

Update on Canada's environmental and regulatory review process

July 10, 2017

On June 29, 2017, the Government of Canada released its environmental and regulatory reviews discussion paper (Discussion Paper). The Discussion Paper follows from reports prepared by expert panels tasked with reviewing Canada's federal environmental assessment process and modernizing the National Energy Board (NEB), among others. Dentons previously commented on the report published by the expert panel mandated with reviewing the federal environmental assessment processes (EA Review Panel) and on the report published by the expert panel on the modernization of the NEB (NEB Modernization Panel).

The Discussion Paper outlines the changes to Canada's federal environmental assessment and regulatory processes the government is considering in light of the recommendations from the expert panels and through feedback the government received directly from Canadians. The Discussion Paper does not provide additional detail beyond what was set out in the expert panel reports. Instead, it provides some high-level insight into the aspects of the various expert panel reports the government may implement and which aspects of those reports may be "off the table".

Environmental assessment process

Consistent with the EA Review Panel's recommendations, the federal government proposes to establish a single government agency which would be responsible for "guiding and conducting" impact assessments (IA) and coordinating consultation with Indigenous peoples for federally-designated projects. The Discussion Paper also suggests that the government proposes to preserve the "one project, one assessment" principle. Accordingly, the new government agency and the relevant life-cycle regulator (e.g. the NEB, Canadian Nuclear Safety Commission or Offshore Petroleum Boards) would assess major energy transmission, nuclear, and offshore oil and gas projects jointly. Non-designated projects would only be reviewed by the life-cycle regulators.

The scope of the new IA process would be expanded beyond consideration of impacts on the bio-physical environment, and would include assessment of environmental, economic, social and health impacts associated with a project. The IA process would not be a forum to raise broader policy concerns. The Discussion Paper notes broad consensus from stakeholders that individual project reviews are not the appropriate forum to discuss complex policy issues. Those policy discussions would instead take place in the context of "strategic assessments" and "regional assessments", which would inform project assessments and explain how various policy documents apply to specific projects.

As for the process itself, the Discussion Paper suggests that project proponents would be required to lead a new "early planning phase" with clear direction from the government before the new agency takes over the assessment. This is a departure from the EA Review Panel recommendation that the new IA agency lead all phases of the IA process. The early planning phase is intended to improve project proposals and "help achieve consensus on the assessment process".

According to the Discussion Paper, outcomes of the early planning phase would include: clarity on the scope and scale of the IA process, information required for the assessment, and the expected timeline for obtaining a decision. The latter outcome seems to imply that decision-making timelines will be project-specific. However, elsewhere in the Discussion Paper, the government seems to be committed to the IA process being governed by legislated timelines which could be extended at the discretion of the responsible minister. Lastly, the Discussion Paper states that the federal Cabinet or responsible Minister(s) will remain accountable for making public interest determinations for designated projects subject to federal jurisdiction to ensure government liability.

NEB Modernization Panel

The Discussion Paper adopts a number of the NEB Modernization Panel's recommendations related to structure and governance of the NEB. The federal government would amend the *National Energy Board Act* to separate the roles of Chief Executive Officer and Chairperson of the Board. It would also create a corporate-style executive board and separate hearing commissioners to review projects. Significantly, while the federal government would eliminate the Calgary residency requirement for board members and hearing commissioners currently enshrined in the *National Energy Board Act*, the NEB itself would remain in Calgary.

As noted above, the NEB and the new IA agency would be jointly responsible for conducting the IA process for federally-designated pipeline projects. The NEB would also be solely responsible for the assessment of pipelines that are non-designated projects, and would have exclusive authority over import and export licences, as well as over certificate/licence transfers and (presumably minor) variances to certificates and licences. Lastly, the *National Energy Board Act* would be amended to give the NEB authority over offshore renewable projects and associated power lines.

It is noteworthy that the Discussion Paper does not draw any distinction between pipeline projects of "national consequence", "significant projects" or "lower risk" projects. Instead, the Discussion Paper suggests the only relevant distinction would be between designated pipeline projects (reviewed jointly by the NEB and the new IA agency at the federal level), and non-designated pipeline projects (reviewed solely by the NEB at the federal level).

It is also important to note that the Discussion Paper does not clearly endorse the two-part review process for projects of "national consequence" recommended by the NEB Modernization Panel. The Discussion Paper is clear that the Governor in Council would retain authority to make public interest determinations for designated projects subject to federal jurisdiction but, apart from a single diagram, is silent on when that determination would be made.

Emphasis on transparency and engagement

The Discussion Paper identifies a number of measures aimed at increasing opportunities for engagement in the IA and regulatory review processes. Perhaps most notably, the Discussion Paper states that the federal government is considering eliminating the "standing test" currently incorporated into the National Energy Board Act. The Discussion Paper also includes plans to increase support (including funding) available to public participants and Indigenous peoples to help them navigate the regulatory process and establishing an advocate specifically to support landowners in those processes. Consistent with the NEB Modernization Panel's recommendation, Indigenous peoples would also benefit from the creation of a government agency responsible for coordinating consultation and accommodation for federally-designated projects.

The federal government is also considering a number of other measures to enhance transparency in the regulatory and IA processes. These include increasing user-friendly online access to project information generated during environmental and regulatory reviews, allowing the public to track condition compliance online, and greater transparency on reasons for environmental assessment and regulatory decisions.

Outstanding issues

As noted, the Discussion Paper provides very limited detail on how the proposals being considered by the government would be implemented. The lack of detail creates challenges for stakeholders who want to provide additional input on whether or how some of the proposed changes should be implemented.

Process timelines

Proponents still do not have a clear sense of the potential timelines for completing the IA and regulatory review processes. Indeed, as noted above, some parts of the Discussion Paper suggest that IA process timelines would be project-specific and established following the early planning phase. Elsewhere, the Discussion Paper suggests legislated timelines will be maintained, without clearly articulating what those timelines may be. Uncertain or unduly long review periods may discourage investment in projects that must go through IA or regulatory processes, and should be clarified as soon as possible.

Balancing inclusiveness and timeliness

The *National Energy Board Act* requires the NEB to consider representations of any person who is directly affected by an application. The NEB also has the discretion to consider representations from other parties who, in the NEB's opinion, have relevant information or expertise. The Discussion Paper recommends eliminating these restrictions. It is not clear how the government expects the new IA agency or the NEB to conduct reviews in a timely and cost-effective manner without some ability to exercise discretion to limit public involvement where reasonably necessary.

Roles and responsibilities

The Discussion Paper contemplates creating a number of new entities, including but not necessarily limited to, the new IA agency and a landowner advocate. The Discussion Paper provides limited detail on the roles of these entities within the IA and regulatory processes. It also references "enhancing support available to all participants" in the regulatory process. It is unclear whether this would entail creating a new "Public Intervenor" as recommended by the NEB Modernization Panel and, if so, what the precise role and authority of that entity would be. Stakeholders need to understand what entities would be involved in the IA and regulatory processes, as well as the burdens and benefits associated with their participation.

The Discussion Paper would make the proponent responsible for the early planning stage of the IA process, but the new IA agency would be responsible for conducting the impact assessment. The Discussion Paper does not provide any additional insight on the role of the project proponent, if any, following the early planning stage.

The Discussion Paper states that the government is considering changes to the federal environmental assessment framework that would, among other things, "enable substitution with indigenous governments" and allowing the federal government to "defer to or harmonize with environmental assessment processes created pursuant to indigenous governments", and ensuring the process better "recognizes indigenous jurisdiction ...". It is not clear how indigenous assessment processes would be "harmonized" with the proposed IA process while preserving the "one project, one assessment" principle. Likewise, the implications of recognizing "indigenous jurisdiction" are also unclear.

Next steps

The government is accepting feedback on the new approach and directions set out in the Discussion Paper until August 28, 2017. The government intends to continue engaging with stakeholders on specific issues (specifically, the proposed approach to the early planning phase, among others). Changes to the regulatory processes are expected

for the fall of 2017.

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