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2 April 2014

To: Those who filed Applications to Participate
Trans Mountain Pipeline ULC

Hearing Order OH-001-2014
Trans Mountain Pipeline ULC (Trans Mountain)
Application for the Trans Mountain Expansion Project dated 16 December 2013
(Application)
Ruling on Participation (Ruling)

The National Energy Board (NEB or Board) has made determinations about participation (or standing) and method (or level) of participation for the public hearing to review Trans Mountain's application for the Trans Mountain Expansion Project.

This Ruling provides a list of intervenors (Appendix I) and commenters (Appendix II), as well as the Board's reasons regarding those persons who were not granted participation or not granted the participation method they requested.

The Board reviewed 2,118 Applications to Participate (ATPs). This includes six ATPs that were filed late and excludes those that were withdrawn.

Of the 2,118 ATPs reviewed by the Board:

- 400 requested intervenor status and have been granted intervenor status;
- 798 requested commenter status and have been granted commenter status;
- 452 requested intervenor status and have been granted commenter status; and
- 468 have been denied.

Background

On 16 December 2013, the Board received the Application. On 31 December 2013, the Board wrote to Trans Mountain and directed it to distribute an Application to Participate Notification (Notification). The Notification included a requirement for its publication in a number of newspapers and bulletins. The Board (including the Panel assigned to review the Application) undertook public engagement to explain the process.

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Those applying to participate could file their ATPs with the Board electronically, by fax, or by mailing a hard copy. The ATP form included references and links to information about what factors the Board may consider in making its decision about participation. Included with the ATP form was a specific document called [Guidance Document on Section 55.2 – Participation in a Facilities Hearing](#) (Guidance Document).

The ATP form indicated that applicants must clearly describe their interest in relation to the List of Issues, which was replicated in the form itself. To convey the importance of providing enough information for the Board to consider an applicant's request for standing, it was emphasized that "If you do not provide sufficient information on this ATP Form, you will not be allowed to participate".

The deadline for submitting completed ATPs was originally noon on 12 February 2014. The deadline was subsequently extended to 11:59 p.m. Mountain Standard Time on 12 February 2014. Details on numbers of ATPs received are provided above.

In the Board's letter of 31 December 2013, the Board said that Trans Mountain had until 19 February 2014 to provide the NEB with comments on the ATPs and, should it do so, it must serve its comments on those to whom the comments applied. Those receiving comments from Trans Mountain (which, in this case, was everyone that filed an ATP) were given until 4 March 2014 to respond to Trans Mountain's comments.

Comments by Trans Mountain

On 19 February 2014, Trans Mountain wrote to the Board with what it described as "general comments" about how the Board should apply the participation test stated in section 55.2 of the *National Energy Board Act* (NEB Act).

Trans Mountain stated that it "takes no position on any of the specific applications submitted". In its comments, Trans Mountain reviewed the legislative test and the Guidance Document, and explained the relevance of the List of Issues. Trans Mountain said that, in its view, when an Act is amended, as was the case here, the alteration must be interpreted to have been made deliberately. In Trans Mountain's submission, there is a requirement in section 55.2 for a direct nexus between the proposed project and the impacts on the applicant. Trans Mountain said the interest must be more than a mere indirect public interest. It stated that the legislative change is meant to avoid parties that may be affected by a project from being "lost in the crowd" of parties whose issues are unrelated to a specific project.

In addition to discussing its view on how a person should be granted standing if he or she is directly affected, Trans Mountain also discussed the Board's discretion under section 55.2 to hear from any person who is determined to have "relevant information or expertise". Trans Mountain described this as applicants who claim to have "relevant information and expertise" (emphasis added).

Comments in response

In response, the Board received comments from Earthjustice (on behalf the Swinomish, Tulalip, Suquamish, and Lummi Indian Tribes); Pacheedaht First Nation; North Shore NOPE; Graham Hallson, Ph. D.; the City of Vancouver; British Columbia Nature and Nature Canada; Lyackson First Nation; Christine Cunningham; Living Oceans Society and Raincoast Conservation Foundation (Living Oceans); Unifor; Mac Nelson; Susan Robertshaw; June Wells; and Frederick Holl. The Board considered all comments that were received on or before 4 March 2014. Comments by June Wells and Frederick Holl were received late without explanation and were therefore not considered.

Living Oceans pointed out that Trans Mountain misquoted the test for relevant information or expertise in section 55.2, and said that a person in this category was not required to have both relevant information and expertise. It said the Board could grant standing to someone who is not an expert, but has relevant information only.

Living Oceans also submitted that Trans Mountain disregarded the Board's obligations under the *Canadian Environmental Assessment Act, 2012* (CEAA 2012). In Living Oceans' view, unlike section 55.2 of the NEB Act, where the Board has discretion ("may consider") whether to hear from those with relevant information or expertise, under the CEAA 2012, once it is determined that an individual has "relevant information or expertise", then the Board has no discretion and "must ensure" that such a person is granted standing.

Finally, Living Oceans indicated, as did several others, that Trans Mountain was seeking too narrow of an interpretation of directly affected. It said one of the stated purposes of the CEAA 2012 was to provide meaningful participation during an environmental assessment. It submitted that both the CEAA 2012 and the NEB Act should be given a liberal and generous approach in determining which applicants are granted standing. In Living Oceans' view, the interpretation of directly affected should be closer to the public law situation.

A similar comment was made by Graham Hallson, Ph. D., as well as other commenters. They said that, in determining who is directly affected, the Board should not exclude individuals that have a community interest rather than a just a personal interest. In Mr. Hallson's view, if a spill were to occur, all those who use the shoreline of Burrard Inlet would be directly affected by the project. He also expressed the view that intervenor status should not be limited to those within close proximity of the project.

In Lyackson First Nation's response to Trans Mountain, it stated that section 55.2 of the NEB Act must be interpreted with regard for the unique and constitutional nature of First Nation rights. It said section 55.2 must be interpreted on a case-by-case basis.

Pacheedaht First Nation indicated that the test for standing should not be restricted beyond the criteria set out in the Guidance Document. It said that, if the Board's applied test were to differ from the Board's Guidance Document, it should be given an opportunity to provide additional information.

The City of Vancouver submitted that the List of Issues does not represent a final determination by the Board and, therefore, should not be viewed as an exhaustive list regarding the assessment of potential intervenors.

Views of the Board

The *Jobs, Growth and Long-term Prosperity Act* came into force in July 2012 and amended the NEB Act, including putting in place time limits for applications under sections 52 and 58. One of the amendments was the addition of section 55.2 to the NEB Act. Section 55.2 establishes what discretion the Board has with respect to granting participation rights or “standing” for certain Board proceedings. Section 55.2 states:

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.

These changes to the NEB Act promote fairness and efficiency by focusing consultation on individuals directly affected by an application and persons with relevant information or expertise. The addition of section 55.2 also assists the Board with collecting information that the Board considers to be relevant to its mandate and the application before it. If you are directly affected, you will be given an opportunity to present your concerns to the Board, and the Board will make its decision based on the Application and all of the evidence before it.

When assessing ATPs, the Board applies the criteria provided in section 55.2 of the NEB Act, the List of Issues (to determine the relevance of the issues people wish to address), and the Guidance Document.

It is up to the person applying to participate to provide enough information to demonstrate to the Board’s satisfaction that they are either directly affected by a proposed project or are in possession of relevant information or expertise. The Board makes its decision under section 55.2 of the NEB Act on a case-by-case basis, taking into account the specific facts and circumstances of each project application, and the information provided in the completed ATP.

Directly affected (Category 1)

When the Board assesses whether a person applying to participate is directly affected, the Board looks at how the person uses the area where the project will be located, how the project will affect the environment, and how the effect on the environment will affect the person’s use of the area. The closer these elements are connected (their proximity), the more likely the person is directly affected. An effect that is too remote, speculative, or is not likely to impact the person’s interests, will not lead to finding an applicant to be directly affected. The Board also considers interests and direct effects that are commercial or financial (including employment) as well as uses of land and resources for traditional Aboriginal purposes.

The Board considered all the information in the filed ATPs, including the address provided or any references to specific locations, and, where applicable and possible, compared this to the location of the existing pipeline and proposed and alternative pipeline corridors, as well as the marine shipping corridor. While it was up to each applicant to demonstrate direct effects, given that Trans Mountain did not object to any individual ATP, as long as the applicant showed with reasonable probability that they have a specific and detailed interest that was sufficiently affected, then the Board granted standing. Each decision was made on a case-by-case basis and the Board read and considered the entirety of each ATP.

The Board took what it considers to be a generous approach in making standing determinations which is reflected in the significant number of applicants for participation that were granted some form of standing. However, the Board was not persuaded by the submission of Living Oceans and others that a public law type of test for standing should be used, as this was not specified in the legislation. The Board was also not persuaded, as Mr. Hallson argued, that a general community interest was sufficient to show a direct effect. As stated in the Guidance Document, to be directly affected, the Board considers whether a person has shown a specific and detailed interest, as well as a sufficient direct project impact on the interest. The List of Issues is helpful in determining this. Where an applicant raised an issue outside the List of Issues, the obligation was on the applicant to show why this was a specific and detailed interest that is directly affected by granting or refusing to grant the Application.

In response to Lyackson First Nation and other Aboriginal groups that applied, the Board is in agreement that it must consider the unique and constitutional nature of Aboriginal rights. The Board has done this.

Relevant information or expertise (Category 2)

In determining whether an applicant has relevant information or expertise, the Board considers whether the applicant has met the onus of showing possession of relevant information or expertise. In response to comments on this issue, the Board agrees with those who noted that Trans Mountain misquoted the test for “relevant information or expertise”. Regardless whether the CEAA 2012 or NEB Act standing test is considered, the Board has discretion in determining whether an applicant has shown that he or she has relevant information or expertise. The Board accepts the submission of Living Oceans and others that, under the CEAA 2012, if the Board determines that, in its opinion, an applicant has relevant information or expertise about the environmental assessment required under CEAA 2012, then the Board is to provide an opportunity for some type of participation. Practically, this will not change how the Board assesses this category of ATPs since the Board has always benefitted from hearing from those with expertise or relevant information.

Group representations

Applicants who applied on the basis that they represent directly affected persons were asked in the ATP form to describe who they represented, to list the persons being represented, and to describe how the persons being represented are directly affected. In order for a representative (such as a lawyer or organization) to be granted standing on this basis, they must be able to demonstrate to the Board's satisfaction that the persons they represent are directly affected. For example, if an organization does not demonstrate to the Board's satisfaction how it or any of its identified members will be directly affected, it will not be granted standing on the basis of being directly affected.

Method of participation

Once the Board makes its determination about standing, the next Board determination is around the method of participation. While the standing tests (Category 1 or Category 2) determine whether a person is allowed to participate, it does not dictate the method of participation that will be granted. Decisions by the Board about the appropriate method of participation were based on what process and participation rights were most appropriate for a person to have his or her representations considered and which meets natural justice requirements. For instance, if the concern expressed was temporary in nature (e.g., potential traffic disruptions in a particular neighbourhood due to construction), in some cases, the Board determined that the person was directly affected, but an appropriate and efficient method of participation was as a commenter (i.e., submitting a letter of comment), not as an intervenor. The Board always made case-by-case decisions with respect to method of participation since very few ATPs were identical. All interests raised in the ATPs were considered when deciding on method of participation.

Late ATPs

The Board received late ATPs from Devon Canada Corporation, Samson Cree Nation, Edward Farquhar, Elizabeth Latta, Don Chalmers, and the United States Environmental Protection Agency. Deadlines are extremely important for the efficiency of this proceeding. In this case, the Board decided to accept all of the ATPs that were filed late. While explanations for lateness varied, at this stage, there was no prejudice to anyone involved in the process, and the Board decided to accept and consider the late filings. The Board's rulings on participation and method of participation for these late ATPs are included below.

Specific ATP decisions

Intervenors

Those accepted as intervenors are identified in the List of Participants: Part A – Intervenors, attached as Appendix I to this Ruling.

Those who have been granted intervenor status have demonstrated to the Board's satisfaction that they are either directly affected by the proposed project or are in possession of relevant information or expertise that will assist the Board in its assessment. In addition, for these applicants, the Board has determined that being an intervenor is the method of participation that will best meet the needs of the applicant and the Board.

As an intervenor, you will be allowed to:

- file written evidence;
- ask written questions about Trans Mountain's and other intervenors' evidence;
- file, and potentially respond to, notices of motion;
- comment on draft conditions; and
- present written and oral argument.

Intervenors should refer to the Board's OH-001-2014 [Hearing Order](#) for an outline of their rights and responsibilities, as well as the steps and deadlines in the hearing process.

Commenters

Participants who requested commenter status, and who the Board has determined are directly affected or have relevant information or expertise, have been granted commenter status.

Commenters are identified in the List of Participants: Part B – Commenters, attached as Appendix II to this Ruling.

A letter of comment is a valuable and important contribution to assist the Board in making its recommendation about a project. Letters of comment permit participants to express their views to the Board without having to provide sworn evidence, or be potentially subject to questioning on those views. Just as every ATP was read by the Board, every letter of comment will be read and considered.

Commenters should refer to the Board's OH-001-2014 [Hearing Order](#) for guidance and deadlines for submitting letters of comment.

Where intervenor status was requested and commenter status was granted

Some persons who requested to participate as an intervenor are instead being provided the opportunity to submit a letter of comment. In these cases, the Board determined that the person was directly affected, but an intervenor method of participation was not appropriate or necessary for the concern raised. Instead, the Board determined that being a commenter provides the best means by which these participants can have their representations considered by the Board. Further reasons for reducing the requested method of participation from intervenor to commenter are provided below.

Many applicants submitted that they were directly affected by the proposed project due to concerns related to the risk of a pipeline spill or rupture and any resulting environmental effects. The Board understands this concern and takes all available actions to protect the public and the environment. As indicated in the Guidance Document, the Board may consider factors such as the degree of connection between the project and the identified interest, and the likelihood and severity of the harm the person could be exposed to. These factors recognize that not every person who applied to participate in this proceeding would be affected by the proposed project in the same way. For example, persons with compromised health could be more affected by emissions (such as dust) than others, such as during construction or when oil storage tanks are operational. Whether there will be these types of environmental effects has not been determined yet.

Below are additional specifics as to the reasons for the Board's decisions to alter certain applicants' requested method of participation from intervenor to commenter.

A. *Temporary effects*

If the project were to go ahead, during construction, there are likely to be some temporary effects, including:

- noise;
- dust;
- traffic congestion; and
- interference with views, access to business or home, and commutes.

On a case-by-case basis, the Board has determined that commenter is the method of participation that will best meet the needs of people with these concerns, as well as the needs of the Board.¹

In addition, aspects of the project may cause impacts from operations and increased tanker traffic. Where ATPs stated these concerns, the Board made case-by-case decisions about whether an intervenor or commenter method of participation was appropriate in the circumstances. Where the concerns were more detailed and specific with respect to the interest specified and the likely resulting individual effects, an intervenor method of participation was granted. ATPs with less detail about these issues were more likely to receive commenter status.

Please see the List of Participants (Part A – Intervenors; Part B – Commenters), attached as Appendices I and II to this Ruling, for the type of participation granted in these cases.

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¹ The Board is mindful that temporary effects, such as air emissions, could cause severe impacts to some individuals (e.g., those with severe allergies). Where an ATP included details about health-related concerns associated with temporary effects, the Board has considered these on a case-by-case basis, and, where there is a reasonable probability of a non-trivial or transient direct probable effect, the Board has granted these persons intervenor status. There were also ATPs that raised temporary effects but also raised other issues. Like all ATPs, these were addressed on a case-by-case basis.

B. Effects of accidents and malfunctions on interests and activities

In the event of an accident or malfunction, there could be a negative effect on air, land and water and on the ability of people to use land, water or their property. Some ATPs focused concerns about the effects of spills on their property, or on public land or water that people use for recreation and other activities (e.g., beaches, boardwalks, hiking trails, hunting, and fishing). In addition, people brought forward concerns that the economies and character of island and waterfront communities could be seriously harmed by spills.

While the Board recognizes that these effects could occur in the event of a spill, accident, or malfunction, the Board has determined that, in many instances, a letter of comment provides the best means by which these participants can have their representations considered by the Board. However, where the person provided detailed information about specific direct effects on personal property or business use, for example, and established a sufficient proximity, the Board granted intervenor status if it was requested. The Board also granted intervenor status to directly affected municipalities as they would be the first responder in an emergency situation in or around their area.

Several ATPs described concerns about potential impacts of a pipeline spill or rupture on those attending schools or in care centres. In some instances, the applicant said that the school or care centre was “near” or “close” to the pipeline or proposed corridor, but sometimes the name or location of the institution was not provided. In the latter cases, the degree of connection between the project and the interest was not established for that particular aspect of the ATP. Conversely, if specifics were provided about location, this factored into the Board’s case-by-case determination.

Please see the List of Participants (Part A – Intervenors; Part B – Commenters), attached as Appendices I and II to this Ruling, for the type of participation granted in these cases.

C. Those with relevant information and expertise

The Board has determined that some relevant information and expertise put forward in ATPs can most efficiently and effectively be gathered through letters of comment.

Please see the List of Participants (Part A – Intervenors; Part B – Commenters), attached as Appendices I and II to this Ruling, for the type of participation granted in these cases.

Where participation has not been granted

While 1,650 applicants (78 per cent of all applicants) were granted participation, some persons who requested to participate as either an intervenor or as a commenter have not been granted standing to participate in this proceeding. These persons did not demonstrate to the Board’s satisfaction that they are either directly affected by the project, or are in possession of relevant information or expertise that will assist the Board in its assessment. Accordingly, the Board has denied standing in this proceeding to these individuals.

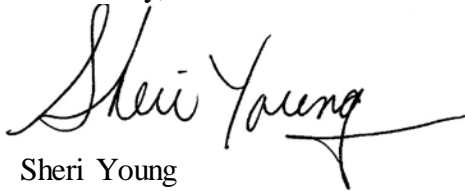
The matters raised within these ATPs related to issues outside of the Board's mandate, such as oil sands development, climate change, sustainable energy alternatives, or were related to issues that were not specific to the particular applicant or to the project. In some instances, such concerns were stated by persons that lived vast distances away from the project. Stating general concerns about pipelines or how a spill might affect a community as a whole, was not sufficient to show a direct effect. There were also individuals who referred only to effects from the Chevron tank farm and refinery in Burnaby. The Chevron facilities are not part of the project application. Therefore, in these instances, standing was denied.

The Board also denied standing where the applicant stated only global support for pipelines or made general references to benefits, such as having better jobs because of pipelines. These persons did not demonstrate to the Board's satisfaction that they were directly affected. As noted earlier, to convey the importance of providing enough information for the Board to consider an applicant's request for standing, it was emphasized that "If you do not provide sufficient information on this ATP Form, you will not be allowed to participate". In certain cases, sufficient information was simply not provided, and these applicants were denied standing.

Those denied participation are listed in Appendix III to this Ruling.

If you have questions about the Board's hearing process, please see the Board's OH-001-2014 [Hearing Order](#) or, as required, contact the Board's Process Advisor Team for this hearing by phone at 403-292-4800 or 1-800-899-1265 (toll-free), or by email at transmountainpipeline.hearing@neb-one.gc.ca.

Yours truly,

A handwritten signature in black ink that reads "Sheri Young". The signature is written in a cursive style with a long horizontal line extending from the end of the name.

Sheri Young
Secretary of the Board

Attachments