



NEW DEMOCRAT OFFICIAL OPPOSITION

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FILED ELECTRONICALLY

National Energy Board
444 Seventh Avenue SW
Calgary, AB T2P 0X8

Attention: Ms. Sheri Young, Secretary of the Board

**Re: Trans Mountain Pipeline ULC
Trans Mountain Expansion Project Application
Submission of Letter of Comment**

Dear Board Members:

The British Columbia New Democrat Official Opposition is submitting this letter of comment to the National Energy Board (“the NEB”) to formally register our views and concerns with the Trans Mountain Pipeline Expansion Project (“the project”).

From the beginning of this process we have advocated for the province of British Columbia to withdraw from their equivalency agreement with the federal government and subject the project to a made-in-B.C. assessment process. We believe the British Columbia government has a duty to stand up for its citizens, and not to hand off decision-making powers for a project of this size, scope and level of risk to the federal government. It was clear from the beginning that political influence could lead to a tainted assessment of the project that would not put the public interest before private and political interests.

Having watched this process unfold for many months now, we can only conclude that the NEB assessment process of this particular project is fundamentally flawed and broken.

Because the risks of the project are so great, and the process has failed to proceed in an unbiased and procedurally fair manner, we do not believe that the NEB can approve the project in good faith. There is simply insufficient evidence that the benefits of the project outweigh the risks, and the public has lost confidence in the process used to evaluate it.

Our principal concerns are as follows:

1. Public confidence in the review process is of paramount importance. The public does not have confidence in the process or its outcomes.
2. The NEB assessment process has a limited scope that excludes climate change as a consideration, and the project proponent has refused to answer important questions from provincial and municipal governments and other intervenors, meaning that the evidence being evaluated for the project is incomplete.
3. The NEB has allowed the proponent to hide their plan to deal with the very real risk of damaging land-based and marine spills, leaving us with no confidence that these risks are being properly considered.
4. The NEB has failed to ensure First Nations were consulted and accommodated according to the standards set out in law. A number of directly affected First Nations – including but not limited to the Tsleil-Waututh, Squamish, and Musqueam First Nations – have serious and unresolved concerns about the project.

Undemocratic process

From the outset, the British Columbia New Democrat Official Opposition has advocated for the province to withdraw from the NEB process for this project and to use a made-in-B.C. environmental assessment process instead. This is because the NEB assessment process for this project is fundamentally flawed and undemocratic.

The NEB received applications from 2,118 individuals and organizations seeking standing at the project hearing. Out of those applications, 468 individuals and organizations seeking to voice their views were denied any participatory status whatsoever; another 452 individuals and organizations who had sought standing as intervenors – intervenors can submit evidence to the Board and request information from the proponent – were denied that role and told their participation would be limited to being a commenter and writing a letter. Rejected individuals and organizations include prominent academics, environmental organizations, public policy institutes, business leaders, community groups, and professional associations. Citizens directly impacted by the pipeline were also excluded from the process, such as land owners along the pipeline route who could face a right-of-entry through their property, and they too were denied the opportunity to send even a single letter to the NEB to voice their thoughts and concerns.

Furthermore, the Board overseeing this process has – in unprecedented fashion – diminished the accountability and transparency mechanisms required for proper due diligence in a public hearing such as this. The Board removed oral cross examinations from the process, meaning that the proponent was not required to defend its evidence and application before the intervenors. This caused one prominent intervenor – Marc Eliesen, former CEO of BC Hydro and former Chair of Manitoba Hydro – to publicly withdraw from the process and call it a “*public deception*” and “*a fraudulent process*”¹. In his letter of withdrawal, Eliesen points out that oral cross examination is necessary to ensure proper evidence and natural justice. He quotes the Government of Canada’s Department of Justice which calls oral cross examination “*the greatest legal invention ever invented for the discovery of truth ... Without cross-examination the Board will be reviewing only untested evidence.*”

It is simply wrong, undemocratic, and contrary to the spirit of a public hearing process with wide-ranging and serious implications to block voices out and gut the accountability and transparency mechanisms. It is also contrary to the principles of procedural fairness to deny people the ability to participate in public hearings due to an unreasonably limited definition of who will be “directly affected” by the project, a definition so narrow that it even denied landowners whose property could be bisected by the pipeline from the opportunity to comment.

The *raison d’etre* of the process has been compromised. British Columbians deserve a voice, due process, and expect procedural fairness and an unbiased assessment. Sadly, most British Columbians feel this process is predetermined and partial in favour of the proponent. And they have good reason to be skeptical. Prior to the NEB recommending the Northern Gateway project to cabinet, the NEB heard from 221 intervenors, 1,239 oral commenters, and over 9,000 concerned Canadians who submitted letters of comment – the overwhelming majority of these public participants were opposed to the project because it was not in their interest or the interest of their communities. Despite this mass opposition to the project – and despite the Government of British Columbia’s opposition to the project – the NEB approved Northern Gateway.

Many people now view the NEB as a public charade used to create the illusion of impartial consideration of projects, when in fact, these pipeline hearings have pre-determined outcomes.

This view was the one taken by the Mayors of Vancouver, Burnaby, New Westminster, City of North Vancouver, Victoria, Squamish and Bowen Island when they joined together to issue a declaration of “Non-Confidence” in the NEB’s review.²

This declaration was made as a result of many of the same failures of process that we have noted above, including the decision to exempt Kinder Morgan from oral cross examination, and the decision to refuse many citizens an opportunity to participate in the review.

The position taken by the Mayors of Vancouver, Burnaby, New Westminster, City of North Vancouver, Victoria, Squamish and Bowen Island was amplified by the Union of B.C. Municipalities (UBCM), which

also passed a resolution calling for withdrawal from the NEB process due to its inadequacies, and lack of rigour.

UBCM is the voice of municipal governments in British Columbia. This organization exists *“to secure united action among members in dealing with all matters of common municipal interest, and, when deemed expedient, to represent members in matters affecting them or the welfare or interests of their citizens.”*³ As such, the Board should give due consideration to this resolution, and other resolutions that touch on issues relating to the Kinder Morgan project.

Overall, the mayor’s declaration and the UBCM resolution demonstrate that the NEB’s decision to reduce accountability, transparency and public participation in this review has resulted in a fatally flawed process that cannot be relied upon to protect the public interest.

Incomplete evidence

In addition to unreasonably limiting the scope of the hearing process, the NEB further tarnished this process by allowing the proponent to refuse to answer important questions from provincial and municipal governments and other intervenors, meaning that the evidence being evaluated for the project is incomplete.

With the Board’s decision to eliminate oral cross examinations, the only avenue available to intervenors to question evidence and the proponent’s assertions was through a much weaker and limited written information request process. Predictably, for many intervenors this proved to be inadequate, and many found that the proponent failed to respond to or address the central features of their questions. The proponent merely provided general statements, referred back to the original application, or said that the question falls outside the limited scope of the “list of issues” established by the NEB. Intervenors asked the NEB to compel the proponent to answer approximately 2,000 unanswered information requests, yet the NEB agreed to compel only 5 per cent of these questions and rejected 95 per cent outright.

Even the Government of British Columbia, several Metro Vancouver municipalities and First Nations had their questions rejected by the proponent and the NEB – questions that these governments thought important enough to ask as part of their duty to British Columbians. The proponent refused to answer nearly 80 questions from the Government of British Columbia, including questions on spill response, pipeline issues, emergency response plans, geo-hazard risks, and more. In response, the province stated: *“Trans Mountain’s failure to file the evidence requested by the Province in Information Request No. 1 denies the Board, the Province and other Intervenors access to the information required to fully understand the risk posed by the Project, how Trans Mountain proposes to mitigate such risk and Trans Mountain’s ability to effectively respond to a spill related to the Project.”*⁴

Similarly, the City of Burnaby noted that the proponent had *“failed to fully and adequately respond to almost half of the information requests put forward by Burnaby.”*⁵ They further testified that this

information “*is fundamental to the determination of whether the Project is in the public interest.*” We agree with this assessment, and furthermore we submit that the Board’s failure to compel the proponent to answer questions put forward by governments and First Nations is evidence of a biased and broken process.

Not only has the NEB compromised the process by refusing to compel the proponent to answer questions put forward by members of the public, First Nations, local governments and the Government of British Columbia, but they also compromised the process by limiting the scope of the hearing process to exclude climate change as a consideration for the project assessment.

The NEB ruled on a “list of issues” to consider during the hearing process and concluded: “[*the NEB*] *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.*”⁶ In other words, the NEB decided to exclude from the assessment process the greenhouse gas emissions generated by project-related oil sands development and the economic, social, and environmental costs of climate change associated with the project.

This is more than irresponsible and short-sighted; it also means that the NEB has skirted its responsibility under the *Canadian Environmental Assessment Act* and that the NEB is evaluating the project based on incomplete evidence.

In *Quebec (Attorney General) v. Canada (National Energy Board)*⁷ the Supreme Court of Canada made it clear that consideration of upstream environmental impacts is well within the jurisdiction of the NEB. In their judgement, the court noted that “*ultimately, it is proper for the Board to consider in its decision-making process the overall environmental costs [of the projects it examines]*”. In this case, the court emphasized that “*to limit the effects considered to those resulting directly from the physical act of transmission is an unduly narrow interpretation of the activity contemplated by the arrangements in question.*”

Similarly, a review of an oil pipeline should not only consider the impact of the pipeline itself, but of the upstream activities required to supply the pipeline with its product, and the downstream effects of product transport and use.

It is reasonable to conclude that a decision that limits the consideration of environmental costs skews the question of public interest in favour of the proponent. Therefore, by choosing to narrowly restrict public hearings to only consider some of the environmental costs of this project the NEB further compromised this process.

According to a report by Mark Jaccard (submitted to the NEB by the City of Vancouver)⁸, the project is estimated to increase greenhouse gas emissions significantly and put Canada at risk of missing its international obligations and climate change commitments. Mr. Jaccard’s report estimates that the project, if approved, would increase the production of oil sands crude and result in an increase of

upstream GHG emissions of approximately 8.8 million tonnes of CO₂E per year when combined with the project's operating emissions. Furthermore, Mr. Jaccard's report also estimates that the project would increase downstream emissions (from refining, distribution, and combustion of oil sands crude) by an additional 71.1 million tonnes of CO₂E per year.

The implications are clear. The project would significantly add to the economic, social, and environmental costs of climate change.

It was unreasonable for the NEB to restrict British Columbians from making their case about how the climate change impacts of the project "directly affect" them. Instead, the NEB decided from the outset that it wouldn't allow evidence of these impacts, despite the fact that increased forest fires, ocean acidification, rising sea levels, and other impacts of climate change will undoubtedly "directly affect" many British Columbians.

Ignoring this – as the NEB has done – is proof positive that the public hearing process for this project is broken and based on incomplete evidence, making it entirely unsupportable.

Risk of land-based and marine spills

The project also poses serious risks to our environment, and the NEB has not done the work required to establish public confidence in the proponent's ability to adequately respond to any land-based or marine spills related to the project. Any reasonable observer would expect that a public hearing process for a major oil pipeline expansion would include a meaningful opportunity to assess the proponent's spill response plans and safeguards. However, for this project, that has not happened.

The Project would increase pipeline transport capacity from about 47,700 m³ per day to 141,500 m³ per day (300,000 bbl/day to 890,000 bbl/day), with a corresponding increase in tanker traffic from 5 to as many as 34 vessels per month through the Burrard Inlet, and the Salish Sea.⁹

The proposed pipeline would make over 700 water crossings in British Columbia, including over 80 within the Lower Fraser River Watershed. The proponent has also requested permission to traverse several B.C. parks.¹⁰

Given the sheer number of water crossings and the environmental, social, and heritage values at stake, the strength or weakness of the proponent's spill response plans are key to determine both the risks to the public and whether the project meets the test of being in the public interest.

As the Government of British Columbia asserted in a submission to the NEB, *"history has shown that the possibility of a spill originating from Trans Mountain's facilities is very real. The potential for devastating effects on the environment, human health, and local economies is irrefutable. There is significant reason to query Trans Mountain's ability to respond to a spill effectively."*¹¹

Yet, despite the crucial nature of this information, and its centrality to the question of the public interest, the NEB allowed the proponent to withhold spill response information from individuals, municipalities, First Nations, and the provincial government.

In the absence of a made-in-B.C. assessment process, the NEB process was the only forum in which the public would have an opportunity to assess the proponent's ability to effectively respond to a spill. That opportunity was taken away by the NEB decision to allow the proponent to hide its spill response plans.

It is our contention that the review process was severely undermined by this decision.

Furthermore, allowing the proponent to hide this information for so called "personal", "security", and "commercial" reasons when nearly identical information on spill response from the proponent is available to the public in the United States is not only inexplicable, but again suggests a tainted process.¹²

Even the chair of the NEB, Peter Watson, acknowledged that the public has a right to be concerned about this crucial information being withheld. He was absolutely correct to ask *"how can we expect the public to have confidence regarding our preparedness and approach to response planning if we [are not] sharing the basic framework of the plan with them?"*¹³

Unfortunately, despite acknowledging how information about spill response is critical to public confidence, no relief has been offered to British Columbians who have concerns about the NEB's flawed process.

Public concerns about oil spill response are extremely high in British Columbia for a number of reasons.

The federal Conservative government's decision to close the Kitsilano Coast Guard station robbed communities of their closest first responder. This has left our south coast at greater risk of being soiled in the case of even a small spill. This was vividly demonstrated to British Columbians on April 8, 2015 when the grain ship Marathassa spilled bunker fuel into English Bay.

It took more than three hours from the initial report of the spill for the coast guard to send for a vessel from the Western Canada Marine Response Corporation (WCMRC) to respond to the spill. Following that call it took WCMRC a further hour and a half to arrive on the scene.

All told, it took 11 hours from the initial spill report for the Marathassa to be identified as the probable source of the spill. By the time WCMRC finished deploying the containment boom around the leaking vessel, almost 13 hours had passed since the initial report of a spill.

In the first 24 hours after the spill, while this slow, inadequate response was unfolding, oil travelled, fouling beaches in North Vancouver, West Vancouver, and downtown Vancouver.

While we don't know exactly how much fuel from the Marathassa was spilled in English Bay, we do know that the amounts involved were significantly less than the credible worst-case oil spill of 16,000 m³ suggested by Nuka Research in a report conducted on behalf of the Tsleil-Waututh First Nation and the City of Vancouver.¹⁴

Overall, the Marathassa spill confirms what a number of recent reports have indicated. Oil spill response plans on our coast are inadequate, especially considering the social, cultural, and environmental values at stake. By withholding their spill response plan from the public the proponent has failed to inspire confidence that they are prepared to protect British Columbia's south coast and the jobs, businesses, communities, and heritage values that rely on it.

In their written evidence, the City of Vancouver asserted that a 16,000 m³ spill at First or Second Narrows could result in the loss of between \$380 million and \$1.23 billion in economic output, and a loss of between 3,238-12,881 person years of employment.¹⁵ This was calculated only examining five key ocean-dependent economic activities, and did not consider "*impacts on human health, real property values, community cohesion, local non-tourism businesses, general well-being of residents in the City of Vancouver, the 'Greenest City' brand and environmental damages.*" Nor does that estimate include "*costs of a spill response, clean-up and litigation activities.*"

Of course, many of the costs of a spill cannot be easily quantified in dollars. For example, the Tsleil-Waututh commissioned report, *Fate and Effect of Oil Spills from the Trans Mountain Expansion Project in Burrard Inlet and the Fraser River Estuary*, suggests that more than 100,000 sea and shorebirds in the Fraser River estuary could be killed by a 16,000 m³ spill. The report also found that a spill even half this size could also jeopardize the viability of the endangered southern resident killer whale population.¹⁶

It isn't only marine-based spills that communities, First Nations and governments are concerned about. The City of Burnaby has first-hand experience of the threat posed by land-based spills from the project. In July 2007, a 12-metre geyser of crude oil from the proponent's existing pipeline sprayed more than 250,000 litres of oil over a Burnaby neighbourhood, forcing 250 residents from their homes, and requiring a massive cleanup effort that cost over \$15 million¹⁷.

Communities and First Nations are deeply concerned about the impact that a pipeline spill could have on the water and the land they depend on. As the Kalamazoo River spill demonstrated, rivers are no less susceptible to the impacts of heavy oil pollution than coastlines.

Given what's at stake, it's clear that the NEB undermined the process when they allowed the proponent to conceal their spill response plans. This decision only furthered the perception that the NEB is a captured regulator and that the process was irredeemably weakened by political changes to the legislation governing the NEB made by the federal Conservative government.

Failure to Respect First Nations' rights and interests

The proposed project crosses the traditional territory of many First Nations and as such, the NEB and the federal government are lawfully required to engage in meaningful consultations that respect Aboriginal Rights and Title.

From the very beginning the NEB set the wrong tone for respectful relationships for First Nations by deciding that First Nations oral testimony would be subject to cross examination. This decision was only made worse by the NEB decision to exempt the proponent from all oral cross examination, a clear double standard.

Making matters worse, written questions submitted by many First Nations were not answered, or answered inadequately by the proponent. This bad-faith tactic was deployed by the proponent against many intervenors, and the NEB failed to counteract it. Not only do these NEB decisions benefiting the proponent bring the entire process into disrepute, but they bolster arguments that, as the Tsleil-Waututh put it, *"the Crown and NEB are running roughshod over our Aboriginal Title and Rights."*¹⁸

The requirement for governments and individuals to consult with First Nations regarding proposed projects on Aboriginal territory was affirmed through the Supreme Court of Canada's June 2014 *Tsilhqot'in Nation v British Columbia* ruling. More specifically, the court stated *"prior to establishment of title by court declaration or agreement, the Crown is required to consult in good faith with any Aboriginal groups asserting title to the land about proposed uses of the land and, if appropriate, accommodate the interests of such claimant groups."*¹⁹ If government fails to adequately consult and gain consent from the affected First Nation, the project could be halted: *"if the Crown begins a project without consent prior to Aboriginal title being established, it may be required to cancel the project upon establishment of the title if continuation of the project would be unjustifiably infringing."*

Of the affected First Nations, the Tsleil-Waututh First Nation, whose traditional territory includes the Burrard Inlet, are strongly opposed to this project. They have voiced their opposition and their concerns regarding the NEB's review process and possible consequences of the project in a number of ways, including signing the Save the Fraser Declaration, delivering a petition to Kinder Morgan with over 58,000 signatures calling for the company to respect Indigenous rights and abandon the project and launching legal action with the Federal Court of Appeal against the project.

The central reasons for their legal challenge relates to *"flawed and unlawful review process that puts Burrard Inlet and all peoples who live here at risk."*²⁰ Like others concerned with the review process, they find it biased, one-sided and unfair. The Tsleil-Waututh assert that the federal government failed to consult and accommodate them in this process, despite the First Nation's repeated attempts. They further assert the NEB also failed to consult with them and accommodate their concerns regarding the project.

Other nations that have voiced their concerns about the project include but are not limited to the Coldwater Indian Band, the Cowichan Tribes, the Squamish First Nation and the Musqueam First Nation.

Conclusion

In conclusion,

The British Columbia New Democrat Official Opposition calls on the NEB to do the right and honourable thing, and recognize that because of the significant risks and the flawed and undemocratic process used to evaluate the project, it cannot be allowed to go forward.

Respectfully submitted,

John Horgan, Leader of the Opposition



Spencer Chandra Herbert, Opposition Spokesperson for Environment



¹ C118-6-1 - Marc Eliesen Letter of Withdrawal - A4E1Q6

² C69-44-13 - Mayors Declaration on Kinder Morgan National Energy Board Process - A4L8G7

³ Union of British Columbia Municipalities Act. S.B.C. 2006, Chapter 18

⁴ C289-3-2 - Province of BC Notice of Motion #1 - A3Y8R3

⁵ C69-34 - City of Burnaby - Notice of Motion re- Adequate Responses of TM to Information Request No. 2 - A66993

⁶ A15-3 - Hearing Order OH-001-2014 - A3V6I2

⁷ Quebec (Attorney General) v. Canada (National Energy Board), [1994] 1 S.C.R. 159

⁸ C77-27-14 - City of Vancouver - Appendix 13 - A4L7X1

⁹ B1-1 - Trans Mountain Pipeline ULC application – A3S0Q7

¹⁰ B1-1 - Trans Mountain Pipeline ULC application - A3S0Q7

¹¹ C289-6-2 - Province of B.C. Notice of Motion #2 and Attachments - A4F7Q9

¹² Washington State can view spill-response plans for pipeline that B.C. cannot, The Globe and Mail, David Geselbracht, February 20, 2015

¹³ NEB vows a 'new standard,' 24 Hours newspaper, Michael Mui, June 9, 2015

¹⁴ C77-27-1 - City of Vancouver Written Evidence - A4L7V8

¹⁵ C77-27-1 - City of Vancouver Written Evidence - A4L7V8

¹⁶ C358-13-17 - Tsleil-Waututh Nation Appendix 3 Fate and Effect of Oil Spills Report - A4L6A8

¹⁷ 3 companies plead guilty to Burnaby oil spill, CBC News Online, October 3, 2011

¹⁸ Tsleil-Waututh Nation Launches Legal Challenge of Kinder Morgan Pipeline and Tankers Project, Tsleil-Waututh Nation, News Release, May 2, 2014

¹⁹ Tsilhqot'in Nation v. British Columbia, 2014 SCC 44, [2014] 2 S.C.R. 256

²⁰ Tsilhqot'in Nation v. British Columbia, 2014 SCC 44, [2014] 2 S.C.R. 256