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23 August 2017

To: Energy East Pipeline Ltd. and TransCanada PipeLines Limited  
All interested parties

**IN THE MATTER OF:**

**Energy East Pipeline Ltd. and TransCanada PipeLines Limited  
(collectively, the Applicants)  
Energy East Project and Asset Transfer (Energy East), and Eastern Mainline  
Project (Eastern Mainline) [collectively, the Projects]  
Lists of Issues and Factors and Scope of the Factors for the Environmental  
Assessments pursuant to the *Canadian Environmental Assessment Act, 2012* (CEAA  
2012) [EA Factors Documents]**

The National Energy Board (Board) is mandated to review each of the applied-for Projects under both the *National Energy Board Act* (NEB Act) and the CEAA 2012:

- Under the NEB Act, the Board will make its public interest determinations through its consideration of each project's potential impacts and benefits.
- Pursuant to the CEAA 2012, the Board will conduct an environmental assessment (EA) of each of the Projects. For each project, the CEAA 2012 EA will factor into the Board's public interest determination under the NEB Act.

While, under the CEAA 2012, the Board will assess and make a recommendation on the significance of each of the Projects' various potential environmental and socio-economic effects, the Board's review under the NEB Act considers more generally whether each of the Projects is in the public interest. The Board considers the public interest to refer to a balance of economic, environmental, and social interests, including human health, that changes as society's values and preferences evolve.

As the Board indicated in its 29 March 2017 [Ruling No. 2](#), it will hear the Energy East and Eastern Mainline project applications together through a coordinated hearing, the process for which will be communicated through a hearing order at a future date (see Appendix 1 for the descriptions of the applied-for Projects and Appendix 2 for the Applicants' requested relief).

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On 10 May 2017, the Board [issued for comment](#) draft versions of its List of Issues and EA Factors Document for each of the Projects.

The Board received approximately 820 submissions, including approximately 700 form letters. It read and considered all submissions in finalizing the attached Lists of Issues and EA Factors Documents for the Projects.

While the Board cannot be expected to communicate its views on each individual letter and comment, it offers views and information in this letter to provide some context to its decision-making process with respect to these documents, and to address various themes and questions raised relating to other matters. The Board explains its approach to considering the comments received and finalizing the Lists of Issues and EA Factors Documents in the following sections:

- Section 1:** Lists of Issues
  - 1.1 Purpose of the Lists of Issues
  - 1.2 Decisions on the additional issues on which specific comments were sought
    - 1.2.1 Consideration of greenhouse gas (GHG) emissions (Energy East and Eastern Mainline)
    - 1.2.2 Impact of GHG laws and policies (Energy East and Eastern Mainline)
    - 1.2.3 Potential effects of power lines (Energy East)
    - 1.2.4 Potential effects of project-related marine shipping (Energy East)
  - 1.3 Decisions on other issues
- Section 2:** EA Factors Documents
  - 2.1 Purpose of the EA Factors Documents
  - 2.2 Consideration of comments received
- Section 3:** Comments received on other matters
- Section 4:** Next steps
- [Appendix 1:](#)** Descriptions of the applied-for Projects
- [Appendix 2:](#)** The Applicants' requested relief in the applications
- [Appendix 3:](#)** List of Issues for Energy East
- [Appendix 4:](#)** List of Issues for Eastern Mainline
- [Appendix 5:](#)** Marine shipping filing requirements
- [Appendix 6:](#)** EA Factors Document for Energy East
- [Appendix 7:](#)** EA Factors Document for Eastern Mainline

## **1 Lists of Issues**

### **1.1 Purpose of the Lists of Issues**

The purpose of identifying the items and topics in the Lists of Issues is notably to assist the Board in its conduct of the proceeding, and participants in participating more effectively in it.

As such, the Lists of Issues are not limitative, but are rather an indication of some of the key issues relevant to the Projects and the Board's reviews that have been identified by the Board, the Applicants, and others. Should other issues or topics arise during the hearing, the Board will, at that time, consider the relevance of those issues or topics and decide whether and how it will consider them.

The Lists of Issues, as revised by the Board, can be found as Appendices 3 and 4.

### **1.2 Decisions on the additional issues on which specific comments were sought**

In its May 2017 release of its draft Lists of Issues, the Board sought specific comments on a series of additional issues that it was considering including in its review. Some pertained to matters that the Board typically has not considered in past facilities applications. The Board's decisions on these additional issues are described below.

#### ***1.2.1 Consideration of greenhouse gas (GHG) emissions (Energy East and Eastern Mainline)***

The Board typically considers direct GHG emissions from construction and operations activities when assessing facilities applications (this topic is included in Issue 11.2.8 of the Energy East List of Issues and Issue 9.2.8 of the Eastern Mainline List of Issues). Given increasing public interest in GHG emissions, together with increasing governmental actions and commitments (including the federal government's stated interest in assessing upstream GHG emissions associated with major pipelines<sup>1</sup>), the Board is of the view that it should also consider indirect GHG emissions in its NEB Act public interest determination for each of the Projects. In considering such indirect GHG emissions, the Board will focus on the quantification of incremental upstream and incremental downstream GHG emissions, as well as incremental emissions resulting from third-party electricity generation.

However, the Board considers that upstream production and upgrading activities, downstream refining activities and end-use, and third-party electricity generation are not part of the "designated project[s]" as defined by the CEAA 2012 and cannot be considered incidental activities under the CEAA 2012. This is because such activities are not within the care and control of the Applicants, and the Applicants will not direct or influence the carrying out of the activities. Nevertheless, given that the primary reason for including indirect GHG emissions in the Lists of Issues is environmental concern, the Board considers that the emissions from these activities are also matters relevant to its EAs of the Projects, and will therefore take these emissions into account under paragraph 19(1)(j) of the CEAA 2012. The Board also notes that

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<sup>1</sup> See, for instance, <https://mpmo.gc.ca/measures/254>.

there are other regulatory regimes in place to assess the construction and operation of these activities.

The Board will release further information regarding its consideration of this issue at a later date.

### ***1.2.2 Impact of GHG laws and policies (Energy East and Eastern Mainline)***

The Board is of the view that GHG laws and policies are relevant to its public interest determinations as they may have an impact on existing and potential markets, and the availability of oil or gas to the proposed pipelines (subsection 52(2) of the NEB Act).

Potential oil and gas supply and market projections are based on scenarios that take into account a number of variables, including laws and policies relating to GHG emissions. For this reason, the Board has added the following to the Lists of Issues:

Supply and demand scenarios incorporating, for example, potential [oil/gas] prices, levels of economic growth, and greenhouse gas abatement laws and policies.

While the Board recognizes the relevance of laws and policies relating to GHG emissions in modelling future supply and demand through scenarios, it also recognizes that a hearing process designed to review specific projects is not an appropriate forum to debate the adequacy of such laws and policies.

### ***1.2.3 Potential effects of power lines (Energy East)***

In light of the comments received, it appears to the Board that some aspects of the construction of power lines to supply power to Energy East are relevant to both its public interest determinations and EAs. Notably, these power lines have the potential to affect valued environmental components (such as caribou) that are also affected by Energy East.

However, the Board notes that the intra-provincial power lines required to deliver electricity to certain Energy East facilities, such as pump stations, will be planned, constructed, owned, and operated by parties other than the Applicants. As such, these power lines are not within the care and control of the Applicants, and the Applicants will not direct or influence the carrying out of the activities. For these reasons, these power lines do not form part of the Applicants' applied-for project, nor can they be considered part of (or incidental activities to) the "designated project" under the CEAA 2012. The Board also notes that there are provincial regulatory regimes in place for assessing construction and operation of these power lines.

However, to the extent that the potential environmental effects of these power lines interact with the potential environmental effects of Energy East, the Board will consider them in its cumulative effects assessment of the project, under the CEAA 2012. The Board has added language to the List of Issues for Energy East (see Issue 11.5) to reflect that these aspects are relevant to the Board's NEB Act review and CEAA 2012 EA.

The Board notes that, in the Energy East application, the Applicants have already provided information in relation to the power lines in their cumulative effects assessment.

#### ***1.2.4 Potential effects of project-related marine shipping (Energy East)***

The Board agrees with comments received to the effect that environmental effects of marine shipping are relevant to its NEB Act public interest determination and its CEAA 2012 EA and will therefore consider it under paragraph 19(1)(j) of the CEAA 2012.

However, the Board is of the opinion that project-related marine shipping is not part of the proposed Energy East project, nor is it an “incidental activity” included in the definition of “designated project” in the CEAA 2012, given that the shipping activities are not within the care and control of the Applicants and that the Applicants will not direct or influence the carrying out of the activities.

The Board acknowledges that Transport Canada is undertaking a TERMPOL review process for Energy East. The Board understands that the TERMPOL review process is focused on navigation and safety of project-related marine vessels, and thus provides an element of protection to the marine environment. However, the Board also understands that the TERMPOL review process does not directly consider the potential environmental or socio-economic impacts of the routine operation of project-related marine vessels. Further, the Board’s review will provide an opportunity for public participation that would not otherwise be available under the TERMPOL review or other regulatory processes.

Although the Board will consider the potential effects of marine shipping under the NEB Act and the CEAA 2012 as part of its assessment of Energy East, the Board notes that it does not have the authority to regulate marine shipping. Those responsibilities lie with other regulatory authorities, such as Transport Canada.

The Board issues as Appendix 5 to this letter additional filing requirements related to marine shipping, which are essentially identical to those that were previously issued in June 2014 to guide the Applicants’ filings, but later voided. The Board considers these filing requirements to accurately describe the matters that it considers relevant and appropriate to include in this hearing.

### **1.3 Decisions on other issues**

The Board offers the following reasons supporting some of the main changes it has made to the Lists of Issues, and explains why some requested changes were not made.

The Board notes that the ordering of the listed issues is not indicative of their importance. Each issue is listed for the very reason that the Board views it as relevant for its public interest determination.

### ***1.3.1 Activities covered by the Energy East review***

A large number of comments, generally, sought confirmation from the Board that the issues listed apply to both the new pipeline sections to be built and the existing pipeline sections to be converted from gas to oil service as part of Energy East. The Board confirms that this is the case, where applicable.

For further clarity, the term “the Project” used throughout the List of Issues for Energy East includes all works and activities proposed in the Energy East application (see Appendix 1 for a summary of these works and activities). The Board purposely does not specifically refer to either pipeline sections mentioned above, so that all issues can apply to the entirety of the Project, where relevant.

Moreover, the Board’s review will consider the full lifecycle of each of the Projects: design, construction, operations (including maintenance), and abandonment/decommissioning. The Board notes that the Applicants have proposed decommissioning certain assets as part of the Energy East application. These particular decommissioning activities will be considered in detail during the hearing as they will require Board decisions in order for the Applicants to undertake the project.

With regard to abandonment and decommissioning activities that will take place in the more distant future, the Board will consider them in a broad context during this hearing. Separate environmental and socio-economic assessments, specific to these decommissioning or abandonment activities, will be required at the time when the facilities are proposed to be decommissioned or abandoned.

In the context of the current applications, the Board will review the Applicant’s preliminary abandonment plan. The plan should ensure that sufficient funding is set aside by the Applicants to cover the eventual abandonment of the project assets as per the Board’s regulations.

### ***1.3.2 Placement of Eastern Mainline’s justification in the Lists of Issues***

Some comments were concerned with the division of issues relating to Eastern Mainline between the two Lists of Issues, particularly with respect to the justification for that project. As noted by the Applicants, the need for Eastern Mainline results from the transfer of assets, which is requested in the Energy East application. As such, the evidence for the justification of Eastern Mainline is found, at least in part, in the Energy East application.

It is for this reason that the Board, in Ruling No. 2, decided to hold a coordinated hearing for the two applications. As a result, the hearing process will allow for the justification issue to be heard together with the asset transfer issue in a coordinated and efficient manner.

The Board has included explanatory language in each of the Lists of Issues to this effect, but has maintained Eastern Mainline’s justification within that project’s List of Issues.

### **1.3.3 Alternatives**

A number of comments asked that the Board conduct a full assessment of alternatives to the Projects, such as transportation by rail or road, including the “do-nothing” alternative.

The Board considers “alternatives” in two different contexts. First, under the CEAA 2012, the Board considers alternative means of carrying out a designated project. Given the proposed Projects involve pipelines, this might include, for example, alternative routing. It can also include alternative mitigation methods to reduce effects. Second, the Board considers whether a proposed project is needed and its economic justification. This analysis can include other technically, economically, and environmentally feasible means of meeting the need for the project. For example, different transportation methods, such as rail, or the “do-nothing” option might be considered. While these might be relevant to the Board’s consideration of the need for a project, the Board would not conduct a detailed EA of such alternative transportation methods, given that they are less related to the project in that they are not an alternative means of carrying out the designated project, as applied for.

### **1.3.4 Changes made to the List of Issues**

Based on comments received, the Lists of Issues have been revised as described below.

#### **The breadth of Indigenous<sup>2</sup> considerations was clarified**

In response to a number of comments, the breadth and scope of considerations that may be important to Indigenous peoples has been clarified. As a result of the changes, there may be overlap or redundancy with other issues appearing on the Lists of Issues, but the Board is of the view that the value of this clarity justifies the potential duplication.

In a series of 28 April 2014 letters, the Major Projects Management Office (MPMO) wrote about the Government of Canada’s commitment to meeting its legal duty to consult. It indicated that it will rely on the Board’s public hearing process to the extent possible and that it will be conducting additional consultations as appropriate.

Accordingly, the Board encourages Indigenous groups to participate in the hearing process and to bring forward their concerns and their information on the potential impacts of the Projects on Indigenous rights and interests.<sup>3</sup> This may include concerns and information on any of the relevant issues, not only those that are included in the “Indigenous Considerations” section (Issue 7 of the Energy East List of Issues and Issue 5 of the Eastern Mainline List of Issues). The Board will take the rights and interests of Indigenous groups into consideration, assess any potential impacts on those rights and interests, and recommend accommodations where appropriate.

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<sup>2</sup> Indigenous peoples include the Indian, Inuit, and Métis peoples of Canada, as defined in section 35 of the *Constitution Act, 1982*.

<sup>3</sup> To be more specific, this includes any Aboriginal and Treaty rights protected under section 35 of the *Constitution Act, 1982*.

In addition, the Board notes that four members have been appointed by the Board to conduct Expanded Indigenous and Public Engagement in a format less constricted than that of a formal hearing. As a first step in this work, these members sought information from the public and Indigenous peoples on the hearing process. These members will submit on the record an initial report on the hearing process in the coming weeks, and will likely submit additional report(s) on the record that will address issues raised during their consultations. Further engagement work outside of the regulatory process will be undertaken by these members concurrent with the regulatory process.

### **Accidents and malfunctions has become a separate issue**

A large number of comments received reflected the public's concerns about releases, accidents, and malfunctions, as well as the emergency response measures to respond to these events. The Board notes that there were several references to this subject throughout the draft Lists of Issues. The Board has decided to combine these references and consolidate them as a distinct issue. While these issues now have their own category on the Lists of Issues, participants will be able to address them whenever relevant during the hearings.

Some submissions indicated that past accidents and malfunctions on the existing TransCanada Mainline system should be considered as a factor in the Board's review of Energy East. To the extent that past performance of the pipeline to be converted can assist with determining future performance, past incidents related to the integrity of the pipeline, as well its operability and maintainability, are relevant to the hearing.

### **Addition of sub-issues**

The Board prepared its final Lists of Issues at a high level to cover all matters of relevance to the hearing. While the Board received a significant number of suggestions for additions, many are, in its view, already covered by the high-level issues presented by the Board, and as such did not require changes to the Lists of Issues. Nevertheless, the Board added a number of sub-issues where it felt they would provide further clarification as to what a given high-level issue comprises.<sup>4</sup>

## **2 EA Factors Documents**

### **2.1 Purpose of the EA Factors Documents**

The content of a project proponent's environmental and socio-economic assessment, submitted as part of a project application, is guided by the Board's [Filing Manual](#) and any other filing requirements that the Board may issue, depending on the case.

The EA Factors Documents produced by the Board elaborate upon the scope and breadth of the CEAA 2012 EAs that the Board will undertake for the Projects, as well as the considerations that

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<sup>4</sup> In doing so, the Board frequently uses the term "including." This is intended to indicate that any items that follow are examples of the considerations that the Board will take into account. It is not meant to signal that the Board's assessment will be limited to only those listed items.

the Board will take into account. The Board developed its EA Factors Documents based on its preliminary analysis of the project applications.

The EA Factors Documents, as revised by the Board, can be found as Appendices 6 and 7.

## **2.2 Consideration of comments received**

As the Board noted earlier in this letter, while it will not respond to all individual comments, it provides the following high-level explanatory comments. Also, note that the explanations outlined in Section 1 of this letter, with respect to comments received on the Lists of Issues, apply to the EA Factors Documents, where relevant.

### ***2.2.1 Spatial and temporal boundaries***

Many comments requested that the Board provide more clarity on the spatial and temporal boundaries that it will consider for specific components of the environment.

In its EA Factors Documents, the Board uses broad language to allow it to vary its assessment on a per-component basis (e.g., air, water, land), as appropriate. These documents are purposely overarching in nature to allow for this necessary flexibility. The Board's Filing Manual requires project proponents to set assessment boundaries. The Board and intervenors can submit information requests during the hearing to seek clarification on the boundaries set by the Applicants. If any participant is of the view that the set boundaries are inappropriate, it will have the opportunity to submit comments and/or evidence challenging the appropriateness of the boundaries set by the Applicants.

### ***2.2.2 Scope of activities being considered***

Some submissions indicated that the Board must include within the scope of its EA for Energy East the work activities associated with existing pipeline sections to be converted to oil service. The Board's EA will include consideration of activities that will be necessary to convert the existing gas pipeline to oil should the project be approved. This will include, for example, the proposed construction of pump stations and new watercourse crossings.

Other comments asked for clarity about whether ancillary works, such as construction camps, storage yards, and borrow sites, would be considered. The Board confirms that each of its EAs will include consideration of such ancillary works, including any temporary infrastructure required for project construction.

## **3 Comments received on other matters**

### **3.1 Comments on application completeness**

The Board received numerous submissions that, in addition to the filers' comments on the draft documents, included comments on application completeness.

As the Board noted in its 27 January 2017 [Ruling No. 1](#), it will be holding a separate comment process on application completeness. The Board is appreciative of the interest and effort shown by those commenting in the various aspects of this proceeding. However, for fairness and efficiency purposes, the Board will only consider the comments received during any comment process that pertain to the intended purpose of that process.

Therefore, comments regarding application completeness that were filed during the process set out for the draft Lists of Issues and EA Factors Documents will not be considered when the comment process opens up on application completeness. Anyone that filed such comments will need to refile those comments at that time.

### **3.2 Comments constituting evidence or argument**

Many comments received constituted evidence or argument on technical matters. To the extent that they were helpful to the Board in supporting a commenter's position on the merits of including or excluding a particular issue, or modifying one, they were considered. This is consistent with the Board's messaging in its 10 May 2017 [letter](#) setting out the comment process.

However, the Board has not yet set out a hearing process outlining the procedural steps that will take place, including for the submission of evidence and argument. Therefore, any technical information or views on the various issues that were submitted during the recent comment process will have to be resubmitted in due course for it be considered as evidence or argument.

### **3.3 Comments on the Applicants' requests for section 58 exemptions**

In their application for Energy East, the Applicants made certain requests under section 58 of the NEB Act, requesting to be exempted from various provisions of the NEB Act in relation to some components of the project (e.g., tanks and related lateral). Such requests include being exempted from the obligation to file detailed information about the route or location of facilities after the conclusion of the hearing.

In deciding whether to grant an application under section 58 of the NEB Act for an exemption from the detailed routing requirements, the Board considers a number of factors. These typically include the consequences of granting the application on those who could be affected, and whether there has been an alternative and sufficient means for hearing the concerns and recommendations of those affected. In the present case, the Board will consider all concerns brought forward in the hearing, including concerns that could not be fully articulated without detailed routing information. The Board will consider evidence such as this when making its determinations on whether to grant the exemptions requested.

### **3.4 Comments about "reserving the right" to suggest issues in future**

In some submissions, the filer indicates that it reserves the right to add or bring forth new issues at a later time. As mentioned earlier, the Lists of Issues are not limitative, but are rather an indication of some of the most salient issues relevant to the Projects and the Board's reviews that have been identified by the Board, the Applicants, and others. Should other issues or topics arise

during the hearing, the Board will, at that time, consider the relevance of those issues or topics and decide whether and how it will consider them.

### **3.5 Comments on the recommendations of expert panel reports**

The Government of Canada has received various recommendations in recent reports produced by expert panels charged with reviewing federal EA processes and Board modernization. Some commenters requested that the Board halt its hearing entirely until such time that the Government of Canada makes its decisions on Board modernization and those decisions are implemented. Other comments suggested that the Board's mandate and process in relation to the applications be modified to reflect various recommendations contained in these recent reports.

The Board is aware of the reports and recommendations. Many recommendations emanating from these reports are congruent with the Board's current process. Some recommendations go beyond the current legislated mandate of the Board and would require action by Parliament to come into effect. Until such changes are officially made, and for considerations of fairness to the Applicants, the Board will continue to review the Projects pursuant to the existing legislation. Further, the Board will align its process with the applicable interim principles and measures adopted by the Government of Canada,<sup>5</sup> which apply to EAs, including those for pipeline projects currently under review by the Board.

## **4 Next steps**

Below, the Board outlines certain important steps that will occur in this proceeding. Although it cannot commit to dates by which these will take place, the Board hopes to provide some clarity on the likely sequence of upcoming events in this proceeding.

### **4.1 Application completeness**

Having finalized the Lists of Issues, the Board will continue its review of the project applications to determine whether each of them is complete enough to proceed to assessment. The Board will also set out a comment period seeking input and views on their completeness. Once comments are received, the Board will make its determination on completeness for each of the applications. Once the Board determines that the applications are complete, the 21-month time limit for it to conduct the hearings and produce its recommendation reports will begin.

Details on the comment process will be communicated in the near future. Note that any comments filed prior to the formal comment period will not be considered, as described in Section 3.1 of this letter.

Further, the Board notes that a significant amount of time has passed since the Applicants filed their consolidated applications. In preparation for the Board's assessment of application

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<sup>5</sup> See: <https://mpmo.gc.ca/measures/257> and <https://www.canada.ca/en/natural-resources-canada/news/2016/01/government-of-canada-moves-to-restore-trust-in-environmental-assessment.html?=&wbdisable=true>.

completeness, the Applicants may wish to file any updated evidence in support of their applications that has become available since that time.

#### **4.2 Process to determine participation in the hearing**

As a result of its Ruling No. 1, which voided the decisions of the previous panel, the Board must make new decisions on who can participate in the hearing, and their role either as intervenor or commenter.

The Board will announce full details on the process it will use to determine participation in the hearing. All previously filed Applications to Participate, whether approved or denied by the previous panel, remain on the record for reconsideration in the upcoming process.

#### **4.3 Hearing order**

Once the applications are deemed complete by the Board, it will issue a hearing order. The hearing order is the key document setting out the process the Board will use to gather the information needed for its review of the project applications. It describes and sets deadlines for all written and oral opportunities for participants.

In preparing the hearing order, the Board will consider any information it receives on the record with respect to hearing design from the Board Members carrying out Expanded Indigenous and Public Engagement.

### **5 Questions**

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](mailto:energyeast.processhelp@neb-one.gc.ca).

Yours truly,

*Original signed by L. George for*

Sheri Young  
Secretary of the Board

Attachments