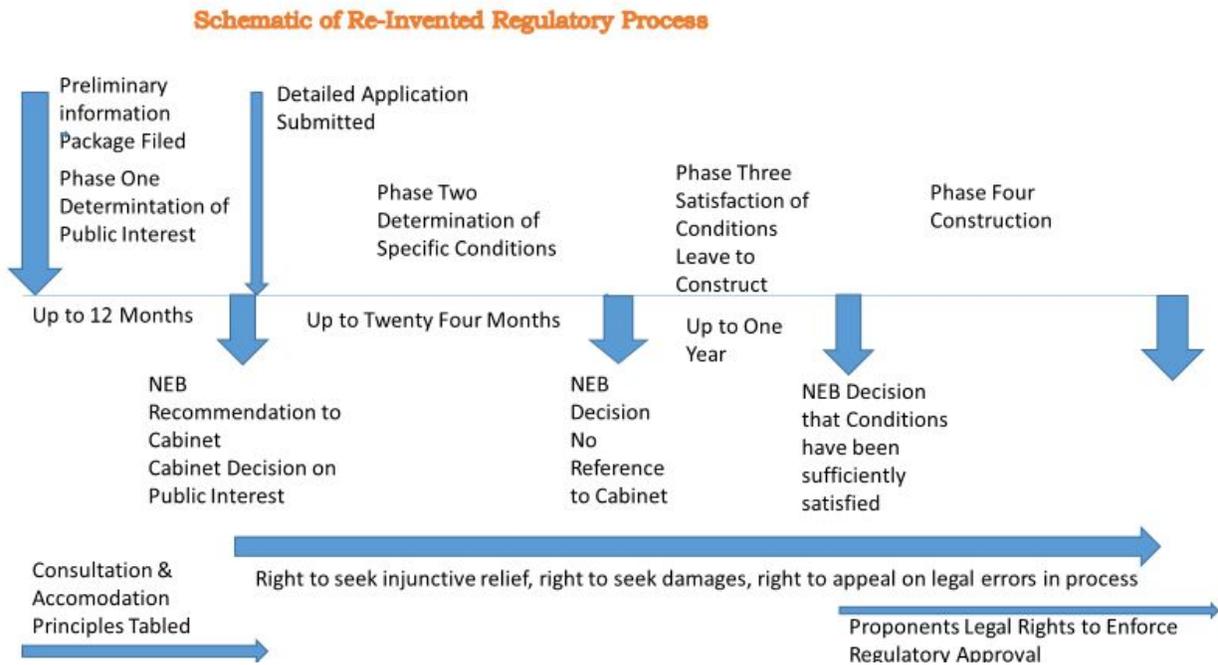
The Government of Canada has supported incremental initiatives to improve regulatory efficiency, and those initiatives should continue to progress. A “single regulatory window” has been a worthy objective for more than a decade, but we are not yet there.

It is recommended that all relevant federal departments, agencies and processes be subsumed into the Phase Two NEB process. Current overlaps and duplications are unnecessary, expensive and confusing. CEAA and other federal requirements should be satisfied through an NEB Phase Two process, with no redundancy of regulatory effort.

After a complete Phase Two application is submitted, the NEB and other federal agencies would conduct hearings and render a judgement within a defined period. The timeline for Phase Two could be specified in enabling legislation or, more likely, specified by the Government of Canada as part of a Phase One approval. No more than 24 months should be required, after filing of a complete Phase Two application.

Throughout this process, both proponents and other stakeholders would still have all of their existing legal rights to seek injunctive relief or other legal claims available to them.

Finally, after a Phase Two decision had been rendered the proponent would seek to satisfy any imposed conditions. Upon satisfaction of those conditions the proponent would seek leave to construct, and then launch actual construction.



## 6. Summation

The real challenge for this panel is to come to terms with Canada’s dysfunctional approval process for major energy infrastructure projects. This submission strives to lay the basic principles of a revised regulatory and political process to resolve that dysfunction – namely, to redress the current situation in which regulatory risks have become so high that the regulatory process itself is the greatest risk of project failure. We are at a point today where private capital may no longer be prepared to undertake essential energy infrastructure projects.

It is not in the national interest to make the approval process more obstruction friendly. Interventions in formal NEB proceedings have been liberalized beyond any reasonable interpretation of legitimate standing or probative value. Those opposed to all forms of hydrocarbon development have successfully disrupted regulatory proceedings in both Canada and the USA. The notion that Canadians have lost confidence in the National Energy Board is largely a fiction created by activists, and should not be accepted by this panel.

It is not in the national interest to alter the composition of NEB panels on any basis other than regulatory competency. Appointing NEB panels with reference to social or political priorities would be a serious error, and must be resisted.

It is no longer a matter of imposing mandated cycle times or consolidating jurisdictions into a single regulatory process. More fundamental changes are required. Private sector interests can no longer manage the risks of a dysfunctional regulatory regime.

Most importantly, political intervention in the regulatory process must come as early as possible, not as late as possible. A sufficient project description filed at the outset should enable the political level to make a public interest determination for the project within a year. More detailed assessments and conditions precedent to leave to construct should be delegated to the regulatory with the context of the national interest determination.

Fundamental change to reduce regulatory process risk is essential. Without reduced process risk all other issues of Canadian energy regulation may become moot, as private capital will no longer pursue essential energy infrastructure projects. Regulatory proceedings have become too expensive and the regulatory process risks have become too great. This dysfunction must be addressed to protect the economic interests of Canada and Canadians.

Respectfully submitted:

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Dennis J. McConaghy

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Harold N. Kvisle