



Council Member Motion

For the Governance and Priorities Committee Meeting of August 28

Date: August 21, 2014 **From:** Mayor Fortin
Subject: UBCM emergency resolution regarding environmental assessment of the Trans Mountain Expansion Project

Summary

The TMX Project

Trans Mountain Pipeline ULC, as General Partner of Trans Mountain Pipeline LP (collectively "Trans Mountain"), has applied to the NEB for a Certificate of Public Convenience and Necessity in respect of the TMX Project. The TMX Project will increase the capacity of the existing Trans Mountain pipeline system from 300,000 bbl/d to 890,000 bbl/d. The TMX Project consists of three components: 1) twinning (or looping) of existing pipeline segments in Alberta and British Columbia; 2) new and modified facilities (including pump stations and tanks); and 3) three new berths at the Westridge Marine Terminal in Burnaby, BC. Within British Columbia, Trans Mountain proposes to construct approximately 647 km of new buried pipeline from Hargreaves to Darfield (279 km), and from Black Pines to Burnaby (368 km). The Terminal expansion will allow for an increase in handling capacity from the current five vessels per month to 34 Aframax class vessels (80,000-120,000 DWT) per month. The tanker route from the Terminal commences in Burrard Inlet, and then traverses Boundary Pass, Haro Strait, and the Juan de Fuca Strait before reaching the Pacific Ocean.

Many British Columbians are concerned about the impact and safety of the Project, particularly the economic and environmental impact of a pipeline or marine spill.

Environmental Assessment Equivalency Agreement

On June 21, 2010, the EAO and the NEB entered into an agreement respecting the environmental assessment of "Projects" (the definition of which includes "a transmission pipeline") that are reviewable under both the Reviewable Projects Regulation, B.C. Reg. 370/2002, and the National Energy Board Act, R.S.C. 1985, c. N-7 ("NEB Act"). The Agreement provides that an NEB assessment of such Projects constitutes an equivalent assessment under sections 27 and 28 of the BCEAA. The Agreement is premised upon an understanding that an NEB assessment "would take into account any comments submitted during the assessment process by the public and Aboriginal peoples". The EAO has the right, under clause 6 of the Agreement, to terminate the Agreement upon giving 30 days written notice to the NEB. This Agreement was the reason there was no provincial environmental assessment of the Northern Gateway pipeline.

The NEB assessment of the TMX Project fails to provide opportunities for meaningful participation by intervenors that have been granted standing under the hearing rules, including municipal

governments and the Province. Both levels of government share an interest in ensuring that Trans Mountain's application undergoes a rigorous and credible environmental assessment. Flaws and deficiencies with the ongoing NEB process have thwarted this goal and deprived British Columbians of the right to participate meaningfully in the regulatory review of the TMX Project.

Lack of Cross Examination

At the outset of this process, the NEB decided that the public hearings into the TMX Project would proceed without the benefit of oral cross examination. It appears that this decision arose from the NEB's desire to expedite the process to ensure compliance with new statutory time limits imposed as a result of amendments to the NEB Act. The elimination of cross examination from the hearing process has been broadly regarded as an alarming restriction on the rights of intervenors to test the evidence put forward by Trans Mountain. In other NEB hearings, cross examination has played a pivotal role. For example, in the Northern Gateway hearings, cross examination revealed important flaws in the proponent's evidence, including serious errors in how Northern Gateway calculated the impact of its pipeline on caribou habitat. Moreover, the Province was one of the intervenors that led the way in demonstrating the scientific uncertainty regarding the fate of diluted bitumen in the marine environment through cross examination of Northern Gateway's experts. Cross examination also cast serious doubt over Northern Gateway's assumptions concerning the buoyancy of diluted bitumen in the event of a marine oil spill.

Lack of Adequate Responses to Information Requests

Instead of being able to cross examine Trans Mountain's experts, intervenors are restricted to posing written questions in the two rounds of Information Request ("IR") phases of the hearing. In turn, Trans Mountain is required by regulation to provide "full and adequate" written responses to these IRs. However, according to many intervenors (including the Province and various municipalities along the pipeline and tanker routes), Trans Mountain has completely failed to comply with this obligation.

As a result, the Province has filed a motion with the NEB regarding the inadequacies in Trans Mountain's responses to the Province's first round of IRs. According to the Province, Trans Mountain's failure to provide adequate responses to IRs "denies the parties a meaningful opportunity to test and clarify the evidence filed by Trans Mountain". Many municipal governments have filed similar motions. These include the Cities of Abbotsford, Burnaby, Port Moody, Surrey, and Vancouver, the District of West Vancouver, the Fraser Valley Regional District, and the Regional District of Fraser-Fort George. The NEB has yet to rule on these motions.

The NEB's Review is Not an Equivalent Assessment

The Agreement entered into by the EAO and the NEB was premised upon the understanding that reviewable projects will be subjected to legitimate, thorough, and rigorous environmental assessments that adequately take into account the concerns of British Columbians—the type of environmental assessments that British Columbians are entitled to under the BCEAA. However, the NEB's assessment of the TMX Project fails to provide a review process that British Columbians expect and deserve.

The NEB's process is unfair, the answers that Trans Mountain provide are not thorough, and there is no cross examination to provide rigorous testing of the evidence. It bears repeating that it was through cross examination by intervenors like the Province that the Northern Gateway Joint Review Panel heard important evidence regarding the buoyancy of diluted bitumen in the marine

environment after a spill. British Columbians would expect nothing less for the TMX Project review process in terms of having a fair and meaningful opportunity to voice their concerns and test the evidence. Unfortunately, the NEB's review does not provide an environmental assessment process that would be expected under the BCEAA. In short, the NEB's review process is not an equivalent assessment. The Province should direct the EAO to withdraw from the Agreement and conduct a provincial environmental assessment of the TMX Project.

Recognizing the Need for Action

The deadline for submitting resolutions for consideration at the 2014 Convention was June 30, 2014. However, UBCM procedures allow for emergency resolutions to be admitted for debate at the Convention after the deadline has passed, and "a resolution may be deemed emergency in nature only if the topic has arisen since the June 30 deadline".

Concerns about deficiencies with the NEB process, particularly due process concerns, have grown over time, coming to a head in late June. It was at this juncture that Trans Mountain was required to respond to the first round of IRs. The answers it provided were so non-responsive and unhelpful that many intervenors filed motions asking the NEB to rule that Trans Mountain had broken hearing rules. Most of these motions, which had to be filed only by early July, noted that this failure was especially troubling in light of the NEB's earlier decision to eliminate cross examination from the hearing. Even if the NEB rules that Trans Mountain has breached the rules of the hearing, however, this will not remedy the fundamental unfairness of the process.

The NEB assessment of the TMX Project denies British Columbians the opportunity to participate meaningfully in the review process. Without the right of oral cross examination of Trans Mountain's witnesses, intervenors must rely on a highly deficient written questioning process. In turn, Trans Mountain has taken advantage of this process, leading to a situation that the Province has itself described as one in which the parties have been denied "a meaningful opportunity to test and clarify the evidence filed by Trans Mountain". As long as these due process issues remain unresolved, intervenors are deprived of the opportunity to test the evidence in this review process. British Columbians cannot be confident in the evidence provided by Trans Mountain without the ability to meaningfully test that evidence.

British Columbians deserve a made-in-BC solution that takes into account their voices and concerns with regards to the TMX Project in a manner that respects and values due process.

Recommendations

That the City of Victoria submit the attached emergency motion to the Union of British Columbia Municipalities, recommending that the Province direct the EAO to withdraw from the Environmental Assessment Equivalency Agreement and conduct its own environmental assessment of the TMX Project under the BCEAA that would ensure meaningful participation from all British Columbians.

Respectfully submitted



Mayor Dean Fortin

Attachment: Emergency UBCM resolution