



File OF-Fac-Oil-T260-2013-03 59
26 September 2018

To: All intervenors in the OH-001-2014 Certificate hearing for the Trans Mountain Expansion Project¹
Trans Mountain Pipeline ULC (regulatory@transmountain.com)
All Indigenous peoples and groups on the Crown Consultation List in the OH-001-2014 Certificate hearing
All interested persons and groups

**Trans Mountain Pipeline ULC (Trans Mountain)
Application for the Trans Mountain Expansion Project (Project)
National Energy Board (Board) reconsideration of aspects of its Recommendation Report (Report) as directed by Order in Council (OIC) P.C. 2018-1177
MH-052-2018**

Application to Participate process; and comment process on the draft List of Issues, the draft Amended Factors and Scope of the Factors for the Environmental Assessment under the *Canadian Environmental Assessment Act, 2012* (CEAA 2012), and the design of the hearing process

A. Overview

On 20 September 2018, through [OIC P.C. 2018-1177](#), the Governor in Council (GIC) referred aspects of the Board's [Report](#) for the Project back to the Board for reconsideration (Reconsideration). The GIC's direction follows a 30 August 2018 [decision](#)² of the Federal Court of Appeal that quashed the GIC's approval of the Project. The GIC has imposed a time limit of 155 calendar days for the Reconsideration. Therefore, the Board must complete the Reconsideration process and issue its Reconsideration report no later than **22 February 2019**.

The Board will hold a public hearing in carrying out the Reconsideration. The Chair of the Board has assigned a Panel of three [Board Members](#) (Lyne Mercier – presiding, Alison Scott, and Murray Lytle) to conduct the Reconsideration.

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¹ Those remaining in the hearing process at the time that the Board issued its Recommendation Report in May 2016, as listed in Appendix 6 of the Report.

² *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153.

As detailed in this letter, the Board is now seeking public comments on:

- 1) whether, “on a principled basis,”³ Project-related marine shipping should be included in the “designated project” to be assessed under the [CEAA 2012](#);
- 2) the draft Amended Factors and Scope of the Factors for the Environmental Assessment pursuant to the CEAA 2012 (Appendix 1), and the draft List of Issues to be considered in the Reconsideration hearing (Appendix 2); and
- 3) the design of the hearing process to be used for the Reconsideration;
- 4) which government departments or bodies that the Board should require information from during the hearing.

Directions on how to file comments with the Board on the above matters are provided in Part G below.

This letter also provides background and guidance on how those interested in participating in the hearing as an intervenor can apply or register to do so.

The deadline for filing all comments, and for applying or registering to participate, is 3 October 2018.

Once the Board has considered the filed comments and Application to Participate (ATP) forms, it will:

- release a Hearing Order setting out the hearing process that will be followed;
- confirm the Amended Factors and Scope of the Factors for the Environmental Assessment pursuant to the CEAA 2012, and the List of Issues for the Reconsideration hearing; and
- announce the intervenors that will be participating in the hearing.

In determining the Amended Factors and Scope of the Factors for the Environmental Assessment pursuant to the CEAA 2012 and the List of Issues for the Reconsideration hearing, in addition to considering the comments received, the Board will be guided by the GIC’s direction, the Federal Court of Appeal’s decision, and relevant provisions of the CEAA 2012 and the *National Energy Board Act* (NEB Act).

B. Background

On 19 May 2016, the Board issued its Report for the Project, which recommended that the GIC approve the Project.

On 29 November 2016, the GIC accepted the Board’s recommendation and issued OIC P.C. 2016-1069. That OIC directed the Board to issue a certificate of public convenience and necessity approving the construction and operation of the Project, subject to the conditions recommended by the Board, which the Board did on 1 December 2016 ([Certificate OC-064](#)).

³ *Tsleil-Waututh Nation v. Canada (Attorney General)*, *supra* note 2 at para. 770.

On 30 August 2018, the Federal Court of Appeal overturned the GIC's approval of the Project, in part because, in the Court's view, the Board unjustifiably excluded Project-related marine shipping from the definition of the "designated project" under the CEAA 2012. The Court noted that this resulted in successive deficiencies, including limiting the Board's consideration of mitigation measures and of section 79 of the *Species at Risk Act* (SARA). The Court noted that the Board had considered Project-related marine shipping under the NEB Act, and that this was adequate for the purposes of informing the GIC of the effects of Project-related marine shipping on Southern resident killer whales and their use by Indigenous groups, as well as of the significance of these effects.

The Federal Court of Appeal quashed OIC 2016-1069, rendering Certificate OC-064 a nullity. The Court stated that the issue of Project approval should be remitted to the GIC for redetermination, and, in that redetermination, the GIC must refer the Board's recommendations and its terms and conditions back to the Board for reconsideration. At paragraph 770 of its judgment, the Court stated:

Specifically, the Board ought to reconsider on a principled basis whether Project-related shipping is incidental to the Project, the application of section 79 of the [SARA] to Project-related shipping, the Board's environmental assessment of the Project in the light of the Project's definition, the Board's recommendation under subsection 29(1) of the [CEAA 2012] and any other matter the [GIC] should consider appropriate.

In OIC 2018-1177 dated 20 September 2018, the GIC, on the recommendation of the Minister of Natural Resources, pursuant to section 53 of the NEB Act and section 30 of the CEAA 2012:

- a) refers back to the National Energy Board for reconsideration the recommendations and all terms or conditions set out in its May 19, 2016 report entitled *Trans Mountain Expansion Project OH-001-2014* that are relevant to addressing the issues specified by the Federal Court of Appeal in paragraph 770 of *Tsleil-Waututh Nation v. Canada (Attorney General)* (2018 FCA 153), including conditions 91, 131 to 134, 144 and 151;
- b) directs that the Board conduct the reconsideration taking into account the following factors:
 - i) the environmental effects of Project-related marine shipping in view of the requirements of the *Canadian Environmental Assessment Act, 2012*, and
 - ii) the adverse effects of Project-related maritime shipping on species at risk, including the Northeast Pacific southern resident killer whale population, and their critical habitat, in view of any requirements of section 79 of the *Species at Risk Act* that may apply to the Project; and
- c) directs that the Board complete its reconsideration within 155 calendar days after the day on which this Order is made."

C. Including Project-related marine shipping as part of the “designated project” under the CEAA 2012

The Board invites public comments on whether, on a principled basis, Project-related marine shipping should be part of the “designated project” under the CEAA 2012, and the rationale for why or why not. More specifically, comments should address whether Project-related marine shipping is “incidental” to Project physical activities, as that term is used in the definition of “designated project” in subsection 2(1) of the CEAA 2012.

The Board is also seeking comments on a draft Amended Factors and Scope of the Factors for the Environmental Assessment pursuant to the CEAA 2012 (Appendix 1), which reflects a scenario where the Board determines that Project-related marine shipping is part of the “designated project” under the CEAA 2012.

D. Government departments or bodies that the Board should require information from during the hearing

Pursuant to paragraph 20(a) of the CEAA 2012, the Board intends to request specialist or expert information or knowledge from each of Fisheries and Oceans Canada, Environment and Climate Change Canada, and Transport Canada in relation to the Reconsideration.

The Board is seeking comments about which other government departments or bodies, if any, that the Board should require information from during the hearing.

E. Draft List of Issues for the Reconsideration hearing

The Board invites public comments on the appropriate List of Issues to be considered in the Reconsideration hearing. A draft List of Issues for the Reconsideration hearing is provided in Appendix 2.

F. Hearing process design

The Board invites public comments on the design of the hearing process that it should use to carry out its Reconsideration. Comments regarding the hearing process design should include a description of the hearing steps that are appropriate, the timing of these steps, and whether they should be written or oral.

Comments must take into account the **time limit and the limited focus** of the Reconsideration process, and that a portion of the time will be required by the Board to collect and consider comments in determining its hearing process and focus, and to prepare its Reconsideration Report. The Board’s hearing process will be, in accordance with subsection 11(4) of the NEB Act, carried out as expeditiously as the circumstances and considerations of fairness permit, but, in any case, within the time limit imposed by the GIC.

Given what will be an expedited hearing process, **all Parties, including individuals, groups and government departments and bodies, that intend to participate as intervenors, are strongly encouraged to start preparing any additional evidence immediately, based on the draft List of Issues for the Reconsideration hearing.** The Board intends for the entirety of the record filed in the OH-001-2014 Certificate hearing to be included as part of its record for the Reconsideration. **Parties will not be required to re-file or re-test evidence that was filed during the OH-001-2014 Certificate hearing.**

G. How to file comments

The deadline for filing all comments pertaining to Parts C to E above is 3 October 2018.

Comments can be filed online using the Board's [e-filing tool](#) (when asked to choose a project name, choose "Trans Mountain Expansion Project – Reconsideration – MH-052-2018").

All filings must refer to **Hearing Order MH-052-2018** and **File OF-Fac-Oil-T260-2013-03 59**, and be addressed to:

Ms. Sheri Young
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)

Alternatively, comments may be mailed or faxed to the Board using the contact information above. **The Board does not accept filings by email.**

Anyone filing comments with the Board should also provide a copy to Trans Mountain at regulatory@transmountain.com.

All comments received, and any future filings related to this Reconsideration hearing, will be found in the Board's online [public registry](#).

H. How to apply or register to participate in the Reconsideration hearing

The Board's Reconsideration hearing will involve:

- the participation of **intervenors**, which typically may file and challenge relevant evidence and submit final argument; and
- gathering **letters of comment from the public** – related to the final List of Issues for the Reconsideration Hearing or the Amended Factors and Scope of the Factors for the Environmental Assessment pursuant to the CEAA 2012 – by a deadline to be set by the Board at a later time.

Only those seeking to participate as an **intervenor** in this hearing are required to file an ATP form. Anyone wanting to file a letter of comment by this future deadline does **not** need to file an ATP form.

Intervenors in the OH-001-2014 Certificate hearing

Intervenors in the OH-001-2014 Certificate hearing at the time that the Board issued its Recommendation Report are **guaranteed intervenor status** in this Reconsideration hearing, should they choose to participate. These intervenors must file an ATP form as a means of "registering" only, though a number of the steps can be skipped.

The purpose of this registration process for these intervenors is to ensure that the Board and Parties to the hearing have their current contact information for the purpose of serving documents.

In the case of a **group** that was granted intervenor status during the OH-001-2014 Certificate hearing, the Board notes that intervenor status was tied to the **group** that participated; **not** to the representative(s) of that group. In other words, **only the group is guaranteed intervenor status** in this Reconsideration hearing. Any individual that represented a group and who wants to participate on his/her own as an individual must file an ATP form for the Board's consideration and decision.

Other interested persons or groups seeking intervenor status

Any other member of the public (individuals or groups) may apply to participate in this Reconsideration hearing as an intervenor. The Board will assess all filed ATP forms and decide who will be allowed to participate as an **intervenor**. Intervenor status will be granted to those who, in the Board's opinion, are directly affected or have relevant information or expertise. Applicants must demonstrate how they meet this criteria as they relate to the draft List of Issues for the Reconsideration hearing.

Those not granted intervenor status – as well as any other interested person or group – will be able to file a letter of comment by a deadline to be set by the Board at a later time.

How to file an ATP form

The ATP form for this Reconsideration hearing can be found on the Board's [website](#).

If you require a hard copy of the ATP form, please contact a Process Advisor (see Part J below).

I. Participant funding

Participant funding is available to facilitate eligible intervenors' participation in this hearing. A simplified funding process will be used for this hearing to reduce administrative burden. Eligible groups may request up to \$80,000, and individuals up to \$12,000.

For information about participant funding and eligible costs, please visit www.neb-one.gc.ca/pfp or contact a Participant Funding Program Coordinator at 1-800-899-1265.

The Participant Funding Request Form is found at the link above, and also attached to this letter as Appendix 3.

J. Where to find additional information

As information becomes available or is released regarding the Reconsideration hearing, the Board's will update its Project [webpage](#).

If you require additional information about this letter, including information on how to file an ATP form or comments, please contact a Process Advisor by phone at 1-800-899-1265 (toll-free) or by email at TMX.ProcessHelp@neb-one.gc.ca.

Trans Mountain is directed to serve this letter on its list of interested parties.

Yours truly,

Original signed by

Sheri Young
Secretary of the Board

Attachments

Appendix 1

Draft Amended Factors and Scope of the Factors for the Environmental Assessment pursuant to the *Canadian Environmental Assessment Act, 2012*⁴

1.0 INTRODUCTION

On 16 December 2013, Trans Mountain Pipeline ULC (Trans Mountain) filed an application with the National Energy Board (Board or NEB) proposing to construct and operate the Trans Mountain Expansion Project (Project). As the Project would require more than 40 kilometres of new pipeline and would be regulated under the *National Energy Board Act* (NEB Act), it is a designated project under the *Canadian Environmental Assessment Act, 2012* (CEAA 2012) and requires a CEAA 2012 environmental assessment for which the NEB is the Responsible Authority. On 20 September 2018, through [OIC P.C. 2018-1177](#), the Governor in Council (GIC) referred aspects of the Board's [Report](#) for the Project back to the Board for reconsideration.

For the purposes of the environmental assessment under the CEAA 2012, the designated project includes the various components and physical activities as described by Trans Mountain in its 16 December 2013 application submitted to the NEB. The Board determined that Project-related marine shipping between the Westridge Marine Terminal and the 12-nautical-mile territorial sea limit is also part of the “designated project” under the CEAA 2012. ~~The Board has determined that the potential environmental and socio-economic effects of increased marine shipping activities to and from the Westridge Marine Terminal that would result from the designated project, including the potential effects of accidents or malfunctions that may occur, will be considered under the NEB Act (see the NEB's Letter of 10 September 2013 for filing requirements specific to these marine shipping activities). To the extent that there is potential for environmental effects of the designated project to interact with the effects of the marine shipping, the Board will consider those effects under the cumulative effects portion of the CEAA 2012 environmental assessment.~~

As noted in the List of Issues (attached to Hearing Order [OH-001-2014](#)), the Board does not intend to consider the environmental and socio-economic effects associated with upstream activities, the development of oil sands, or the downstream use of the oil transported by the pipeline.

In accordance with paragraph 79(2)(b) of the CEAA 2012, the following provides a description of the factors to be taken into account in the environmental assessment under the CEAA 2012 and of the scope of those factors.

⁴ Deletions from the original Scope of Factors are shown with in ~~black strikethrough~~ text, while draft additions are shown in red underlined text. While this document indicates that Project-related marine shipping is part of the designated project on a draft basis, the Board will consider comments on this issue.

2.0 FACTORS AND SCOPE OF THE FACTORS

2.1 Factors to be considered

The CEAA 2012 environmental assessment for the designated project will take into account the factors described in paragraphs 19(1)(a) through (h) of the CEAA 2012:

- (a) the environmental effects⁵ of the designated project, including the environmental effects of malfunctions or accidents that may occur in connection with the designated project and any cumulative environmental effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out;
- (b) the significance of the effects referred to in paragraph (a);
- (c) comments from the public or any interested party received in accordance with the CEAA 2012;
- (d) mitigation measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the designated project;
- (e) the requirements of the follow-up program in respect of the designated project;
- (f) the purpose of the designated project;
- (g) alternative means of carrying out the designated project that are technically and economically feasible and the environmental effects of any such alternative means; and
- (h) any change to the designated project that may be caused by the environment.

In addition, the environmental assessment will also consider community knowledge and Aboriginal traditional knowledge.

2.2 Scope of the factors to be considered

The environmental assessment will consider the potential effects of the designated project within spatial and temporal boundaries within which the designated project may potentially interact with and have an effect on components of the environment. These boundaries will vary with the issues and factors considered, and will include, but not be limited to:

- construction, operation and maintenance, foreseeable changes, and site reclamation, as well as any other undertakings proposed by the proponent or that are likely to be carried out in relation to the physical works proposed by the proponent, including mitigation and habitat replacement measures;
- seasonal or other natural variations of a population or ecological component;
- any sensitive life cycle phases of species (e.g., wildlife, vegetation) in relation to the timing of Project activities;

⁵ Section 5 of the CEAA 2012 further describes the environmental effects that are to be taken into account.

- the time required for an effect to become evident;
- the area within which a population or ecological component functions; and
- the area affected by the Project.

Any works and activities associated with additional modifications or associated with the decommissioning or abandonment phase of the Project would be subject to a future application under the NEB Act and assessed in detail at that time. Therefore, at this time, any works or activities associated with these phases of the Project will be examined in a broad context only. As indicated above, the environmental assessment will consider cumulative environmental effects that are likely to result from the designated project in combination with effects from other physical activities that have been or will be carried out.

Subsection 2(1) of the CEAA 2012 provides definitions potentially relevant to the scope of the factors, including:

“environment” which means the components of the Earth, including

- (a) land, water and air, including all layers of the atmosphere;
- (b) all organic and inorganic matter and living organisms; and
- (c) the interacting natural systems that include components referred to in paragraphs (a) and (b);

and

“mitigation measures” which means measures for the elimination, reduction or control of the adverse environmental effects of a designated project, and includes restitution for any damage to the environment caused by those effects through replacement, restoration, compensation or any other means.

Appendix 2

Draft List of Issues for the Reconsideration Hearing

The Board's Reconsideration hearing will consider any necessary changes or additions to its May 2016 Report, in light of the inclusion of Project-related marine shipping in the "designated project" under the CEAA 2012. This includes issues related to factors described in paragraphs 19(1)(a) through (h) of the CEAA 2012 and to section 79 of the SARA:

- 1) The environmental effects of Project-related marine shipping, including adverse effects on species at risk, and the significance of those effects.
- 2) Measures that are technically and economically feasible, and that would mitigate any significant adverse environmental effects of Project-related marine shipping. *Given that the Board found four significant adverse effects related to Project-related marine shipping in its original assessment⁶ (i.e., greenhouse gas emissions, Southern resident killer whale, traditional Aboriginal use associated with Southern resident killer whale, and the potential effects of a large or credible worst-case spill), the consideration of mitigation measures will focus on these four matters. This will include consideration of whether the mitigation measures will change the Board's previous significance findings.*
- 3) Alternative means for carrying out Project-related marine shipping that are technically and economically feasible, and the environmental effects of such alternative means.⁷
- 4) Requirements of any follow-up program in respect of Project-related marine shipping.
- 5) Measures to avoid or lessen the adverse effects of Project-related marine shipping on SARA-listed wildlife species and their critical habitat, including monitoring, and consideration of how the undertaking of such measures could be ensured. *The Board's original assessment identified the SARA-listed marine fish, marine mammal, and marine bird species that could be found in the area of, or affected by, Project-related marine shipping,⁸ providing a focus for this issue. Any marine species that have been newly listed, or any species that have seen a change to their designation, since the issuance of the Board's Report and that could be affected by Project-related marine shipping would also require consideration under the SARA.*
- 6) Whether there should be any changes or additions to the Board's recommendations for the Project, or recommended terms or conditions, in light of the above issues.

⁶ See the Board's Report at pages 337, 350-351, 363, 378, and 397-398.

⁷ For greater clarification, the Board does not intend to reconsider alternate locations for the Westridge Marine Terminal as this was previously considered.

⁸ See the Board's Report at pages 338, 341, and 352.

The consideration of the above issues will be limited to Project-related marine shipping between the Westridge Marine Terminal to the 12-nautical-mile territorial sea limit.

The Board is of the view that certain issues described above, in particular Issue #1, were thoroughly canvassed in the OH-001-2014 Certificate hearing and may not require additional evidence. The Board is particularly interested in new, additional evidence (including comments from the public, community knowledge, and Indigenous traditional knowledge) on Issues #s 2 to 5.

Appendix 3 Participant Funding Request Form

MH-052-2018 – Participant Funding Request Form

The National Energy Board (NEB) administers a Participant Funding Program (PFP) independently of the hearing process. Funding is available for eligible intervenors, including Indigenous groups, individuals with a direct local interest, as well as non-industry not-for-profit groups. A simplified funding process has been approved for this hearing to reduce administrative burden. Eligible groups may request up to \$80,000, and individuals up to \$12,000, to participate in this hearing. For more information about the PFP and reimbursement of eligible costs, go to www.neb-one.gc.ca/pfp or contact a PFP Coordinator at 1-800-899-1265.

If you want to request funding, please return a completed form **on or before [ATP Deadline]** to the PFP by email pfppafp@neb-one.gc.ca or by fax 1-877-288-8803.

1. Funding Applicant

Legal name of entity or individual applying for funding

CRA Business # or Band #

Address 1 [apt.; street; city]

Address 2 [province; postal code, zip code; country]

Phone

Fax

Website

2. Funding requested

Please specify the amount of funding you are requesting: \$

Eligible groups may request up to \$80,000, and individuals up to \$12,000.

3. Primary contact for funding

Name and title of person the PFP will contact about funding

Phone

Fax

Email

4. Signing authority for funding

Name and title of person authorized by the applicant to sign funding agreement

Phone

Fax

Email

Important

Once a complete form is received, PFP staff will send you a contribution agreement to be signed. Once signed by both parties, the information provided will be used to administer funding in accordance with the NEB's PFP program, including public disclosure of the award. PFP is a reimbursement-based program, you must submit claims for eligible expenses incurred in order to receive payment.

Privacy notice statement

Your personal information is being collected to process your request to the PFP pursuant to the *National Energy Board Act*. Providing this information is voluntary however, missing information may affect our ability to communicate with you and assess your application. Your personal information will be protected in accordance with the *Privacy Act*. You have the right to access and correct any of your personal information held by the NEB. For more details contact the NEB's Access to Information and Privacy Coordinator at DLATIPCoordinator@neb-one.gc.ca and cite Personal Information Bank NEB PPU 025.