

March 9, 2015

Via E-filing

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File No: 488

Attention: Sheri Young, Secretary of the Board

Dear Sirs/Mesdames:

**Re: Trans Mountain Pipeline ULC – Trans Mountain Expansion Project (the “Project”)
File-OF-FAC-OIL-T260-2013-03-02
Hearing Order OH-001-2014
Notice of Motion of Trans Mountain Pipeline ULC (Filing ID A4I6A9)
Letter concerning Commitment to File Information in Response to NEB Information
Requests (Filing ID A4I6C0)**

I represent the intervenors Living Oceans Society (“Living Oceans”) and Raincoast Conservation Foundation (“Raincoast”) in this proceeding.

I write to provide Living Oceans and Raincoast’s comments on the February 27, 2015 Notice of Motion of Trans Mountain Pipeline ULC regarding outstanding filings (Filing ID A4I6A9) (the “Motion”), in which Trans Mountain seeks leave to file evidence outlined in the February 27, 2015 letter from Trans Mountain concerning its commitment to file information in response to NEB information requests (Filing ID A4I6C0) (the “Letter”).

The Motion

Trans Mountain seeks leave of the National Energy Board (the “Board”) to file evidence described in the Motion and Letter:

- a) Trans Mountain’s self-assessment of the potential for serious harm related to watercourse crossings, which it committed to filing in Q4 2014 in its Response to NEB IR No. 1.49, dated May 1, 2014 (Filing ID A3W9H8);
- b) Horizontal direct drill feasibility reports and contingency reports for watercourse crossings that Trans Mountain is proposing to cross by horizontal directional drill, for the 18

remaining watercourses of the 21 that Trans Mountain identified in its original Application (Filing ID A3S0Z5) as still to be assessed, and that Trans Mountain committed to filing by Q1 2015 in its Response to NEB IR No. 1.80e (Filing ID A3W9H9); and

- c) Geotechnical reports for terminals and pump stations, which Trans Mountain committed to filing in Q1 2015 in its response to NEB IR No. 1.82a, dated May 1, 2014 (Filing ID A3W9H9), and which Trans Mountain describes as “preliminary at this point in the design of the terminals and pump stations.”

Trans Mountain states that it will file a final outstanding piece of evidence on or before March 31, 2015:

- d) The initial seismic assessment report for the high seismic susceptibility sites along the proposed pipeline corridor, which Trans Mountain committed to filing in its response to NEB IR No. 1.82a, dated May 1, 2014 (Filing ID A3W9H9).

Living Oceans and Raincoast’s position

Living Oceans and Raincoast do not oppose Trans Mountain’s request for leave to file outstanding evidence which the Board requires to assess the Project and which Trans Mountain has committed to file. In order for the Board’s review to be thorough, it must be informed by the full complement of facts relevant to the List of Issues. This evidence is relevant to the List of Issues, and evidence related to water crossings in particular is highly relevant to matters Living Oceans and Raincoast intend to address in their written evidence.

Living Oceans and Raincoast do, however, have serious and ongoing concerns about the shifting evidentiary landscape in this hearing, and what this reveals about the (in)completeness of the Project Application. They are concerned about the lack of time remaining for them and for their experts to review the new evidence before the deadline for intervenors’ written evidence, and about the lack of opportunity for intervenors to ask questions about this new evidence.

Trans Mountain submits that the existing hearing process “provides all parties with a fair and reasonable opportunity to comment and respond to the Outstanding Filings”, on the basis that intervenors could have asked IRs about the criteria for assessing serious harm, which they have been able to review since December 1, 2014; that intervenors may file written evidence regarding the Outstanding Filings up to May 27, 2015; and that the Board may ask IRs of Trans Mountain regarding the Outstanding Filings up to July 15, 2015.

Living Oceans and Raincoast disagree for three reasons. First, regardless of the opportunity intervenors had to submit IRs to Trans Mountain about its criteria for assessing serious harm, intervenors will have no opportunity to submit IRs about the application of the criteria or the results, nor will they have any opportunity at all to ask questions about the horizontal direct drill

feasibility reports and contingency reports for 18 watercourse crossings, geotechnical reports for terminals and pump stations, or the initial seismic assessment report for the high seismic susceptibility sites along the proposed pipeline corridor. Living Oceans and Raincoast submit that this is neither fair nor reasonable.

Second, intervenors' written evidence is not a substitute for asking questions and being entitled, pursuant to s. 34(1)(a) of the *NEB Rules*, to full and adequate responses. It is not fair or reasonable to expect intervenors to address this new evidence solely through their written argument.

Third, it is neither fair nor reasonable to deny intervenors the opportunity to ask questions about the outstanding filings on the basis that the Board may ask IRs of Trans Mountain about the outstanding filings. It is not the Board's responsibility to anticipate the questions that intervenors wish Trans Mountain to answer, and intervenors are entitled to ask their own questions rather than hoping that the Board might raise their concerns.

By Trans Mountain's logic, intervenor IRs are entirely dispensable. However, the hearing process established by the Board provided for intervenor IRs for good reason; IRs are the Board's chosen means of providing intervenors with an opportunity to ask the proponent questions about the Project, in lieu of other means such as cross-examination. In fact, the importance of responses to IRs is such that subsection 20(1) of the *NEB Rules* permits the Board to stay a proponent's application when it does not respond to an information request from the Board or any other party, until the information is provided.

In addition to the lack of IRs, the timing of this evidence is problematic. At this late stage, experts have already received instructions and are well into the process of preparing their reports in advance of the May 27, 2015 written evidence deadline. They cannot reasonably be expected to review a large volume of outstanding filings and prepare written evidence that addresses those filings. (The self-assessment, the feasibility and contingency reports, and the geotechnical reports total approximately 536, 2746 and 1320 pages respectively.) Living Oceans and Raincoast note that it is difficult to instruct experts, and it is difficult for experts to prepare their reports, when the evidence continues to change.

Therefore, Living Oceans and Raincoast request that the Board:

1. grant Trans Mountain leave to file the evidence it seeks to file in the Motion;
2. provide an opportunity for intervenors to submit IRs to Trans Mountain concerning the outstanding filings;
3. extend the deadline for intervenors' written evidence in order to allow intervenors' experts sufficient time to review the outstanding filings and Trans Mountain's responses to the IRs concerning the outstanding filings; and

4. extend the statutory timeline for this hearing, pursuant to s. 52(5) of the *NEB Act* accordingly.

Sincerely,



Dyna Tuytel

cc.

Karen Wristen, Living Oceans Society

Paul Paquet, Raincoast Conservation Foundation

D. Scott Stoness, Kinder Morgan Canada

Shawn Denstedt, Q.C., Osler Hoskin & Harcourt LLP