

National Energy  
Board



Office national  
de l'énergie

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

Mr. D. Scott Stoness  
Vice President, Finance & Regulatory Affairs  
Kinder Morgan Canada Inc.  
Suite 2700, 300 – 5<sup>th</sup> Avenue SW  
Calgary, AB T2P 5J2  
Email [Regulatory@transmountain.com](mailto:Regulatory@transmountain.com)

Mr. Shawn H. T. Denstedt, Q.C.  
Osler, Hoskin & Harcourt LLP  
Suite 2500, 450 – 1<sup>st</sup> Street SW  
Calgary, AB T2P 5H1  
Email [Regulatory@transmountain.com](mailto:Regulatory@transmountain.com)

Dear Mr. Stoness and Mr. Denstedt:

**Hearing Order OH-001-2014  
Trans Mountain Pipeline ULC (Trans Mountain)  
Application for the Trans Mountain Expansion Project (Project)  
Request to file Emergency Management Program (EMP) documents confidentially  
Ruling No. 31**

On 1 August 2014, the National Energy Board (Board) received a [motion](#) from Trans Mountain for an order allowing it to file its EMP documents confidentially, pursuant to *National Energy Board Act* (NEB Act) sections 16.1 and 16.2 (the Motion).

The Board denies the Motion for the reasons that follow.

Background

In its Motion, Trans Mountain stated that filing the EMP documents on a confidential basis would fulfill commitments it made to intervenors in response to their first round of information request (IRs) motions. In addition to its main filing request, Trans Mountain further asked the Board to provide directions regarding disclosure of the EMP documents to local, provincial, and federal authorities who satisfy certain conditions.

The EMP documents relate to the existing system. If the proposed Project is approved and built, the EMP documents must be revised and modified to reflect the new interconnected facilities, as required by the *National Energy Board Onshore Pipeline Regulations* (OPR).

.../2

517 Tenth Avenue SW  
Calgary, Alberta T2R 0A8

517, Dixième Avenue S.-O.  
Calgary (Alberta) T2R 0A8

Canada

Telephone/Téléphone : 403-292-4800  
Facsimile/Télécopieur : 403-292-5503  
<http://www.neb-one.gc.ca>  
Telephone/Téléphone : 1-800-899-1265  
Facsimile/Télécopieur : 1-877-288-8803

The following intervenors provided responses to the Motion within the 10-day period provided in subsection 35(4) of the *National Energy Board Rules of Practice and Procedure* (Rules):

- [Province of British Columbia](#) (British Columbia).
- [Tsleil-Waututh Nation](#) (TWN).
- [City of Vancouver](#) (Vancouver).
- [Upper Nicola Band](#) and [Tsawout First Nation](#) (UNB and Tsawout) jointly.

The City of Burnaby (Burnaby) also provided a [response](#) to the Motion, which it recognized was filed a day after the deadline set out in the Rules. It urged the Board to consider the response because of the circumstances set out in its letter that made compliance with the Rules challenging for Burnaby's counsel and because Burnaby's input is directly relevant to the Motion. Given the circumstances Burnaby outlined, the Board has accepted and considered Burnaby's comments.

Trans Mountain filed a [reply](#) on 18 August 2014, as required by subsection 35(5) of the Rules.

#### NEB Act

Trans Mountain submitted that its EMP documents satisfy the tests to be treated as confidential set out in sections 16.1 and 16.2 of the NEB Act, which read:

16.1 In any proceedings under this Act, the Board may take any measures and make any order that it considers necessary to ensure the confidentiality of any information likely to be disclosed in the proceedings if the Board is satisfied that

- (a) disclosure of the information could reasonably be expected to result in a material loss or gain to a person directly affected by the proceedings, or could reasonably be expected to prejudice the person's competitive position; or
- (b) the information is financial, commercial, scientific or technical information that is confidential information supplied to the Board and
  - (i) the information has been consistently treated as confidential information by a person directly affected by the proceedings, and
  - (ii) the Board considers that the person's interest in confidentiality outweighs the public interest in disclosure of the proceedings.

16.2 In respect of any order, or in any proceedings, of the Board under this Act, the Board may take any measures and make any order that the Board considers necessary to ensure the confidentiality of information that is contained in the order or is likely to be disclosed in the proceedings if the Board is satisfied that

- (a) there is a real and substantial risk that disclosure of the information will impair the security of pipelines, international power lines, buildings, structures or systems, including computer or communication systems, or methods employed to protect them; and
- (b) the need to prevent disclosure of the information outweighs the public interest in disclosure of orders and proceedings of the Board.

### Submissions of the Intervenors and Trans Mountain

Trans Mountain submitted that the EMP documents contain information that it has consistently treated as confidential, including:

- proprietary technical information about the procedures used in the event of an emergency;
- personal information, such as names and contact information for Trans Mountain and other industry personnel; and
- information that, if disclosed, puts at risk the security of the pipeline, buildings, structures, or systems.

Trans Mountain argued that that the need to prevent public disclosure of this information outweighs the public interest in disclosure of Board proceedings. Trans Mountain did not identify any portions of the EMP documents that could be released in whole or with redacted portions.

British Columbia acknowledged the imperative for pipeline security and did not seek public disclosure of any plans or documents concerning the prevention of, or response to, acts of terrorism and other forms of intentional damage. It otherwise maintained that the Board should deny the Motion and order that the EMP documents be filed on the public record. Accordingly, British Columbia took the position that no directions regarding disclosure of the EMP documents to public authorities are required.

TWN indicated that it has requested access to the EMP documents and claims that it is an authority that should have access to them. It said that it has been refused access. It also set out a number of legal and factual reasons upon which the Board should deny the Motion. It proposed a process to “ensure that the information subject to any confidentiality order reflects the public interest in open and accessible Board proceedings.”

UNB and Tsawout adopted the submissions of British Columbia and submitted that disclosure of the documents to intervenors should not be restricted. However, if it is, they argued that they should have access because of their claim to Aboriginal rights and title and established Treaty rights. Finally, they argued that they are governments and disclosure of the EMP documents is necessary in order for them to fulfil their responsibilities in their Territories and to their members.

Vancouver had no objection to the proposed confidentiality order provided that Vancouver personnel are permitted to review the documents as part of its review of the Project application. Vancouver did object to Trans Mountain’s proposed viewing condition that would require that “the authority has, or is willing to, participate in consultations with Kinder Morgan Inc.” Vancouver was of the view that this is unrelated to sections 16.1 and 16.2.

Burnaby’s response supported Vancouver’s submissions. It submitted that the public interest outweighs Trans Mountain’s interest in confidentiality. It identified risks to the citizens of Burnaby not obtaining access to the documents.

In reply, Trans Mountain indicated that it wanted to ensure that security and confidentiality obligations related to the disclosure of the EMP documents are respected. It noted the request from British Columbia and TWN that redacted versions of the EMP documents could be publically filed and asked the Board to provide directions for doing so.

### ***Views of the Board***

The Board is of the view that Trans Mountain has not shown that its interest in confidentiality of the entire EMP documents outweighs the public interest in disclosure.

The public interest includes the requirement for an open and transparent process, and confidentiality is an exception to this requirement. The evidence upon which the Board relies to come to a decision must be as open and accessible as possible. Where documents are redacted, the redactions must be as narrow as possible and the reasons for redacting should be made clear.

Trans Mountain asked to file all the EMP documents on a confidential basis, though it indicated in reply that redacted versions could be publically filed. If redactions are sufficient to protect the information, there is no basis for filing the entire EMP documents confidentially. Trans Mountain did not provide the Board with any evidence to show which portions of the EMP documents should be redacted, so the Board cannot offer any direction with respect to redactions. The onus is on Trans Mountain to indicate which portions should be redacted and to justify why this information must be kept confidential.

The Board also notes that the EMP documents relate to existing facilities that are not the subject of the present Project application. OPR sections 32 to 35 require an EMP with regular revision and cooperation with the relevant agencies throughout the lifecycle of a pipeline. Whether Trans Mountain is meeting its obligations with respect to its EMP for the existing facilities is a matter for the Board to consider outside of the hearing for this Project. The safe operation of the existing Line 1 facilities under current operating conditions is out of scope for this hearing.

If the Project is approved and built, the EMP will have to be modified to reflect the new facilities. The process of developing a new EMP requires consultation with affected parties. For example, in addition to the requirements under the OPR, the Board's [Draft Conditions](#) 42, 49, and 52 to 54 would require Trans Mountain to show their EMP consultations and modifications at various times prior to and during construction. Since the EMP documents will be the subject of consultations, at least portions of them will be disclosed to members of the public during their development.

After considering all of the comments received, and for the reasons stated above, the Board denies Trans Mountain's Motion to file the entire EMP documents confidentially. The documents filed with the Board will be returned to Trans Mountain's counsel by courier under cover of a separate letter.

Trans Mountain further requested direction from the Board regarding the disclosure of the confidentially filed EMP documents. Since the Board has denied the first request in Trans Mountain's Motion, the Board does not need to provide further direction.

The Board notes that EMP-related information was requested by various intervenors through IRs and motions to compel further answers to IRs. In reply, Trans Mountain committed to filing its EMP documents with the Board along with a request for their confidential treatment. In light of this ruling, any updated responses that Trans Mountain provides to those IRs must be filed by **17 October 2014**, including redacted versions of the documents, if appropriate. If redacted versions are filed, Trans Mountain is directed to also provide justification for the redactions.

Yours truly,

*Original signed by L. George for*

Sheri Young  
Secretary of the Board

c.c. All intervenors