

**TRANS MOUNTAIN PIPELINE ULC
SECTION 52 OF THE NATIONAL ENERGY BOARD ACT APPLICATION FOR
TRANS MOUNTAIN EXPANSION PROJECT
NEB FILE 0F-FAC-OIL-T260
FILED June 23, 2014
OH-001-2014**

NOTICE OF MOTION 2

Name of Person Bringing Motion

This Motion by Intervenor, Robyn Allan, is made pursuant to Hearing Order OH-001-2014 (the "Hearing") and Section 35 of the National Energy Board Rules of Practice and Procedure, 1995. SOR 195-208.

Decision or Order Requested

This Motion requests that the National Energy Board order Trans Mountain Pipeline ULC to:

- (a) remove from its Application and the NEB hearing record all evidence prepared by, conclusions drawn from, and responses related to Dr. HJ Ruitenbeek's materials, including but not limited to:
 - i) the entirety of Volume 7, Appendix G, Potential Cleanup and Damage Costs of a Hypothetical Oil Spill: Assessment of Trans Mountain Expansion Project, (A3S4W8);
 - ii) related Trans Mountain Pipeline ULC Responses to National Energy Board Information Request No.1 (A60392);
 - iii) related Trans Mountain Pipeline ULC Responses to Robyn Allan Information Request No.1 (A3X5V9); and
 - iv) related Trans Mountain ULC Responses to any other Information Requests;
- (b) withdraw from the hearing record Dagmar Etkin papers as submitted including Attachments 1.10 (d) (A3W9I3), 1.11 Attachment 1 (A3W9I5) and 1.11 Attachment 2 (A3W9I6);
- (c) file with the Board and serve all Intervenors with a clear summary outlining all information that has been withdrawn or removed from the hearing record; and
- (d) undertake other relief the Board may decide is warranted under the circumstances.

Statement of Facts

1. Trans Mountain has adopted and relied on the estimation of clean up and damage costs prepared by its witness Dr. HJ Ruitenbeek, Volume 7, Appendix G.
2. Trans Mountain relies on Dr. Ruitenbeek's estimates in order to make representations to the Board regarding the potential public interest and environmental impact of hypothetical oil spills, their potential costs, and adequacy of Trans Mountain's financial capacity to meet these costs.
3. Dr. Ruitenbeek has adopted and relied on "Etkin DS. 2004. Modeling Oil Spill Response and Damage Costs. USEPA."¹ USEPA is the US Environmental Protection Agency.
4. The US EPA clearly states on page 1 of the paper that it is a "DRAFT Do Not Cite or Quote." http://www.epa.gov/osweroe1/docs/oil/fss/fss04/etkin2_04.pdf
5. Trans Mountain maintains that a copy of the Etkin 2004 paper has been provided to the NEB in response to the NEB Information Request No. 1 to Trans Mountain, Question 1.10 Potential clean up and damage costs of a hypothetical oil spill, (d) "Table B.1 is based on Etkin (2004), a copy of which is attached in reply to NEB IR No. 1.11."²
6. NEB IR No. 1.11 Attachment 2 is: https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2451003/2454322/B32%2D10_%2D_Trans_Mountain_Response_to_NEB_IR_No%2E_1.11%2DAttachment2_%2D_A3W9I6.pdf?nodeid=2453588&vernum=-2
7. The "DRAFT Do Not Cite or Quote." disclaimer is not provided in the version of the paper supplied by Trans Mountain to the NEB in IR No. 1.11 Attachment 2.
8. The document that has been filed on the record by Trans Mountain is the document that is available on the EPA website, *verbatim*, but for the disclaimer indicating it is a draft and it should not be cited or quoted.
9. Trans Mountain and Dr. Ruitenbeek have submitted a document that, according to the EPA, they do not have permission to submit, cite or otherwise rely upon.
10. Etkin 2004 was sourced on the EPA website by the Intervenor Robyn Allan during preparation of her Information Request No.1.18 "Spill Costs" submitted to Trans Mountain. A review of Etkin 2004 was necessary in order to formulate questions regarding spill cost

¹Trans Mountain Pipeline ULC, Volume 7, Appendix G, page 9, footnote 4, https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2451003/2393783/B18%2D14_%2D_V7_APPG_CLEANUP_COST_POTEN_OIL_SPILL_%2D_A3S4W8.pdf?nodeid=2393434&vernum=-2

² Trans Mountain's Response to NEB Information Request No 1, page 33 of 184, https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2451003/2454322/B32%2D2_%2D_Trans_Mountain_Response_to_NEB_IR_No._1_1_of_2_%2D_A3W9H8.pdf?nodeid=2456419&vernum=-2

claims because the Ruitenbeek analysis, which purports to rely on three of Etkin's papers (two of which predate the EPA 2004 paper) is largely incomprehensible and fraught with inconsistencies, gaps in analysis, and relies on outdated data.

11. The EPA was contacted by email and telephone by Robyn Allan to confirm that the Etkin 2004 paper was prepared for the EPA and ascertain whether the model developed by Etkin was determined by the EPA to be reliable and useful. The EPA confirmed that the paper, although commissioned by it, did not pass the first stage peer review process conducted internally by EPA staff nor was the data reliable. Etkin's work did not proceed to any further stage of EPA evaluation and has not been relied upon by the EPA.
12. Dr. Ruitenbeek should not have relied on, quoted, referenced or otherwise used Etkin 2004 in the preparation of his analysis.
13. Trans Mountain should not have submitted a copy of the Etkin 2004 paper to the National Energy Board. The US Environmental Protection Agency that commissioned the paper explicitly excludes such use or representation.
14. The Proponent, by adopting and endorsing Dr. Ruitenbeek's evidence without ensuring its integrity, has misrepresented to the Board the reliability and usefulness of Rutenbeek's report and Etkin's work, upon which Dr. Ruitenbeek relies. The Proponent could have, and should have, undertaken more care and due diligence to ensure that Dr. Ruitenbeek's representations were accurate and reliable.
15. Trans Mountain was asked in Information Request No.1 from Intervenor Robyn Allan, Question 1.18 (s) to confirm that the EPA does not endorse nor has it ever relied on the Etkin paper or model for purposes of estimating spill clean-up costs of hypothetical or real spills. *"1.18 s) Please confirm that the EPA does not now, nor has it ever, relied on the Etkin model to predict spill costs, notwithstanding the model was prepared for the EPA. If not confirmed please provide evidence of when and how the model has been used other than the claim provided in Etkin's papers."*
16. Trans Mountain responded that *"1.18 s) Not confirmed. As noted in the request, Etkin's work was supported by the EPA. Trans Mountain is not, however, privy to the manner in which staff or others associated with the EPA may have used her work or the conclusions therefrom and cannot speculate on such uses. Trans Mountain is aware that the model has been used for the Transport Canada (2007) work on estimating costs of hypothetical East Coast Canada oil spill costs; this work is cited in Volume 7, Appendix G.*

Reference: Transport Canada. 2007. Synopsis Report – Environmental Oil Spill Risk Assessment for the South Coast of Newfoundland, Edition 1 September 2007, Revised 11/2007. Report TP14740E. (p. 28).³

³ Trans Mountain Response to R Allan, IR No. 1, 1.18 Spill Costs, (s) page 172 - 185, [https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2451003/2478117/B40%2D1 %2D Trans Mountain Response to Allan R IR No. 1 %2D A3X5V9.pdf? nodeid=2480550&vernum=-2](https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2451003/2478117/B40%2D1%2DTrans%20Mountain%20Response%20to%20Allan%20R%20IR%20No.%201%20A3X5V9.pdf?nodeid=2480550&vernum=-2)

17. Trans Mountain mischaracterizes Robyn Allan's question as having noted Etkin's work as being "supported" by the EPA when Trans Mountain says "As noted in the request, Etkin's work was supported by the EPA". The request by Intervenor Robyn Allan did not "note" that the EPA "supported" Etkin's work. The request "noted" that the model was "prepared" for the EPA.

18. The EPA did commission the Etkin paper but it does not support the work. Written communication with EPA staff confirmed the EPA's assessment of the reliability of the model and data as follows:

"I wanted to follow up with you on your query about the Basic Oil Spill Cost Estimation Model used by author H. Jack Ruitenbeek.

BOSCEM was developed by Environmental Research Consulting under a contract with our office (EPA's Office of Emergency Management (OEM)). We were looking for a way to demonstrate the benefits and value of our oil spill prevention programs and regulatory requirements. Unfortunately, the model did not advance through the internal peer review process due to data quality concerns and further work using this approach stopped. We have not used the model for benefits analysis of regulations and we have no plans or intentions to use the model for future benefits analysis.

Note that there is a footnote on the first page of the paper cited by the author (http://www.epa.gov/oem/docs/oil/fss/fss04/etkin2_04.pdf) MODELING OIL SPILL RESPONSE AND DAMAGE COSTS by Dagmar Schmidt Etkin of Environmental Research Consulting says: "DRAFT Do Not Cite or Quote. Presentation at 6-8 April 2004 Freshwater Spills Symposium."⁴

19. The EPA explicitly restricts the use of the model it commissioned. Recognizing the paper's restricted use, there is a question as to whether Transport Canada should have incorporated the EPA commissioned work as part of its references in its 2007 synopsis report as suggested by Trans Mountain in its Information Response to R. Allan 1.18 (s).

20. However, Intervenor Robyn Allan has also checked the Transport Canada reference and there is no indication that Transport Canada, or the synopsis report author, SL Ross Environmental Research Ltd., relied on the Etkin 2004 paper anywhere in its synopsis and certainly not on page 28 as suggested in the Trans Mountain response.

21. It should be noted that Volume 7, Appendix G did not claim that Etkin had been relied on by Transport Canada in its discussion in the report or footnote 9 reference, rather, Trans Mountain in its response indicates that Trans Mountain is aware that it was. In response to Robyn Allan's Information Request 1.18 (d) the company says, "*Trans Mountain is aware that the model has been used for the Transport Canada (2007) work on estimating costs of hypothetical East Coast Canada oil spill costs; this work is cited in Volume 7, Appendix G.*", when that information is not disclosed in the Transport Canada synopsis document nor is a bibliography provided in the synopsis document where it might otherwise have been cited

⁴ EPA Staff email to Robyn Allan, June 5, 2014. Telephone conference call with EPA staff members was held May 29, 2014.

that Etkin 2004 was sourced.⁵ It is unclear how Trans Mountain could be aware that the Etkin 2004 model was used.

22. Trans Mountain has submitted a document as evidence which is not the document referenced in footnote 4, Volume 7, Appendix G. The EPA document has a clear disclaimer but the document submitted to the Board by the Proponent does not include EPA's disclaimer restricting its use, citation and identifying the paper as a DRAFT.
23. The EPA document, which is referenced in footnote 4, Appendix G of the Application, clearly identifies the document as a DRAFT and requests that it not be cited or quoted. Dr. Ruitenbeek relies on the document for purposes of preparing spill clean up and damage cost estimates, references the EPA document in a number of instances throughout Volume 7, Appendix G, and implies that the work has been granted stature by the EPA when it has not.
24. Trans Mountain has adopted Dr. Ruitenbeek's report without undertaking basic due diligence to ensure his material is reliable, that he was permitted to use the source information he relies upon, and that the representations he makes regarding the reliability and usefulness of the source material are based in fact.
25. The Panel has been misled by Trans Mountain and Dr. Ruitenbeek in numerous instances regarding the quality and reliability of the evidence prepared by Dr. Ruitenbeek, and misled indirectly through responses to questions posed by Intervenor Robyn Allan regarding the Ruitenbeek evidence.
26. If Dr. Ruitenbeek's evidence, and Etkin's papers remain on the record the Panel will be basing its assessments regarding spill clean-up and damage costs on data deemed by the EPA to suffer from quality deficiencies as well as false and inappropriately obtained information that neither Dr. Ruitenbeek or Trans Mountain should have relied on, referenced or submitted.

Decision or Order Requested

This Motion requests that the National Energy Board order Trans Mountain Pipeline ULC to:

- (a) remove from its Application and the NEB hearing record all evidence prepared by, conclusions drawn from, and responses related to Dr. HJ Ruitenbeek's materials, including but not limited to:
 - i) the entirety of Volume 7, Appendix G, Potential Cleanup and Damage Costs of a Hypothetical Oil Spill: Assessment of Trans Mountain Expansion Project, (A3S4W8);

⁵ Transport Canada, 2007, Synopsis Report - Environmental Oil Spill Risk Assessment for the South Coast of Newfoundland, Edition 1, September 2007, TC14740E, <http://www.tc.gc.ca/publications/en/tp14740/pdf/hr/tp14740e.pdf>

- ii) related Trans Mountain Pipeline ULC Responses to National Energy Board Information Request No.1 (A60392);
 - iii) related Trans Mountain Pipeline ULC Responses to Robyn Allan Information Request No.1 (A3X5V9); and
 - iv) related Trans Mountain ULC Responses to any other Information Requests;
- (b) withdraw from the hearing record Dagmar Etkin papers as submitted including Attachments 1.10 (d) (A3W9I3), 1.11 Attachment 1 (A3W9I5) and 1.11 Attachment 2 (A3W9I6);
- (c) file with the Board and serve all Intervenors with a clear summary outlining all information that has been withdrawn or removed from the hearing record; and
- (d) undertake other relief the Board may decide is warranted under the circumstances.

All which is respectfully submitted on this 23rd day of June 2014.

Robyn Allan
9294 Emerald Drive
Whistler BC
V0N 1B9
604-962-4160