



File OF-Fac-Oil-T260-2013-03 02  
26 September 2014

To: All intervenors and Trans Mountain Pipeline ULC

**Hearing Order OH-001-2014  
Trans Mountain Pipeline ULC (Trans Mountain)  
Application for the Trans Mountain Expansion Project  
Ruling No. 33 – Motions to compel full and adequate responses to the first round of  
intervenor information requests (IRs)**

**Process background**

Trans Mountain responded to the first round of intervenor IRs on or before 18 June 2014. Prior to that, on 3 June 2014, the National Energy Board (Board) issued [Procedural Direction No. 3](#) setting out the process for intervenors to request that the Board compel full and adequate IR responses from Trans Mountain (motions to compel).

The process required intervenors to file their motions to compel by 4 July 2014 in a chart format provided in Procedural Direction No. 3. Trans Mountain's comments on the motions to compel were due by 11 July 2014, while any intervenors' replies to Trans Mountain's comments were due by 16 July 2014.

The Board received approximately 50 motions to compel, involving approximately 2,000 requests for full and adequate answers to IRs. One motion to compel (Village of Belcarra) was filed late on 8 July 2014, without reasons. As Trans Mountain filed a reply and did not comment or object to the lateness, the Board decided to accept and consider the contents of this motion as part of this ruling.

The Board is now releasing its decisions about the motions to compel it received. The attached Appendix 1 lists each question included in the motions to compel, organized by intervenor. The Board has provided a decision with a brief reason or reasons for each question that was subject to a motion. The reason(s) provided include the primary reason the motion to compel was granted or denied. The Board is also providing some overall comments about the motions and the Board's decisions in this letter.

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In addition to the charts that most intervenors used to organize their motions to compel, some intervenors made requests in their introductory or cover letters/notes which pertained to specific IR responses or IR topics. If Trans Mountain indicated that these were addressed in its own IR response chart, then the Board, in turn, included its decisions in the attached Appendix 1.

Many motions to compel included other requests of the Board on matters not related to the motions to compel process, or to the Board's assessment of particular IR responses. Some of these have been dealt with in past Board correspondence. Others are addressed in Appendix 2 of this ruling. The Board will decide those requests which remain outstanding in due course.

### **The Board's test in considering motions to compel**

When considering a motion to compel full and adequate responses to IRs, the Board looks at the relevance of the information sought, its significance, and the reasonableness of the request. The Board balances these factors so as to satisfy the purpose of the IR process, while preventing an intervenor from engaging in a "fishing expedition" that could unfairly burden the applicant.<sup>1</sup> The Board applied this test to reach its decisions on the motions to compel.

### **General comments on the Board's decisions**

The Board recognizes the substantial efforts put forward by both intervenors and Trans Mountain in developing IRs, responding to IRs, and following up during the motions to compel process. The Board carefully considered all of the information provided as it pertained to each individual question.

The Board found circumstances where it agreed with intervenors that Trans Mountain did not adequately respond to particular IRs and are, accordingly, requiring Trans Mountain to provide full and adequate responses. These are highlighted in Appendix 1 for ease of reference. In other cases, the Board did not find there were sufficient grounds to compel further information, the reason(s) for which are also provided in the appendix.

In some instances, where the Board did not find Trans Mountain's responses to be full and adequate, it was because an intervenor asked a specific and relevant question and Trans Mountain's response did not answer the question. In other instances, the reference Trans Mountain provided to answer the question appeared to be incorrect or unhelpful in answering the specific intervenor question.

With respect to questions where the Board determined that Trans Mountain was sufficiently responsive to the question originally asked, the Board identified some recurring IR topics or issues for which it is not compelling further responses. Intervenors are pointed to the information below which describes situations where the Board is of the view that information not being compelled at this time is either:

- a) appropriate to be asked for, or about, in the future; or
- b) not appropriate to be asked for, or about, in the future.

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<sup>1</sup> Westcoast Energy Inc., GH-5-94, Transcript Volume 3 (8 Feb 1995), at pages 341 to 343.

A. Information appropriate for future questions

*i) Premature requests*

In some cases, Trans Mountain indicated in its IR responses that materials will be filed at a future date. In their motions to compel, some intervenors asked the Board to compel Trans Mountain to file these materials. The Board will not compel Trans Mountain to file something which the company has indicated is not yet available, but that it will file in the future, or that it has already filed at the time these motions have been determined.

*ii) Requests for new or different information*

Some IRs, as asked, requested general information, which Trans Mountain provided in its responses. In certain motions to compel, intervenors sought more specific information or more details, which essentially were requests for new information. To obtain these new details, a follow-up IR during the next round of IRs can be sent to Trans Mountain.

Intervenors are reminded that an IR may include a general question with more specific sub-questions. This approach may better serve to highlight, from the outset, the details that you wish to receive from Trans Mountain in its IR responses. “If ..., then...” questions may be appropriate in some cases. In doing this, a motion to compel full and adequate responses may be avoided.

In some instances, Trans Mountain provided a full answer to the question asked, but the intervenor disagreed with the answer. In these cases, rather than seeking to compel a further answer, the intervenor may file its own evidence in response or provide its views during final argument.

*iii) Information related to the impacts of the Project on Line 1’s operating conditions*

Safety and compliance concerns related to the changes in operating conditions that Line 1 would experience, should the Project be constructed, are relevant. Similarly, financial considerations related to Line 1 operations, to the extent that they relate to the financial feasibility of the Project, both at the present time and as part of combined Line 1 and 2 operations should the Project be constructed, are relevant and the Board may consider these as specified in paragraph 52(2)(d) of the *National Energy Board Act*. That the continued operation of Line 1 is not before the Board in this hearing does not mean that the Board cannot consider the applicant’s financial responsibility and financial structure, including as these relate to Line 1. The Board considered requests falling within these categories to be within the List of Issues, be relevant and, where such a request would result in a substantive contribution to the record and be material to the Board’s assessment, it has compelled Trans Mountain to answer.

B. Information not appropriate for future questions

*i) Upstream and downstream effects, and other topics beyond the List of Issues or the Board's mandate*

As per the Board's [Ruling No. 25](#), the Board does not intend to consider the environmental and socio-economic effects associated with upstream activities and downstream use. Questions on these topics are not within the scope of the Board's assessment of this Project.

Similarly, the Board does not find it appropriate or helpful to compel responses on topics not included in the List of Issues (attached to the Hearing Order), or that extend beyond the Board's legislated mandate.

*ii) Responses that were sufficient*

In some cases, Trans Mountain may not have answered all parts of an intervenor's IR. However, the Board was of the view that the response provided sufficient information and detail for the Board in its consideration of the application and no further response is required.

*iii) Information related to Line 1's current operation*

The continued operation of Line 1 under its current operating conditions is not before the Board as part of this hearing. Despite this, as with all pipelines under the Board's jurisdiction, the Board undertakes a number of compliance activities and expects companies, including Trans Mountain, to take all available actions to ensure public safety and protection of the environment. As a result, the Board did not find IRs relating solely to safety and compliance issues regarding Line 1's current operation to be relevant to this hearing and is not compelling Trans Mountain to answer those.

*iv) Information that Trans Mountain is not responsible for, or that is readily available to intervenors*

Some requests involved information that appeared to be in the hands of other intervenors (e.g., government departments), rather than Trans Mountain. The Board generally did not compel answers in this type of situation. There will be a later opportunity to ask IRs of other intervenors.

In addition, some intervenors made detailed requests pertaining to evidence, such as other studies, that appears to be information the asking intervenor has in its own possession. In this type of situation, it is usually more appropriate for the intervenor to file evidence that includes or refers to this information (and later make arguments about it, as appropriate), rather than try and compel Trans Mountain to file it. If an intervenor has a specific question about a study not referenced by Trans Mountain, then that study can be referenced and a specific question asked. Only filed evidence and answers to IRs (not the IRs themselves) constitute evidence.

v) *Information overly broad in scope*

There were a number of instances where intervenors asked for all records on a topic or topics over a significant time period. These types of overly broad requests are usually not specific enough to warrant the Board compelling Trans Mountain to search and compile such information. The IR process is designed to allow intervenors and Trans Mountain to probe and ask questions about evidence that has been filed. It is not meant to be an opportunity to engage in what the Board has described previously as a “fishing expedition” (see the footnote on Page 2 of this ruling). In situations where the Board viewed the request as overly broad and not likely to result in significant information being filed, the Board declined to compel an answer.

**Deadline for full and adequate IR responses**

Where the Board has indicated in Appendix I that full and adequate responses are required, Trans Mountain is directed to file those responses by **17 October 2014**.

The Board acknowledges that Trans Mountain has filed evidence, including Technical Updates, since the motions to compel and replies to them were filed. If Trans Mountain is of the view that a subsequent filing addresses the question for which it is being compelled to provide a full and adequate response, it may provide a hyperlink to the Filing ID and refer to the relevant section of that newly filed evidence.

If you have questions about this ruling, please 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](mailto:transmountainpipeline.hearing@neb-one.gc.ca).

Yours truly,

*Original signed by L. George for*

Sheri Young  
Secretary of the Board

Attachments