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February 21, 2014

National Energy Board
444 – 7th Avenue
Calgary, Alberta T2P 0X8

Attention: Sheri Young, Board Secretary

Via electronic mail

Dear Ms. Young:

Re: Trans Mountain Expansion Project
Board File OF-Fac-Oil-T260-2013-03 02
Response to Trans Mountain Pipeline ULC Submission regarding Applications to Participate

I am legal counsel to Living Oceans Society and Raincoast Conservation Foundation (together, the "Coalition") with respect to Trans Mountain Pipeline ULC's ("TMPL") Application for the Trans Mountain Expansion Project ("Project"). Living Oceans Society and Raincoast Conservation Foundation have submitted Applications to Participate in the National Energy Board ("Board") hearing of the Project Application.

I am writing in response to a letter written by counsel for TMPL and submitted to the Board on February 19, 2014 (the "TMPL Letter") with respect to the process for determining the right of Applicants to participate in the Board hearing. The Coalition respectfully disagrees with a number of the arguments made by TMPL in that letter.

Specifically, the Coalition submits that:

1. TMPL proposes a test for a person with "relevant information or expertise" that misinterprets section 55.2 of the *National Energy Board Act*, RSC 1985, c N-7 ("*NEB Act*");

2. The TMPL Letter disregards the Board's obligations under the *Canadian Environmental Assessment Act, 2012*, SC 2012, c 19, s 52 ("*CEAA 2012*"); and

3. TMPL proposes a test for "directly affected" that is inconsistent with the purpose of *CEAA 2012*.

1. TMPL proposes a test for a person with "relevant information or expertise" that misinterprets section 55.2 of the *NEB Act*.

In the TMPL Letter, TMPL variously refers to persons who may have "relevant information or expertise" and persons who may have "expertise and relevant information". At pages 13-14 of the TMPL Letter, TMPL states:

> Section 55.2 of the NEB Act says that the Board "may" accept an intervenor with "relevant expertise and information"…
>
> As stated above, since the NEB Act says that the Board "may" accept an intervenor with "relevant expertise and information" the Board retains discretion to deny intervenor standing to experts who would not be of assistance.
>
> (Underlining added.)

With respect, these sentences misquote section 55.2 of the *NEB Act* which states in its entirety:

> 55.2 On an application for a certificate, the Board shall consider the representations of any person who, in the Board's opinion, is directly affected by the granting or refusing of the application, and it may consider the representations of any person who, in its opinion, has relevant information or expertise. A decision of the Board as to whether it will consider the representations of any person is conclusive.
>
> (Underlining added.)

The *NEB Act* provides that the Board may consider the representations of a person who has relevant information and may consider the representations of a person who has relevant expertise. The *NEB Act* does not require, as appears to be suggested by TMPL, that a person seeking standing, who is not directly affected, must have both relevant expertise and information.

This misinterpretation appears to have informed the test proposed by TMPL at page 3 of their letter:

> 1. In order to have "relevant information or expertise" for the Board to consider, the applications must demonstrate:
>
> - A nexus between the asserted expertise and the project;
>
> - That its expertise is of assistance to the Board, and beyond that of the general public;

- That it has information that is logically connected to the List of Issues for the Project; and

- That its information is of assistance to the Board.

(Underlining added.)

The Coalition submits that TMPL, through its use of the word "and" following the third bullet in their proposed test, has conflated the two separate and distinct categories of "a person with relevant information" and "a person with relevant expertise" into a single test for a person with "relevant expertise and information" contrary to section 55.2 of the *NEB Act*.

TMPL further demonstrates that they have conflated these two separate and distinct categories at page 15 of the TMPL Letter where they state:

> To ensure a fair and efficient process for all interested parties, TMPL suggests that the Board must ensure that participants be directly affected by the Project or have relevant expertise with a demonstrable connection to the Project.

This concluding statement fails to acknowledge that the Board may also grant standing to persons who are not directly affected and not experts, but who have relevant information.

The Coalition submits that the Board correctly distinguishes between persons with relevant information and persons with relevant expertise in the Board's Section 55.2 Guidance Document that sets out guidelines, first for a person who has relevant information and second, for a person who has relevant expertise.[1]

2. The TMPL Letter disregards the Board's obligations under *CEAA 2012*.

In considering the Project Application, the Board has two roles to fulfill. First, the Board must consider the Application as an application pursuant to section 52 of the *NEB Act*. Second, the Board must ensure that an environmental assessment of the Project is conducted in accordance with *CEAA 2012*.[2]

At page 14 of the TMPL Letter, TMPL states:

> The NEB Act standing provision states that the Board "may" accept an intervenor with "relevant expertise and information". The word "may"

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[1] National Energy Board, "Section 55.2 Guidance – Participation in a Facilities Hearing" (22 March 2013), online http://www.neb-one.gc.ca/clf-nsi/rthnb/pblcprtcptn/pblchrng/prtcptnthrhrnggdncs52_2-eng.pdf, at 2.

[2] *CEAA 2012*, s 2(1), 13, 15(a), 22.

> denotes "possibility" and therefore provides the Board with the discretion to deny intervenor status even if the requirements are met (whereas the new section 55.2 provides that the Board "shall" grant intervenor status to a directly affected person.)

The Coalition agrees that section 55.2 of the *NEB Act* grants the Board the discretion to consider the representations of a person who, in the Board's opinion, has relevant information or expertise. However, that discretion is not available to the Board under *CEAA 2012*. Section 28 of *CEAA 2012* states:

> 28. If the carrying out of a designated project requires that a certificate be issued in accordance with an order made under section 54 of the *National Energy Board Act*, the responsible authority with respect to the designated project must ensure that any interested party is provided with an opportunity to participate in the environmental assessment of the designated project.
>
> (Underlining added.)

CEAA 2012, similar to the section 55.2 of the *NEB Act*, defines an "interested party" as a person who, in the Board's opinion, is directly affected or has relevant information or expertise.[3]

Thus, under the *NEB Act*, if the Board determines that a person has relevant information or expertise, the Board retains the discretion to consider or not consider the representations of that person. However, under section 28 of *CEAA 2012*, once the Board has determined that a person has relevant information or expertise, the Board must ensure that person is provided with an opportunity to participate in the environmental assessment of the project. Therefore, the Coalition submits that TMPL's assertion that the Board maintains "the discretion to deny intervenor status even if the requirements are met" is incorrect.

3. TMPL proposes a test for "directly affected" that is inconsistent with the purpose of *CEAA 2012*.

In the TMPL Letter, TMPL seeks a narrow interpretation of "directly affected". The Coalition submits that this is inconsistent with the purpose and intent of an environmental assessment pursuant to *CEAA 2012*.

CEAA 2012 states as one of the purposes of the Act:

> …to ensure that opportunities are provided for meaningful public participation during an environmental assessment.[4]

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[3] *CEAA 2012*, s 2(2).
[4] *CEAA 2012*, s 4(1)(e).

As discussed above, section 28 of *CEAA 2012* ensures that an interested party, that is, a person who is directly affected or has relevant information or expertise, has an opportunity to participate in the environmental assessment of the project.

The Federal Review Panel for the New Prosperity Gold-Copper Mine Project expressed the following with respect to the determination of "directly affected" under *CEAA 2012*:

> The explicit definition of "interested party" and the requirement for the Panel to determine whether a person qualifies as an interested party are new under the Act. The Canadian Environmental Assessment Agency does not have policy guidance on this issue. Therefore, the Panel is guided by the general principles established by case law on interested party standing, the Panel's Terms of Reference, and the Act.
>
> Subsection 2(2) states that it is a matter of opinion for the Panel to decide if a person is "directly affected by the carrying out of the designated project" or has "relevant information or expertise." However, the exercise of that opinion must take into account and balance the important public interests reflected in the stated purposes set out in section 4 of the Act.
>
> Generally, "directly affected" refers to a personal interest that is distinct from the general public interest in a matter. In the private law situation, a direct interest may arise from holding property or other legal right that may be affected by a decision. In the public law situation, an interest sufficient to support standing is interpreted more broadly but still must be "genuine interest", a "real stake" or "substantial connection". The Supreme Court of Canada has emphasized the need to screen participation to allow only those with a genuine interest and exclude the mere "busybody". In public law cases, the Court calls for a "liberal and generous" or "flexible" approach, guided by the purposes that underlie the traditional limitations on standing designed to protect the efficient use of the court's resources.
>
> When assessing whether a person is "directly affected" by a designated project the Panel regards the situation to be closer to the public law situation because of the purposes of the Act. In addition, subsection 2(2) also contemplates granting interested party status if the Panel decides a person "has relevant information or expertise". Therefore, the Panel has followed a liberal and generous approach to determine Interested Party status for this Review, weighing the requirements of 2(2) with the purposes listed in section 4.[5]

[5] Federal Review Panel for the New Prosperity Gold-Copper Mine Project, "Panel Ruling on Interested Party Status", (12 October 2012), online http://www.ceaa-acee.gc.ca/050/documents/p63928/82370E.pdf at 1-2.

(Footnotes omitted. Underlining added.)

In the TMPL Letter at page 7, TMPL references the decision in *Kostuch v Alberta (Director, Air and Water Approvals Division, Environmental Protection)* ("*Kostuch*") for support of their argument that the term "directly affected" is intended to confine standing to a personal, rather than community, interest. Justice Marceau, who upheld the Alberta Environmental Appeals Board decision in *Kostuch*, recently commented on that decision in *Pembina Institute v Alberta (Environment and Sustainable Resource Development*):

> [44] The Respondents cited my decision in *Kostuch v Alberta (Environmental Appeal Board)* (1996), 182 A.R. 384. In that case the Director (who performed the same role as the Director in the case at bar) amended a permit granted to the Alberta Cement Corporation by extending the deadline for construction of a cement plant from November 1, 1994 to November 1, 1995 and provided for additional soil and groundwater monitoring. The applicant, Martha Kostuch, objected to the Director's decision by filing a notice of objection with the Environmental Appeal Board, the Board similar to the Environmental Appeals Board constituted under the present *EPEA*. The Board ruled that Ms. Kostuch was not directly affected by the Director's decision and denied her status as an objector. I note that under section 84(1)(a)(iv) of the *Environmental Protection and Enhancement Act* in force at that time a notice of objection could only be submitted "by the approval holder or by any person who had previously submitted a statement of concern in accordance with section 70..."; legislation almost identical to the present legislation. At para 12 of my decision I stated "[t]he applicant had filed a statement of concern." Since the test of who is "directly affected" is less stringent before the Director than at the level of the EAB, my decision approving the EAB's decision is not directly applicable in this case. It simply shows that status may be granted as a Statement of Concern filer but that same person may not meet the definition of "directly affected" for the purpose of an appeal to the EAB. Although I agreed with the EAB's decision, I stated they were entitled to deference in interpreting their statute.
>
> [45] I voiced at the hearing of this matter and reiterate here my concern that the only persons who gained status of Statement of Concern filers were an Aboriginal band, Fort McKay First Nation, and a Métis association, the Fort McKay Métis Association (both of whose close ties to the land are indisputable), but that OSEC, self-described as "a coalition of Alberta-based environmental organizations with a longstanding interest in environmental and socioeconomic issues associated with oil sands development" should not be granted status as

> a Statement of Concern filer. The applicant STP is heard; the Aboriginal interests are well represented; but those who voice environmental concerns including Fort McMurray, Fort McKay and Anzac residents and a major environmental organization, Pembina, are not allowed a voice. Apparently no one else applied to be heard so I wonder how real the concern expressed on page 2 of the "Briefing Note" is: "with more parties providing submissions, there is a need to identify the groups or individuals who are truly directly affected, and this test needs to be fairly applied between the stakeholders." Keeping in mind that repetition of identical concerns by those generally and similarly impacted is to be discouraged, there is room for flexibility in the definition of "directly affected." [6]
>
> (Underlining added.)

The Coalition notes that the *Kostuch* case referred to by TMPL, as well as the *Friends of the Athabasca Environment Association et al v The Public Health Advisory and Appeal Board* and the *Court v Alberta Environmental Appeal Board* cases also referred to in the TMPL Letter, were all cases dealing with the meaning of "directly affected" in the context of an appeal of a decision of an administrative decision maker and under different Alberta statutes. These cases were not in the context of a hearing before the original decision maker nor in the context of participation in an environmental assessment process under *CEAA 2012*.

The Coalition also notes that in the hearings into Enbridge Pipelines Line 9B Reversal and Line 9 Capacity Expansion Project ("Line 9B Hearings"), the Board received Applications to Participate from 177 persons. Of the 177 applications, 158 were granted as requested and 11 persons who were granted intervenor status were instead granted the opportunity to submit a letter of comment. Only 8 persons were denied standing.[7] Therefore, most applicants were approved even under the discretionary provisions of section 55.2 of the *NEB Act*. The Coalition expects that under the mandatory provisions of section 28 of *CEAA 2012* and a liberal and generous interpretation of section 28 as suggested by the Federal Review Panel in the New Prosperity Mine Project, a similar result would be reached with respect to the Applications to Participate currently before the Board in this matter.

In summary, the Coalition submits that TMPL's misinterpretation of section 55.2 of the *NEB Act*, their failure to consider the provisions of the *CEAA 2012* and their attempt to have the Board adopt a narrow definition of "directly affected" are all contrary to the purpose of *CEAA 2012*, reasonable statutory interpretation and the jurisprudence on these matters. The Coalition submits that the Board must meet the requirements of both

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[6] *Pembina Institute v Alberta (Environment and Sustainable Resource Development)*, 2013 ABQB 567 at para 44-45.

[7] National Energy Board, "Procedural Update No. 2 – Ruling on Participation and Updated Timetable of Events in the Application for the Line 9B Reversal and Line 9 Capacity Expansion Project (Project) pursuant to section 58 and Part IV of the National Energy Board Act", (22 May 2013).

the *NEB Act* and *CEAA 2012* and must make their determinations consistent with the purposes of *CEAA 2012* and consistent with a liberal and generous approach that allows for flexibility in the determination of interested parties.

Finally, the Coalition notes that the TMPL Letter was sent to all Applicants to Participate. The Coalition notes that the TMPL Letter may have caused some confusion and concern amongst Applicants as to the role of TMPL in the Application to Participate process and the factors that the Board will consider in assessing their applications. The Coalition submits that it would be of value for the Board to advise the Applicants that the TMPL Letter was the submission of one party to the proceedings and to clarify the factors that the Board will be consider in assessing the Applications.

Sincerely,

Barry Robinson
Counsel to Living Oceans Society and Raincoast Conservation Foundation

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