



File OF-Fac-Oil-E266-2014-01 02
27 January 2017

To: All participants

IN THE MATTER OF:

**Energy East Pipeline Ltd. (EEPL) and TransCanada PipeLines Limited
(TransCanada) [collectively, the Applicants]**

**Hearing for the Energy East Project and Asset Transfer (Energy East), and
Eastern Mainline Project (Eastern Mainline) [Energy East Hearing]**

**Ruling No. 1 – Consequences of the Energy East Hearing panel's recusal and
how to recommence the Energy East Hearing**

Preamble

On 9 September 2016, the three panel members previously assigned to the Energy East Hearing (Mr. Roland George, Ms. Lyne Mercier, and Mr. Jacques Gauthier) [recused themselves](#)¹ in response to motions alleging that a reasonable apprehension of bias existed. The recusals are no longer in question.

According to case law, once a reasonable apprehension of bias has been established, the outcome of the proceeding, or the proceeding to date, is void.²

On 9 January 2017, Mr. David Hamilton, Acting National Energy Board (Board) Chair for the purposes of the Energy East Hearing, [appointed a new panel](#) to conduct the review of Energy East and Eastern Mainline.

The current panel (Panel) – comprised of Mr. Don Ferguson, Ms. Carole Malo, and Mr. Marc Paquin – is of the view that the first questions it must address are how to recommence the process and how to treat the decisions made throughout the hearing process by the previous panel.

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¹ These were decisions of each panel member; not a decision of the collective panel.

² See e.g. Cory J. in *Newfoundland Telephone Co v. Newfoundland (Board of Commissioners of Public Utilities)*, [1992] 1 S.C.R. 623 (SCC) at para 40, and again in *R. v. S. (R.D.)* [1997] 3 SCR 484 (SCC) at para 100.

The Panel notes that Transition Initiative Kenora (TIK) requested, in letters dated [7](#) and [22](#) September 2016 and in a 10 January 2017 [notice of motion](#), that the Board void all previous decisions of the Energy East Hearing, given that a reasonable apprehension of bias had been established. Other participants filed related submissions. Lastly, the Panel also notes that the Applicants, in a [letter](#) dated 7 September 2016, asked the Board to set up a process to hear from all parties on the effects that the recusals would have on the review of the project applications. The Applicants filed an [additional letter](#) on 20 January 2017 indicating that they will await Panel advice or decisions regarding how it intends to deal with all outstanding motions and requests, including those of TIK.

Ruling 1.1: Voiding of previous decisions

The Panel decides that, given the recusals and the applicable case law, all decisions made by the previous panel must be, and are hereby, voided and stricken from the record. These will be removed from the online public registry. This decision effectively voids the last decision of the previous panel to adjourn the process. As described below, the Panel is now taking steps to begin a new hearing process. The Panel does not deem it necessary to solicit comments on this question.

This means that the **completeness determination** made on 16 June 2016, the **List of Participants** issued on 22 June 2016 (as well as the ruling on Aboriginal intervenors issued on 16 July 2015) and any subsequent individual ruling on participation, as well as the **OH-002-2016 Hearing Order** issued on 20 July 2016 (and any procedural directions, process guidance documents, etc.), are hereby voided. Further, all steps and related deadlines included in the Hearing Order are no longer applicable. The Panel will consider these matters anew at a later time, as appropriate.

The Panel is of the view that this decision addresses the relevant sections of TIK's requests and motion, and any related submissions made by other participants.

Ruling 1.2: Joint hearing

The Panel has voided the previous panel's decision to review the two applications via a single hearing, to be heard by one panel with a single record. The Panel will assess what the best process is to review these two applications and, at a later time, will communicate its decision on whether the applications will be heard together or separately. Those wishing to comment on this issue can do so **on or before noon, Calgary time, on Wednesday, 15 February 2017**. See the instructions on how to properly file comments at the conclusion of this letter.

Ruling 1.3: Lists of Issues

The Panel has voided the previous panel's decision establishing the Lists of Issues. Thus, the Panel will issue new draft Lists of Issues shortly and will invite comments on them at that time.

Ruling 1.4: Completeness determinations

The Panel has voided the completeness determinations made by the previous panel. Once the Lists of Issues are finalized, the Panel will consider whether the applications are complete to proceed to assessment. The Panel will invite comments on the completeness of the applications at that time.

If and when the Panel makes its determinations on completeness, the legislated time limits will start anew from the time those determinations are made, and the Panel will provide further information at that time.

Ruling 1.5: Factors and Scope of the Factors for Environmental Assessments pursuant to the *Canadian Environmental Assessment Act, 2012* (EA Factors Documents), and related requests

The Panel has voided the Lists of Issues and the EA Factors Documents for Energy East and Eastern Mainline.

The EA Factors Documents were issued on 20 July 2016. Three requests (from Algonquin to Adirondacks Collaborative, Aroland First Nation, and Algonquins of Ontario) were subsequently received, asking the Board to include various elements within the scope of the Energy East designated project so that its specific EA Factors Document could be properly applied to the entire project. Given that the Panel has voided the Lists of Issues and the EA Factors Documents, it is of the view that these requests challenging the Energy East EA Factors Document have become moot.

The Panel will issue new EA Factors Documents at a later time and will invite comments on them at that time.

Ruling 1.6: The Applicants' filings

The Panel decides that the [Eastern Mainline application](#) filed on 30 October 2014 remains valid. The [Energy East application](#) refiled as a consolidated version on 17 May 2016 also remains valid. As well, all related subsequent amendments and supplemental filings remain valid and will stay on the hearing record.

The Panel sees no convincing grounds on the basis of which to grant TIK's request that the Applicants resubmit their applications. The applications were and are still properly before the Board. The Panel is of the view that all of the Applicants' submissions are theirs and cannot reasonably be expected to have been tainted by the recused panel. The Applicants can amend or withdraw their filings should they choose to do so.

Further, all of the Applicants' responses to Board information requests and their filings made in response to Board filing requirements remain valid. The Panel is of the view that no harm comes from having this additional information on the record. The Applicants' responses are theirs and

cannot reasonably be expected to have been tainted by the recused panel. The Applicants can amend or withdraw their responses should they choose to do so.

There will be opportunities later in the process for the Board and intervenors to ask more questions on the Applicants' evidence.

While future hearing process steps still have to be determined, and given that the applications and filings described above will remain on the record, the Applicants may resume filing supplemental project information, as needed.

Ruling 1.7: The Applicants' requests for confidential filings

On 17 December 2015, TransCanada filed an amendment to its Eastern Mainline application. Part of the amendment was filed in paper copy, in which TransCanada requested confidential treatment of information concerning vulnerable and endangered species. It requested such treatment in support of protecting information about the locations of endangered and vulnerable species along the pipeline route, in accordance with the Sensitive Data Use Licence Agreement that TransCanada entered into with the Ontario Ministry of Natural Resources and Forestry. The information was contained in the following documents:

- Appendix K – Species at Risk Report of the Environmental and Socio-Economic Assessment Amendment (ESA Amendment).
- Table 2 of Appendix I of the Pipeline Environmental Protection Plan (Appendix A of the ESA Amendment).
- Index map from the updated Environmental Alignment Sheets (Appendix C of the ESA Amendment).

On 24 May 2016, EEPL [requested](#) confidential treatment of the information contained in the coding sheet related to the Environmental Alignment Sheets for Energy East's Quebec Segment. EEPL requested such treatment in support of protecting information about the locations of endangered and vulnerable plants along the pipeline route in Quebec, in accordance with the express guidance and objectives of the Centre de données sur le patrimoine naturel du Québec.

In both cases, the Applicants requested that the information not be placed on the Board's electronic repository for public viewing.

The previous panel decided to grant the requests for confidentiality, in former Rulings Nos. 12 and 13.

The Panel has voided the previous panel's decisions on these confidentiality requests. It will consider the requests anew and issue its rulings at a later time. In the interim, these filings will be kept confidential.

Ruling 1.8: Applications to Participate (ATPs)

The Panel recognizes that having voided the previous rulings on participation, there is no longer a valid List of Participants. The Panel will reconsider each ATP filed to date, including those where the applying individual or group was denied standing, once it has decided whether to hear the applications together or separately, and once it has finalized new Lists of Issues and EA Factors Documents. **Persons and groups that have already filed ATPs are not required to refile those ATPs.** However, if a previously approved intervenor or commenter no longer wants to participate or wishes to amend their ATP, they may file a letter with the Board to this effect.

Any participant wishing to make changes to their contact information can do so themselves in the [Participation Portal](#) or by contacting the Regulatory Officer at EnergyEast.RO@neb-one.gc.ca.

Ruling 1.9: Intervenor and commenter filings, including past motions and requests decided upon by the previous panel

The Panel is of the view that intervenor and commenter filings are theirs and cannot reasonably be expected to have been tainted by the recused panel. In addition, it would seem burdensome to require these participants to refile their submissions.

All intervenor and commenter filings remain valid, pending further consideration by the Panel of the issue of whether to hear the applications together or separately, and until it has finalized new Lists of Issues, EA Factors Documents, and a new List of Participants.

Intervenors and commenters have the right to modify or withdraw any filing they have made should they wish to do so. Some filings may now be moot, but they will remain on the record unless an intervenor or commenter asks that a particular filing be struck from the record.

If an intervenor or commenter made a request that was decided upon by the recused panel and the related decision is now void, and that participant wants the Panel to reconsider his or her request, they must either file the request again, or file a letter clearly identifying the previously filed request for which they seek a new decision.

Ruling 1.10: Outstanding motions and requests

When the previous panel recused itself on 9 September 2016, there were a number of outstanding motions and requests before the Board.

For instance, Stratégies Énergétiques and the Association québécoise de lutte contre la pollution atmosphérique (AQLPA) filed a [notice of motion](#) on 11 August 2016. The Panel considers that Items 1 to 5 are now moot by virtue of the previous panel recusing itself and further decisions taken by the Board's Chair and Vice-Chair in their 9 September 2016 [Decision Statement](#).

However, Items 6 and 7 of AQLPA's notice of motion (i.e., to publish documents and to hold an inquiry) remain outstanding. The Panel will address these requests and communicate its decisions at a later date. AQLPA also made various requests on [11](#) and [12](#) October 2016 to strike certain portions of the Chair's and Vice-Chair's Decision Statement. Similarly, the Panel will consider these requests and communicate its decisions at a later time.

There were also a few other requests – for example, to consider late ATPs, to hold oral traditional evidence sessions, to review decisions that denied participation or to change participation status, to have the Applicants file maps and information on the lateral to connect the refinery to the marine terminal in Saint John, among others – which remain outstanding. The Panel will consider all outstanding motions and requests that were not otherwise addressed before 9 September 2016. They do not need to be refiled. The Panel will issue the respective decisions in due course.

Process for properly filing comments with the Board

Anyone who wishes to comment on the topic of whether the two project applications should be heard together or separately (see Ruling 1.2 above) may do so by filing a letter with the Board on or before **noon, Calgary time, on Wednesday, 15 February 2017.**

To ensure that comments are properly considered, all filings must refer to File No. OF-Fac-Oil-E266-2014-01 02. Filings should be addressed to:

Secretary of the Board
National Energy Board
Suite 210, 517 Tenth Avenue SW
Calgary, AB T2R 0A8
Facsimile 403-292-5503 (toll-free 1-877-288-8803)

Those commenting can file their comments by hand delivery, mail, fax, or courier, or electronically through the Board's [e-filing tool](#) or [Participation Portal](#) (for participants with an online account). **Emailed comments will not be accepted.**

Those commenting must send the Applicants and their counsel a copy of their comments filed with the Board, or a notification that the filing was made. This service can be done via email. Each of the following requires this notification:

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For any questions, please contact the Board's Process Advisory Team by phone at 403-292-4800 or 1-800-899-1265 (toll-free), or by email at energyeast.processhelp@neb-one.gc.ca.

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