CEP
Communications, Energy and Paperworkers Union of Canada

Communications, Energy and Paperworkers Union of Canada (CEP) comment on

National Energy Board (NEB) Consultation concerning:

File Ad-GA-ActsLeg-Fed-NEBA-Amend 0101

The CEP has over 110,000 members and is Canada's largest union of energy workers, with some 35,000 members employed in oil and gas extraction, transportation, refining, and conversion in the petrochemical and plastics sectors. Its members work throughout Canada, from the Hibernia platform off the shore of Newfoundland to the refineries on the West Coast. In between, thousands of CEP members are employed in petrochemicals in Sarnia, Ontario and in the tar sands in Fort McMurray, Alberta.

The CEP is committed to ensuring that Canadian oil and gas resources are developed and utilized in a manner that fosters economic development in Canada, and does so in a way that is consistent with meeting the challenges of climate change while providing secure energy supplies for Canadians in the future.

This comment is presented on behalf of the CEP by David Coles, the President of the CEP and Fred Wilson, Assistant to the President.

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The National Energy Board (NEB) has solicited comment from interested parties within the community with respect to regulatory changes being contemplated in light of statutory changes made to the NEB enabling legislation by the government of Canada in 2012. They have further sought to "streamline the regulation of hydrocarbon exports and imports, improve consistency between fuels, and update regulations to reflect current oil and gas market conditions." In order to achieve this goal the NEB has specifically proposed seven regulatory changes.

> 1. Institute a surplus test to reflect the changes to the NEB Act as well as update the process for assessing whether the quantity of oil or gas to be exported exceeds the surplus after considering reasonably foreseeable Canadian requirements and supply trends.
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> 2. Make the surplus test and the process for assessing surplus similar for both oil and gas.
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> 3. Reduce the information required for long-term export licence applications consistent with the NEB Act.
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> 4. Exempt natural gas imports from requiring Board authorizations consistent with the approach currently in place for other fuels.
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> 5. Modernize the reporting requirements to simplify the regulations and reflect current market conditions.
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> 6. Set a consistent two-year limit for short-term orders for all fuel types.
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> 7. Remove the requirement for a hearing for an oil export license application so that it is consistent with the recent changes to the NEB Act which made hearings no longer mandatory for gas import or export license applications.

In this comment the CEP will be making remarks on each of the 7 proposed changes to the regulatory framework and then where appropriate we provide responses to the 5 specific questions asked. By way of introductory comment and summary we will start with a remark on the 7 proposed changes taken as a whole.

Introduction: General comments

Having 35,000 members directly employed in relevant sectors, the CEP is committed to improving the regulatory regime such that it helps improve the efficiency in the functioning of the sectors in question. Indeed maintaining the viability of the sectors is essential to the interests of our members and employment opportunities for future members to come. We recognize, therefore, that the vitality of the sectors in question is very important to the health of the Canadian economy in terms of growth and jobs. Along with energy security, and environmental sustainability we take this to be what the NEB means when it says that its general mandate "is to regulate pipelines, energy development and trade in the Canadian public interest" and that "these

principles guide NEB staff to carry out and interpret the organization's regulatory responsibilities". It is the aforementioned principles which will inform the nature of our comments and responses to the specific questions.

The proposed changes to the regulatory regime as outlined by the NEB (above) seem contradictory in purpose. For example, it is not at all clear that the proposed changes with respect to monitoring energy security (Canadian energy surpluses) are consistent with the proposed changes to the status of public hearings as outlined in Proposal 7. Similarly, it is not at all clear how reducing reporting requirements implied by Proposals 3 and 4 furthers the goals of determining energy security, environmental sustainability and the creation of a robust 'surplus test'. We recognize that statutory changes to the NEB Act require the reformulation of reporting requirements for licence holders. It is our position that the NEB stills retains sufficient discretionary power to maintain high standards vis-à-vis reporting requirements on applications if it so chooses to do so.

In general, it appears to the CEP that the Board is taking the position that modernizing and streamlining regulations is synonymous with deregulation. The basic contradiction, in our opinion, is that the NEB is a regulatory agency as stipulated in its statutory mandates notwithstanding recent changes made in the enabling legislation. It is the position of the CEP that the NEB is still required to ensure that Canadian energy security is maintained and that it follows its principles as enumerated (see above).

Our view is given considerable credence in the fact that since 1986 the vast majority of oil and gas exports have fallen under the short term (two years or less) 'order regime' that requires little to no regulatory oversight.

In fact, an export order application can be made online and it requires only the most perfunctory information. Unlike oil export licences, no public hearing need be held, nor is cabinet approval required and the Board is not required to determine whether the oil exported is actually surplus to Canadian needs. It is our position that the NEB has been allowing the respective sectors to operate outside the intended statutory obligations of the enabling legislation by making a series of rolling short term orders that *de facto* circumvents the intended export regime. Virtually the only substantive regulatory requirement on these orders is for the client to file monthly reports after the fact about the quantities of oil exported and other related information.

In our opinion, a strong argument could be made, therefore, that the NEB has been enabling the sectors in question to operate in a *de facto* deregulated environment with little to no regard for Canadian energy security[1] and, as such, the NEB has been conducting its affairs in an *ultra vires*

[1] Our interpretation of the situation is that we do not equivocate between the definition of 'energy surplus' as it relates to provisions within NAFTA and 'energy security' which is a phrase which predates NAFTA and is a key component of NEB's statutory mandate. While we recognize that NEB regulations need to conform to the provisions on energy as enumerated in NAFTA we do accept them as the maximal standards in terms of regulation or general energy policy. Moreover, it is the government of Canada which is ultimately responsible for ensuring conformity with NAFTA not the NEB. Simply put, we think the NEB should regulate the relevant sectors through the lens of 'energy security' and not the narrower concept of 'energy surplus'. We illustrate below why the distinction matters.

manner with respect to its statutory obligations and stated guiding principles. It is our opinion that any changes contemplated should be in reducing the distance between past practice at the NEB and its statutory obligations with respect to energy security.

Part I: Comment on proposed changes

Proposal 1

> *1. Institute a surplus test to reflect the changes to the NEB Act as well as update the process for assessing whether the quantity of oil or gas to be exported exceeds the surplus after considering reasonably foreseeable Canadian requirements and supply trends.*

We recognize that the NEB has developed over the years a relatively robust (comprehensive) econometric model for making estimates of domestic supply and demand and of what, in their view, is the size of the surplus. The CEP takes a slightly different view on how the surplus should be estimated. It is our position that the NEB should calculate a complementary 'security capacity surplus'[2] measure that would take into account the difference between value added products derived from oil and gas imports and exports. This metric could then be reported along with other measures in the development of the NEB's 'surplus test'.

We recognize that the NAFTA provisions are quite clear on what constitutes a surplus. It is, however, our position that those provisions in no way constrain the Board in the development of alternative measures and addressing other issues with respect to energy security which are in its broader statutory mandates.

Proposal 2

> *2. Make the surplus test and the process for assessing surplus similar for both oil and gas.*

Here the CEP is in general agreement that making the surplus test uniform is a reasonable modernisation of the regulatory regime subject to the concerns we raise with respect to Proposal 1 and 7.

Proposal 3

> *3. Reduce the information required for long-term export licence applications consistent with the NEB Act.*

It is the position of the CEP that the pre-existing *disclosure* requirements did not place an onerous obligation on the part of the applicants and as such did not hamper the efficiency of the

[2] This metric would account for the difference between the surplus on the raw exports of energy and any deficit between value added exports minus value added imports. See comments on Proposal 5 below.

sectors in question. We appreciate that the changes made to the NEB Act in virtue of the *Jobs, Growth and Long-term Prosperity Act*, deprives the NEB of the power "to place *conditions* on any oil or gas licences or orders concerning requirements related to the protection and restoration of the environment and any social effects that would be directly related to those environmental effects."[3] However, the NEB retains sufficient discretionary power to require full environmental disclosure as part of the *application process*.

That is to say, there is a difference between requiring information for the purposes of *applying* for a licence and the *conditions* upon receiving that license. We are of the view that the aforementioned changes made to the NEB Act *do not apply to the applications processes*.

Proposal 4

> *4. Exempt natural gas imports from requiring Board authorizations consistent with the approach currently in place for other fuels.*

We at the CEP take no position with respect to this proposal subject to the comments made with respect to Proposal 1.

Proposal 5

> *5. Modernize the reporting requirements to simplify the regulations and reflect current market conditions.*

It is our position that if the NEB continues with the present practice of granting exports under the short term 'order regime' then there is little reason to modernise the reporting requirements as the existing requirements are so limited as to be un-remarkable. If, on the other hand, the NEB is referring to the long term regime (1-2 to 25 years) then it makes little sense to base reporting requirements exclusively on "current market conditions".

In order to generate reasonably robust future estimates of the size of the primary surplus (raw values on the net: exports – imports) and the secondary surplus (the net on value added exports – value added imports) it is our position that the more information that is available to the Board the more robust will be their estimates.

Proposal 6

> *6. Set a consistent two-year limit for short-term orders for all fuel types.*

The CEP is in favour of supporting a rational and consistent regime for the treatment of all the relevant sub-sectors and products. However, there are many issues that should be considered in increasing the length of short term hydrocarbon export authorizations for propane or butanes or heavy crude oil. Natural gas and crude oil derivatives are the "feed-stock" or raw materials to

[3] Italics added.

produce chemicals, fertilizers, paints and resins, and many other products in more than 1,000 workplaces across Canada. These products are manufactured by using fractions extracted from natural gas and crude oil such as ethane, propane, butane, pentane, and their olefins. This value-added sector of the Canadian economy could be further undermined by enabling easier exports. It is therefore, the position of the CEP that whatever consistent time frame that is chosen, that it is done so with a view to maximising the supply to the value added sectors.

Further, we take the position that the Board should stop issuing *de facto* unlimited short term export authorizations. Unlike export licenses, gas export orders engender no obligation to protect Canadian reserves. Moreover, orders are issued *ex parte*, (granted without public notice or hearing) thereby circumventing the public hearing requirements of the Act as well. The procedures adopted by the Board to issue such orders were last examined in 1992, and until now have never been seriously challenged. However, since that time export orders have become the rule, not the exception. Today, 80 percent of Canada's natural gas exports are taking place pursuant to short-term, *ex parte* orders. It seems to us that the requirements of the Act (Sections 116 and 118) are being effectively circumvented, thereby allowing producers and exporters to avoid compliance with the surplus and public interest safeguards of the Act.

Proposal 7

> 7. Remove the requirement for a hearing for an oil export license application so that it is consistent with the recent changes to the NEB Act which made hearings no longer mandatory for gas import or export license applications.

The CEP recognizes that recent changes to the NEB Act negated the need for *mandatory* public hearings (Section 24) with respect to export licences. However, these changes did not negate the NEB's discretionary statutory power to order public hearings with respect to oil and gas import and export licences.[4] Nor did these changes in anyway alter the Board's ability to make representation to the Minister with respect to the regulations contained within the *National Energy Board Act Part VI (Oil and Gas) Regulations*

By not requiring public hearings for long term oil and gas import and export licences it is not at all clear how the NEB will be able to assess present and future domestic supply and demand requirements. Part of the rationale behind public hearings is that it gives producer and consumer groups an opportunity to exchange information about present and future plans affecting the supply of and demand for energy in Canada. Public hearings are thus an essential component of the NEB's statutory mandate (Section 118, NEB Act) to:

> On an application for a licence to export oil or gas, the Board shall satisfy itself that the quantity of oil or gas to be exported does not exceed the surplus remaining after due allowance has been made for the reasonably foreseeable requirements for use in Canada, having regard to the trends in the discovery of oil or gas in Canada.

[4] Section 24 (3) of the NEB Act reads: "The Board may hold a public hearing in respect of any other matter if it considers it advisable to do so."

As the NEB noted in its 2011 publication *Canada's Energy Future* (p. ix):

> In developing this report, the NEB met with various energy experts and interested stakeholders, including representatives from industry and industry associations, government, environmental non-governmental organizations and academia to gather input and feedback on the preliminary projections. The information obtained from these consultations helped shape *the key assumptions and final projections* (italics added).

The CEP concurs with the NEB's view that public hearings play a central role in collecting crucial information with respect to making as accurate as possible estimates. Such information gathering will be essential in the NEB's *stated goal* of developing a robust surplus test.

Further, in the forward to its 2011 publication, *Canada's Energy Future* (p. vii), the NEB described its mandate in the following manner.

> The National Energy Board (the NEB or the Board) is an independent federal regulator whose purpose is to promote safety and security, environmental protection and efficient infrastructure and markets in the Canadian public interest within the mandate set by Parliament for the regulation of pipelines, energy development, and trade.

Inter alia the authors defined the 'public interest' (fn 1.) as follows: "*The public interest is inclusive of all Canadians and refers to a balance of economic, environmental, and social considerations that change as society's values and preferences evolve over time* (italics added)."

The CEP supports this expansive definition of the public interest. In the furtherance of the NEB's stated goal of developing a robust surplus test, ensuring that Canadian consumers have fair market access to domestic oil and gas supplies, and ensuring that it, the NEB, is reasonably cognizant of the public interest it is the CEP's position that the Board should recommend to the responsible minister that Section 26 of the *National Energy Board Act Part VI (Oil and Gas) Regulations* should be amended to read as follows:

> **26.** (1) Subject to subsection (2), the Board may, after holding a public hearing and obtaining the approval of the Governor in Council under section 4, issue a licence authorizing any person
>
> (*a*) to export heavy crude oil for a period exceeding two years but not exceeding 25 years;
>
> (*b*) to export oil, other than heavy crude oil, for a period exceeding **two** years but not exceeding 25 years; **and**
>
> **(c) to export gas for a period exceeding two year but not exceeding 25 years.**[5]

[5] The two year time frame was chosen for symmetry. If the Board thinks one year is preferable we defer to their judgement.

Our position at the CEP is further that the Board should use its discretionary powers to order public hearings with respect to the import and export of oil and gas regardless of the duration of the license or order particularly when the public has expressed interest in said applications.

Part II: Comments on the specific questions

1. a) What form should the test take for both oil and gas so that the Board can satisfy itself that there is a surplus of hydrocarbon products to be exported?

i) If the Board were to retain a form of the MBP, what modifications should be made?

ii) If the Board were not to retain a form of the MBP, what should replace it?

iii) What complaint procedure, if any, should be retained by the Board?

1. b) What role should market monitoring play under the new NEB Act?

There should be a strict test to define whether there is a surplus of hydrocarbon products to be exported. In effect, it should be the responsibility of any company wanting to export hydrocarbons to prove that the resources are surplus to national demand.

The surplus test that must be applied by the NEB before export licenses can be issued is fundamentally a regulatory standard, not a market-based standard. It explicitly acknowledges that the market is not sufficient to ensure the protection of Canadian interests. The market-based procedure adopted by the NEB in 1987 must not be confused with the continuing mandate of the Board as set out in Section 118 of its governing Act. The surplus to Canadian needs test is fundamentally a public interest safeguard to prevent the machinations of the market from overwhelming the right of Canadian consumers to access their own natural resources on reasonable terms.

In 1996 the Board also adopted the Fair Market Access Procedure for dealing with export licensing. Under this procedure, any party wishing to export crude oil from Canada must demonstrate that it has provided fair market access to potentially-interested Canadian refiners and marketers (i.e. "buyers"). This places two obligations on an export licence applicant (the "Applicant"):

1. The Applicant must inform potential Canadian buyers of the volumes and type(s) of crude oil associated with the proposed export; and

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2. If any Canadian buyer expresses an interest in purchasing all or part of the available volumes, the Applicant must enter into good faith negotiations with that potential buyer

Once the Applicant has determined whether or not there is any interest on the part of Canadian buyers and has negotiated in good faith with such buyers, the Applicant may file a complete

export licence application with the Board. Upon receipt of an application and upon satisfying itself that an Applicant has complied with the filing requirements of the Regulations, the Board will set the application down for a public hearing.

The Board is then to take into account all other relevant public interest considerations, including the need for the applied-for licence, and the burden of proof rests with the Applicant to show that an export licence should be issued.

It is the CEP's position that the Board should not retain the Market Based Procedure and rather begin to adhere to what's currently in the NEB Act. Section 118 of the Act provides an important protection of Canadian energy security by requiring that export licenses only be issued for gas and oil that is surplus to Canadian needs. Fair Market Access Procedures also safeguard the interests of would-be Canadian purchasers and must be satisfied before the Board will consider an export license application. It is our opinion that each and every one of these safeguards has been entirely negated by the Board's practice of simply issuing export orders following the most perfunctory administrative procedures. It is the CEP's position that the power to regulate surplus supply is there and should be applied.

As part of determining whether there is a surplus of hydrocarbons the Board must consult widely and is that why we are adamant that public hearings continue and if anything be expanded. The NEB should provide financial support to First Nations and non-profit organizations wishing to participate in NEB hearings on the matter.

Prioritizing Canadian employment must also be part of the calculus for approving export permits. The NEB has the statutory responsibility to ensure the public interest is ensured with respect to Canadian oil and gas, including domestic employment and security of supply. The NEB should guarantee long term energy supplies for Canadians before granting export licenses, and it should encourage the linking of regional grids between provinces.

Our position is that a complaint procedure must be retained by the Board. Canadian natural gas market participants need a mechanism to complain if they have not had the opportunity to buy gas on terms similar to those of the proposed export.

2. What modifications, if any, are required to the information that applicants must submit in requesting an export licence?

It is our view that the Board should not discontinue the information requirement for applications for long term export licences. In fact, considering the growing importance of energy policy, companies wanting an export permit ought to increase their information disclosure requirements. Companies need to show that they have searched out a Canadian buyer.

3. a) Would it be appropriate to modify the Part VI Oil and Gas Regulations to exempt natural gas imports from Board authorization?

3. b) What are the implications, if any, of removing a gas import authorization requirement?

The CEP has no comment with respect to the above questions at this time.

4. a) Are there changes to the reporting requirements that should be considered?

4. b) What changes are required to accommodate exports or imports of gas in the form of liquefied natural gas?

The CEP has no comment with respect to the above questions at this time subject the issues already raised *inter alia*.

5. a) Is there value in applying a two year term to all short-term hydrocarbon export authorizations?

5. b) What are the issues that should be considered, market or other, in applying a similar term to all short-term hydrocarbon authorizations?

As noted above it is the CEP's position that the Board should make fewer short term orders. In principle we are not against bringing symmetry to the short-term hydrocarbon export regime. It is, however, our position that the short term order regime should be brought into conformity with the long term licence regime. In practice this would mean requiring that Applicants demonstrate due diligence in satisfying the Board that they have attempted to find Canadian buyers and that the proposed volume of exports are indeed surplus to Canadian energy needs. We would also like to see the Board use its discretionary power in virtue of Section 24(3) of the NEB Act to hold public hearings particularly in cases when the public has raised questions and concerns over the application.

Conclusion

It is the CEP's position that the proposed changes that the NEB is contemplating, on the whole, are counterproductive to its statutory obligations with respect to Canadian energy security and in contradiction to its stated objective of regulating "pipelines, energy development and trade in the Canadian public interest." Beyond these general observations we would like to reiterate our position that the Board use its discretionary powers to order public hearings, collect information with respect to the import and export of oil and gas regardless of the duration of the license or order particularly when the public has expressed interest in said applications. It is our opinion that the more information the NEB has at its disposal the better they will be equipped to develop a robust surplus test; ensure that Canadian consumers have fair market access to domestic oil and gas supplies; and ensure that it, the NEB, is reasonably cognizant of the public interest.

The CEP would like to thank the NEB for receiving our comment.