

Ms. Sheri Young
Secretary of the Board
517 Tenth Avenue
Calgary, Alberta T2R 0A8

Dear Ms. Young,

Please accept the following as my letter of comment regarding Trans Mountain Expansion Project Hearing Order OH-001-2014.

Introduction

I am a resident and co-owner of 9920 Gowlland Point Road on South Pender Island. Our 3 acre waterfront property is on Boundary Pass adjacent to Brooks Point Regional Park, a protected Conservation area. The pristine foreshore is an integral part of our family life and a major reason why we purchased this property in 1998. The waterfront is an especially important part of our grandchildrens enjoyment of their time on Pender. Our family is committed to retaining this property in our family for coming generations.

The oil tanker traffic through Boundary Pass passes by our home sometimes within 600 metres of our shore. The shipping traffic has increased significantly since we have resided full time on Pender in 2003. We live 5 kilometres from Turn Point on Stuart Island, which involves a 90 degree navigational turn where Boundary Pass meets Haro Strait. According to Kinder Morgan's Trans Mountain Expansion project (TMX) documentation, the area around Turn Point has "...the greatest level of navigational complexity for the entire passage" for oil tankers carrying tar sands bitumen from Westridge terminal in Burnaby to the Strait of Juan de Fuca and the open sea.¹

An oil spill in the vicinity of Turn Point would devastate the pristine foreshore along South Pender and undermine the ecological integrity of the marine environment generally. A spill would also negatively impact our property value and our lifestyle and compromise our fragile Gulf Island economy.

I have read and fully support the letter of comment to the NEB from the Friends of Brooks Point. That organization has consulted with residents of South Pender and held an open community dialogue at the North Pender community hall and

¹ Kinder Morgan's Oil Spill Response Simulation Study (page 8) submitted to the NEB

several workshops on the TMX application and its potential impact on our Island and beyond. I endorse and adopt all of the recommendations included in the Friends of Brooks Point letter as part of my letter. I will not repeat those recommendations in their entirety here since the NEB and the proponent have full access to them in the record.

I would like to offer further comment on the following issues:

- The potential environmental and socio-economic effects of the proposed project;
- The potential environmental and socio-economic effects of marine shipping activities; and
- Contingency planning for spills, accidents or malfunctions during operation of the project.

Navigational hazards at Turn Point

Turn Point presents a high risk zone for a marine accident. Preventive measures to avoid a spill must be the first priority. The existing navigational rules that apply in the Special Operating Area around Turn Point were developed nearly 15 years ago when the volume of shipping traffic was significantly lower than the current volume. The current navigational rules need to be enhanced and the Special Operating Area significantly expanded to address the risks of a shipping accident with the existing level of marine traffic in Boundary Pass and Haro Strait before any increase in tanker traffic is approved.

Residents on the South shore of South Pender have a front row seat for observing the marine traffic navigating the area around Turn Point. From our living room we can easily observe all of the Special Operating Area around Turn Point. We have observed instances of apparent violations of the half nautical mile separation requirement for large marine vessels as they navigate the 90 degree turn. Attachment #1 provides a photograph showing the oil tanker "Commitment" and the auto carrier "Liberty Ace" passing each other in the Turn Point Special Operating Area much closer than the allowable distance under the existing navigational rules.

I urge the NEB to withhold approval of a seven fold increase in oil tanker traffic with the resulting increased risk of a tanker shipping accident until the existing navigational rules are enhanced by the appropriate authorities around Turn Point.

The NEB's draft condition number 114 ("Marine shipping-related commitments") as detailed in the recently released conditions in Procedural Direction 17 is insufficient to address the hazards around Turn Point. Kinder Morgan's initial recommendation for a "Moving Exclusion Zone" to surround laden tankers was a sensible recommendation that would reduce the risk of a tanker accident. The rejection of this improved level of protection in Transport Canada's TERMPOL report was a huge disappointment to those who are on the front line of a possible oil spill from a shipping accident.

I urge the NEB to strongly support a Moving Exclusion Zone as a condition for approval of the TMX application.

Oil spill response capacity

Western Canada Marine Response Corporation (WCMRC), of which Kinder Morgan owns the majority of shares, is responsible for oil spill response on the west coast of Canada. Current federal government regulations (*Canada Shipping Act*) require a spill response capacity of 70,000 barrels of oil. WCMRC states that their current planning standards require capacity to respond to oil spills of up to 73,000 barrels (10,000 tonnes) in specified time frames which, in some cases, allow up to 72 hours plus travel time to deliver response equipment.²

Effective spill response must not only be timely, it must also be capable of dealing with a worse case scenario. Kinder Morgan's TMX application views a worse case scenario as a grounding of a tanker that ruptures only 2 tanker compartments releasing 106,000 barrels of oil. However, a more credible worse case scenario would be a collision of an oil tanker with another large vessel releasing the total amount of dilbit being transported.

The BC Government's 2013 Vessel Traffic Study (Vol. 2, page 64) found that: "The worst case spill from a single vessel would be the loss of 210,000m³ of crude oil" (or 1,300,000 barrels), significantly more than Kinder Morgan's estimate. Washington State requires a worse case response capacity for the full amount of oil in a laden tanker. An Aframax oil tanker has an 800,000 barrel capacity and generally carries around 650,000 barrels from Westridge terminal.

² Response time is defined as the time between receipt of spill notification and initial on-site deployment of countermeasures, provided it is safe to do so.

In WCMRC's November 2013 "Future Oil Spill Response Plan" to accommodate the increased tanker traffic from Kinder Morgan's Trans Mountain Expansion Project proposes to increase the spill response capacity to 140,000 barrels (20,000 tonnes) if the application is approved.

However the funding of WCMRC's proposed enhanced response capacity appears to be uncertain. Kinder Morgan has assured the NEB it "is working to secure a commitment from WCMRC, in the form of a resolution from its Board of Directors or similar instrument, to implement the enhanced planning standards." However this commitment is "subject to a funding mechanism which Trans Mountain and WCMRC are working to implement for Q2 2015." It appears from Kinder Morgan's May 21, 2015 letter to the NEB that the proposed funding mechanism has attracted opposition from some of WCMRC's current customers including Phillips 66.

WCMRC has proposed establishing 5 additional spill response stations including one at Sidney if the TMX application is approved. However, the funding for such a facility appears to be uncertain. The turbulent waters around Turn Point would disperse a dilbit spill more quickly than most other areas. Without a fully equipped and staffed facility in the proximity of the Turn Point area, the response time to deal with the spill would be insufficient to prevent widespread damage to the marine environment.

NEB condition #114 b requires WCMRC to address a large spill within 36 hours. That is not sufficient within the Boundary Pass Haro Strait area with strong tidal currents. A 6 hour response capacity would be more appropriate to the conditions in this area. I urge the NEB to designate the shortest possible response time for the Boundary pass Haro Strait area in condition #114 b.

NEB condition #114 b also calls for Kinder Morgan to provide assurances that WCMRC's spill response capacity be increased to 20,000 tonnes (approximately 146,000 barrels). In my view that is insufficient to deal with a shipping accident that involves the full amount of oil in a laden tanker. I urge the NEB to amend condition 114 b to require a spill response capacity of at least 650,000 barrels (90 tonnes).

I strongly urge the NEB to withhold approval of the TMX application until WCMRC can demonstrate a timely response capacity to deal with a spill from a 650,000 barrel spill in the Turn point area.

NEB condition # 108 (Financial Assurances Plan – operations phase) calls for Kinder Morgan to provide details of the financial resources and secured sources of funds that will be capable of covering the costs of liabilities without limitation for cleanup, remediation, and other damages caused by the Project facilities during the operations phase including all spills originating from the pipeline and the Westridge Marine Terminal, up to and including spills of a quantity that have the potential of being a catastrophic event. The Plan does not require similar assurances for the costs of liabilities for damages caused by an oil spill while transporting the oil along the tanker route in BC.

I urge the NEB to require Kinder Morgan as part of the TMX application to provide similar assurances that the tanker companies that load dilbit at its terminal have sufficient financial resources and secured sources of funds to cover the full costs of liabilities for damages from an oil spill en route through BC waters before loading the tanker at Westridge, and that Kinder Morgan agree to cover costs of liabilities in the event that the tanker company is unable to demonstrate sufficient resources and funds.

Marine Environment

The impact of a tanker accident and a major oil spill on the sensitive marine environment in the Salish sea would be devastating. Available information on the nature of dilbit³ shows it is one of the most environmentally-damaging petroleum products. The literature indicates that warm dilbit spilled in cold water will generally float initially. However, depending on time, temperature, and wave action, the light diluent begins to evaporate (sometimes referred to as weathering) leaving behind increasingly dense raw bitumen or extra heavy crude that will sink even in brackish coastal waters.⁴ The water turbulence and sediment content around the Turn Point area would accelerate the sinking of dilbit's heavy components making recovery especially difficult. The unrecovered dilbit would persist indefinitely in the environment with lasting effects.

Haro Strait and Boundary Pass are key habitat for the endangered and federally protected Southern Resident Killer Whales. In addition, in the last year humpback whales have returned to these waters to feed. Fisheries and Oceans Canada

³"A bitumen and dilbit primer", Mike Priaro, P.Eng. May 12, 2015 available online at: <https://www.behance.net/gallery/16654901/A-BITUMEN-AND-DILBIT-PRIMER>

⁴ IBID. P

has determined that that the potential effects of increased Project-related marine traffic on the Southern Resident Killer Whales are predicted to be significant. Protection of the endangered Orcas population must be given the highest priority by the NEB in its consideration of the TMX project that will directly affect this endangered species critical habitat.

The NEB has addressed the issue of species at risk to some extent in draft conditions #44 (Wildlife Species at Risk Mitigation and Habitat Restoration Plans), #78 (Updates under the Species at Risk Act), and # 128 (Marine Mammal Protection Program) in Procedural Direction #17. However, the NEB conditions do not contain a specific condition for the Southern Resident Killer Whales although they do so for other species including Caribou (#21, #144 & #145), Spotted Owl (#22), and Grizzly Bear (#45).

As part of the Marine Mammal Protection Program Kinder Morgan's TMX response commits to "Actively encourage and participate in multi-stakeholder or independent initiatives that contribute to southern resident killer whale recovery strategies identified by Fisheries and Oceans Canada." That gesture is insufficient to respond to the fundamental challenges to the survival of this species.

The February 2015 scientific report from the Department of Fisheries and Oceans shows that Kinder Morgan's TMX assessment of the impact of ship noise and ship strikes on marine mammals is insufficient to evaluate these threats on the Southern Resident Killer Whale population currently, or how the impact may increase with the proposed increase in vessel traffic.

Given the endangered status of the Orcas and the significant impacts of shipping traffic and possible oil spill on their critical habitat, I urge the NEB to establish a specific condition for the TMX project related to protection of the Southern Resident Killer Whale population. That condition should specifically address the issues of acoustic disturbance and ship strikes and provide a detailed plan for mitigation measures in the event of an oil spill in the critical habitat of the Orcas. I also recommend that the condition address the need for specific proactive mitigation measures to protect the 116 Chinook and Coho salmon bearing streams that the pipeline will cross during the proposed pipeline construction, given the importance of these fish species to the survival of the Orcas.

However, it is not sufficient for the NEB to rely solely on a report from Kinder Morgan on mitigation measures. There needs to be independent scientific oversight of Kinder Morgan's plan to ensure its responsiveness to the threats to the

species. That requirement should be included as a condition before approval of the TMX application is further considered.

I strongly support the recommendation by the Friends of Brooks Point that the NEB commission an independent science based evaluation of the impact of the proposed increase in oil tanker traffic will have on the survival of the endangered Southern Resident Killer Whale population including ship strikes and sound impacts before further considering the Kinder Morgan TMX proposal.

The sensitive marine environment in the Boundary Pass and Haro Strait area contains a rich habitat for forage fish that provides an important foundation for other marine life that rely on this key element in the food chain. I support the Friends of Brooks Point recommendation that the NEB commission an independent, science based evaluation on the likely impacts that the Kinder Morgan TMX proposed expansion will have on the range of critical forage fish species before further considering the proposal.

I also support the need for completion of a Marine Protected Area in the Haro Strait Boundary Pass area and beyond. Any approval of increased oil tanker traffic should be considered with reference to goals and requirements of a Marine Protected Area that protects the environment, maintains a sustainable economy and promotes community based values.

Aboriginal Rights

As noted in the Friends of Brooks Point letter of comment, the *W̱SÁNEĆ* First Nation also known as the Saanich First Nation has been stewards of the Salish Sea for many centuries, long before oil tankers were ever contemplated. The Tsawout First Nation community located in close proximity to Turn point offers an important aboriginal and historical perspective on the protection of the waters now used as the shipping route for tar sands oil tankers.

The Tsawout people have reserve land at Hay Point on South Pender that looks across Boundary Pass to Turn Point. As their eloquent oral evidence before the NEB panel in November 2014 demonstrated, they have a Sacred relationship to the waters, islands and the marine life in the Salish Sea. I urge the NEB panel to go back and listen carefully to their wisdom. Your decision on the TMX application will benefit greatly from their guidance.

Of particular importance is the revival of the the traditional Reef Net Fishery. The NEB panel would benefit greatly to get and read a copy of Dr. Nick Claxton's recently released PhD dissertation: "To Fish as Formerly: A Resurgent Journey back to the Saanich Reef Net Fishery."

The revival of the Reef Net Fishery breathes new life into the Douglas treaty that recognized the indigenous right "to fish as formerly." Dr. Claxton's revival of the sacred Reef Net Fishery strikes a direct blow to the colonization that once outlawed it. The Reef Net Fishery together with the revival of the SENĆOTEN language by Dr. Earl Claxton, Sr. is charting a course of cultural renewal that will benefit not only the Tsawout, but all who share in the spirit of reconciliation.

The Tsawout Marine Use Study submitted to the NEB shows that the TMX project would result in significant adverse effects on Tsawout's traditional marine use and ability to exercise Douglas Treaty rights. That report details and documents the disturbances and disruptions that would result if the TMX application is approved.

At a March 2015 Historical Society event on South Pender, Tsawout elder Belinda Claxton described the interconnected wisdom of the seasons, plants, medicine, foods, and cultural activities and guidance as illustrated by their intricate 13 moon calendar. In a reflective moment during her presentation she said: "I have this fear of oil tankers because it will ruin us."

It is of fundamental importance that the NEB hear and understand the important part that the *W̱SÁNEĆ* First Nation plays in your deliberations. Failure to fully and fairly consider the impact of the TMX application on the *W̱SÁNEĆ* People and their Douglas treaty rights will not only undermine the integrity of your decision; I believe it will provide the means to fully establish their fundamental rights before the Courts.

Social license to operate

Section 11 of the *National Energy Board Act* establishes the Board as "a court of record" with the powers, rights and responsibilities of a superior court. Section 12 of the *Act* requires each Board member is to make decisions "in the public interest" of Canadians. The Board is charged with the responsibility to ensure that NEB-regulated energy facilities and infrastructure are constructed and operated in a manner that is safe and is perceived to be safe by Canadian citizens. Where the Board approves a project that the general public perceive as unsafe and

against the public interest, the citizens can withhold “social license”⁵ to that project.

Concurrent with the responsibility of ensuring the public safety of any energy project is the imperative to protect the environment in which that project takes place. Approval of a project that undermines the integrity of the environment in the eyes of the affected and interested population also invokes the issue of social license.

The manner in which the Board conducts its proceedings is also relevant for the Canadian public’s willingness to grant social licence. The Board must engage in a process where all affected and interested parties are provided a fair opportunity to be heard. Failure to conduct a fair inquiry process where all the relevant facts and evidence are publicly disclosed and examined invites denial of social license.

As the founding vice president of the BC Council of Administrative Tribunals and a tribunal educator and tribunal member for the last 23 years, I have a special interest not only in the issues the NEB decides to consider, but also in the process followed by the NEB in deciding those issues.

The NEB process

NEB appointments and panel composition

A cornerstone of “a court of record” is that the Board must be independent and transparent in its process and the members of the Board must be independent and free of bias. In the words of the NEB chair, “The Board and its staff must not only be free from bias, but also the perception of bias.”⁶ The perceived independence of the NEB panel appointed by the Federal Government Cabinet in January 2014 to consider Kinder Morgan’s TMX application is important to the public who will be directly affected by the NEB’s eventual decision.

⁵ “Social license is generally considered to exist when the perceptions, opinions, and beliefs held by a local population regarding a development allow for the ongoing public approval of the related activity.” Pembina Institute, June 6, 2014 - [Duncan Kenyon](#), [Andrew Read](#) *The costs of losing social licence*.

⁶ Gaétan Caron, Chair and CEO NEB, “Independence of the Regulator: The Canadian Story,” <http://www.neb-one.gc.ca/bts/nws/spch/archive/2012/ndpndncrgltr/ndpndncrgltr-eng.html>

In January 2014 the Conservative Government appointed the 3 member panel (David Hamilton, Lynn Mercier and Don Young) to consider Kinder Morgan's TMX application. When the panel toured B.C in February 2014, one of the first questions raised was on the independence of the panel assigned to consider Kinder Morgan's TMX application.⁷ The panel chair, Mr. Hamilton, made it clear he had never worked for Kinder Morgan and Ms. Mercier emphasized that Board members were not allowed to have any shares in any company dealing with energy.

One panel member, Don Young (former CEO of Ducks Unlimited, a leading environmental and science-based non-governmental organization) had a long history of involvement in environmental engineering and socio-economic impact assessments at the international level. He was appointed as a full-time permanent member of the NEB in September 2013 for a 7 year term. His appointment to the panel in January provided some comfort that an independent environmental perspective would be represented on the panel.

It came as a surprise to many that Mr. Young suddenly resigned from the NEB on April 1, 2014, just as the NEB panel was gearing up for the hearing process. The reason for the resignation was for unspecified "personal reasons." Mr. Young's unexpected departure from the NEB was in contrast to the glowing statement he made before Parliament's Natural Resources Committee hearings on the appointment on November 20, 2013: "I'm proud to be able to serve in my new capacity to help ensure that the National Energy Board effectively and efficiently fulfills this important mandate..."

When the the NEB panel was appointed in January 2014, the appointment notice specified that: "The Alternate Panel Member is Allison Scott, who will step in if one of the Panel Members is unable to continue." Ms. Scott is a former Deputy Minister of Energy and Intergovernmental Affairs with the Nova Scotia Government. In 2009 she was seconded to Environment Canada to advise the federal government on the development of Canada's approach to climate change. It was also quite surprising (at least to some) that Mr. Young was replaced on the panel, not by Ms. Scott, but by Mr. Philip Davies. Mr. Davies has over 30 years of expe-

⁷ For example see: "Fate of the pipeline is in their hands," *Jennifer Moreau, Burnaby Now* February 6, 2014 online at: <http://www.burnabynow.com/news/fate-of-the-pipeline-is-in-their-hands-1.826280>

rience in acquiring, constructing and operating energy infrastructures and facilities in North America's oil, gas and electric power industries.⁸

The issue of the independence of the Conservative Government's appointed panel was called into question by intervenor Marc Eliesen, former CEO of B.C. Hydro and the former Chair of Manitoba Hydro on April 10, 2014. Mr. Eliesen filed a notice of motion alleging a reasonable apprehension of bias for panel chair David Hamilton on the basis of his participation in decisions of three prior NEB decisions "...on important and significant issues that impact the Trans Mountain Expansion Project recommendation. Therefore he should be disqualified from ruling on the current Application." On April 28, 2014 the NEB dismissed Mr. Eliesen's application.

In May 2014 Mr. Eliesen stated that Kinder Morgan's whole economic case put forward by its main energy consultant, Steven Kelly of IHS Inc, was "fabricated and fictitious." Mr. Eliesen indicated that Mr. Kelly's "analysis is unreliable and limited" and cited "contradictory evidence" put forward by Mr. Kelly in prior submissions to the NEB. Mr. Eliesen's efforts to have the NEB require Kinder Morgan to provide a substantive response to Mr. Kelly's economic analysis apparently met on deaf ears at the NEB.⁹

On November 3, 2014 Mr. Eliesen withdrew from the NEB hearing after concluding "... that the Board, through its decisions, is engaged in a public deception. Continued involvement with this process is a waste of time and effort, and represents a disservice to the public interest because it endorses a fraudulent process." Mr. Eliesen stated:

"The unwillingness of Trans Mountain to address most of my questions and the Board's almost complete endorsement of Trans Mountain's decision has exposed this process as deceptive and misleading. Proper and professional public interest due diligence has been frustrated, leading me to the conclu-

⁸ Ms. Mercier has subsequently been replaced by Ms. Scott.

⁹ for example see: Kinder Morgan's economics case under fire," JENNIFER MOREAU / BURN-ABY NOW MAY 8, 2014. Mr. Eliesen's notice of motion to the NEB on this issue can be found online at: https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449925/2451033/2483882/C118-4-1 - Notice_of_Motion_M._Eliesen_IRs_-_A3Y6Y0.pdf?nodeid=2484447&vernum=-2
A further follow-up motion can be found at: https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/548311/956726/2392873/2449925/2451033/2487474/C118%2D5%2D1_%2D_Marc_Eliesen_Reply_Notice_of_Motion_June_30%2C_2014_%2D_A3Z3V0.pdf?nodeid=2487279&vernum=-2

sion that this Board has a predetermined course of action to recommend approval of the Project and a strong bias in favour of the Proponent.”

On August 1, 2015 the Conservative Government chose the Friday afternoon of a long weekend, just before the Sunday launch of a federal election, to appoint Mr. Steven Kelly as a member of the NEB Board.

Access to participate

A second cornerstone to a fair and open process is an opportunity to participate and to be heard. In 2012 the Conservative Government made changes to the NEB Act (section 55.2) allowing the NEB to limit participation in the TMX application to those who could establish “in the Board’s opinion” that they are “directly affected” by the application or had relevant information or expertise. The NEB then established an administratively cumbersome application process and established a very narrow time frame in which to complete the application. This one-two punch had a significant chilling effect on participation in Kinder Morgan’s TMX application.

Effective participation in the hearing process requires an opportunity to test the validity and reliability of applicant’s evidence and to provide additional evidence in response for the NEB to fully and fairly evaluate the application. The established process to test evidence, particularly where credibility of that evidence is an issue, is through an oral hearing process with cross examination where interveners can ensure that the applicant’s positions have a substantive basis in fact. The NEB ruled that an oral hearing was not required and indicated that the process would be limited written questions to the applicant effectively turning the review of Kinder Morgan’s TMX application to a mere paperwork exercise according to some intervenors.

To compound that limitation on effective public participation, Kinder Morgan’s response to interveners’ written questions was less than responsive in many cases and unresponsive in others. The failure of Kinder Morgan to respond to written questions is illustrated by their refusal to respond to Mr. Eliesen’s questions regarding (now NEB member) Steven Kelly’s allegedly flawed economic analysis used as the foundation of Kinder Morgan’s TMX application. Intervenors objections to the NEB’s failure to require Kinder Morgan to provide substantive re-

sponses to the written questions submitted to the NEB did not achieve substantial results.¹⁰

In response to this limitation to be heard and to “test” the evidence, a number of interveners and individuals filed a motion with the NEB arguing that the application of section 55.2 of the NEB Act violates the freedom of expression guarantee in section 2(b) of the Charter. The NEB’s October 2, 2014 decision dismissed the motion and found that the limits the NEB imposed on participation allowed those “most” directly affected while “providing for an efficient process.”

Scope of the inquiry

The further issue the interveners and individuals included in their motion alleging a Charter violation was on the limitation on the scope of inquiry, by excluding from the List of Issues the NEB would consider the climate change impacts of upstream and downstream environmental and socio-economic effects. The NEB summarily dismissed that argument contending that the List of Issues was not related to section 55.2 of the Act. The Federal Court of Appeal declined to grant leave to appeal.¹¹

On Friday, 20 March 2015, an application for leave to appeal the NEB’s decision was filed with the Supreme Court of Canada.

On May 20, 2015 another high profile expert intervenor, Ms. Robyn Allan, also withdrew from the NEB review of the TMX project. Ms Allan objected to a number of alleged and apparent flaws in the process including:

- failure to consider the risks of the sixty year old existing legacy line that posed significant risks and would continue to be a significant part of the operation.
- failure to assess the risks of the full 780,000 designed pipeline capacity.
- compromised principles of procedural fairness and natural justice.
- biased decision making in favour of the proponent.

¹⁰ For example, Marc Eliesen’s November 3, 2014 withdrawal letter stated: “Given the Board’s lack of objectivity it is not surprising that out of the approximately 2000 questions not answered by Trans Mountain that Intervenor called on the Board to compel answers, only 5 per cent were allowed by the Board and 95 per cent were rejected.”

¹¹ In a case involving similar issues under the Northern Gateway application, the *Forest Ethics and Sinclair case*, the Court of Appeal found the Board did not err in ruling that it did not have to consider the larger environmental effects of a pipeline project including the contribution to climate change made by the Alberta oil sands and facilities and activities upstream and downstream from the pipeline project.

Ms. Allan contends that:

The review is not conducted on a level playing field. The panel is not an impartial referee. The game is rigged; its outcome pre-determined by a captured regulator. The NEB's integrity has been compromised. Its actions put the health and safety of the Canadian economy, society and the environment in harm's way.

Conclusion

In light of all these developments, I have asked myself if I too should withdraw from the process, since I have significant concerns regarding the perceived fairness of the NEB's process in this case. However, even though I may not be fully or fairly heard, I feel it is my duty as a citizen directly affected by the TMX application to voice my concerns. While the constrictions recently imposed on the NEB's process as a result of political and policy decisions taken by the federal government are of considerable concern, and the NEB's application of those constrictions is, in my view, unfortunate; there may well be changes in the political landscape coming that will relieve the constrictions on the independence and autonomy of the NEB.

In the final analysis, the "recommendation" that the NEB will make to the Minister and the federal government cabinet, will not be the final word. The recently enacted section 55.2 of the *Act* gives the federal cabinet an effective veto over the NEB recommendation. Ultimately, social license for a major resource development can not be conferred by an administrative or political decision alone. It requires that a project enjoys sufficient trust and legitimacy, and has the consent of the public that will be affected by the project. An administrative or political decision is reached through a process that is not perceived as fair, transparent and unbiased will undermine social license.

In my view, Kinder Morgan's TMX application does not have sufficient merit to be approved. It is my hope that the NEB panel will exercise independent judgement and reject the application, although I recognize that is not the expected outcome. The risks to the environment are too great. The benefit to the public is too low. The opposition of the affected public is too great. I believe the NEB would be doing Kinder Morgan a favour to reject the application at this stage. It would save Kinder Morgan the ordeal of watching an "approved" project wither on the vine due to public denial of social license.

Thank you for considering my comments.

Paul Petrie

copy to: Counsel: Trans Mountain Pipeline ULC

