

National Energy  
Board



Office national  
de l'énergie

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19 July 2019

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Dear Mr. Stoness and Mr. Denstedt:

**Trans Mountain Pipeline ULC (Trans Mountain)  
Trans Mountain Expansion Project (TMEP or Project)  
Order in Council (OIC) P.C. 2019-820  
National Energy Board (Board) decisions on resuming the TMEP regulatory  
processes**

**A. Background**

On 18 June 2019, the Governor in Council (GIC) issued [OIC P.C. 2019-820](#) approving the Project.

In response to GIC's direction, the Board [issued](#) Certificate OC-065 and Amending Orders AO-005-OC-2 and AO-004-OC-49 on 21 June 2019, which authorized the Project subject to 156 conditions. The Board indicated that, with the issuance of the Certificates, the Board Orders issued on 6 June 2016 are in effect, subject to the conditions as amended by GIC. By separate letter of 19 July 2019, the Board has issued the following Amending Orders to update the conditions on these Board Orders:

- AO-001-XO-T260-007-2016;
- AO-002-XO-T260-008-2016;
- AO-002-XO-T260-009-2016;
- AO-002-XO-T260-010-2016; and,
- AO-001-MO-015-2016.

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Also on 21 June 2019, the Board issued a letter<sup>1</sup> that proposed an approach to resuming each of the following regulatory processes for the Project:

- 1) Condition compliance;
- 2) Detailed route approval;
- 3) Routing variances;
- 4) Non-routing variances or design changes;
- 5) Right of entry;
- 6) Orders for temporary access.

The Board requested public comments on the appropriateness of its proposed approach, including any suggested alternatives.

In consideration of the comments received, this letter sets out the Board's decisions on how it will resume the regulatory processes related to the Project. The Board's written reasons for these decisions will follow.

## **B. Specific Requests Received During the Comment Process**

When commenting on the Board's proposed approach, some commenters provided specific comments asserting changes in circumstance. Other commenters made requests for relief that went beyond the comment process the Board set out. Such comments were not considered in the Board's process determination. For such comments or requests to be considered, they must be refiled as set out in the processes described below. If the specific relief is not addressed below, the Board requires an appropriately supported notice of motion to be filed and served.

## **C. Board decisions on regulatory processes**

### **General**

The Board will rely on decisions and orders that were issued prior to the 30 August 2018 decision of the Federal Court of Appeal (FCA) in *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153 (*Tsleil-Waututh*) unless the Board decides that relevant circumstances have materially changed such that there is a doubt as to the correctness of a particular decision or order.

The Board may initiate a review in one of the following ways:

- on the Board's own motion;
- in response to a request for review or updated information received from Trans Mountain; or
- as a result of an application for review filed by an affected party under section 21 of the *National Energy Board Act* (NEB Act).

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<sup>1</sup> [A6V4J4](#)

**Appendix 1** contains information about filing applications for review.

Issued decisions or orders remain valid unless and until the Board issues a decision to amend or overturn the prior decision or order. In other words, the mere filing of an application for review does not place the previous Board decision or order “on hold” or prevent Trans Mountain from relying on that authorization to construct. However, construction can only occur where applicable conditions have been satisfied and applicable PPBoR orders have been issued.

For processes that were underway at the time the *Tsleil-Waututh* decision was released, the Board will rely on the record to date and complete any remaining process steps before making a decision or issuing an order.

Process-specific decisions are outlined in the sections that follow.

### **Condition compliance**

The Board has decided the following with respect to condition compliance:

#### ***Where the Board issued a condition compliance or relief decision before Tsleil-Waututh<sup>2</sup>***

- The Board has decided to review its compliance decisions with respect to Conditions 6, 91, 98 and 100, which GIC amended following the reinitiated Phase III consultation process.
- Trans Mountain must, in a timely manner, update filings with respect to Conditions 58, 71, 97, and 100, to the extent it has not already done so, or explain why no updated filing is required as a result of the accommodation measures set out in the Crown Consultation and Accommodation Report by **26 July 2019**.
- Trans Mountain must submit any additional updated condition compliance filings in a timely manner.
- The Board will consider Trans Mountain’s updated filings and decide whether a review is warranted. If the Board decides to conduct a review, the Board will confirm, amend or overturn its prior condition compliance decision.
- The Board will consider any applications for review filed by an affected party. Such applications must be filed in a timely manner. The Board will decide whether a review is warranted. If the Board decides to conduct a review, the Board will confirm, amend or overturn its prior condition compliance decision.
- Unless and until the Board decides to amend or overturn prior condition compliance or relief decisions following a review, the Board’s previous decisions, as set out in the Letter Reports, remain valid.<sup>3</sup>

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<sup>2</sup> For clarity, relief decisions include the Board’s 18 January 2018 Permitting Decision ([A89357-1](#)).

<sup>3</sup> Letter Reports should be read as though reference is made to the instruments issued in 2019. Letter Reports are available in the Certificate and Compliance document folder on the Board’s online registry (ID: [2981674](#))

***Where the Board has yet to issue a condition compliance or relief decision***

- Trans Mountain must file submissions in respect of Conditions 124, 132, 133, 134, 144 and 151, which GIC amended. The Board requires this information in order to render compliance decisions for these conditions.
- The Board will rely on the record to date, and consider relevant future submissions, in reaching compliance decisions or decisions on relief requests.

**Detailed route approval**

The Board has decided the following with respect to the detailed route approval process:

***Plan, Profile and Book of Reference (PPBoR) and Service and Publication of Notices***

- On 12 July 2019, Trans Mountain applied for Board approval of the form of PPBoR, sample landowner notice, sample publication notice, and publication plan.<sup>4</sup> By separate letter of today's date, the Board has decided on these requests.
- Trans Mountain must newly file PPBoR for the entire Project route.
- Trans Mountain must personally serve the landowner notice, as approved, on all current owners of lands to be acquired<sup>5</sup>. In addition, Trans Mountain must publish the publication notice in accordance with the publication plan, as approved.
- The Board will issue notices to potentially affected Indigenous peoples, advising of the detailed route approval process. These notices will be posted in the Board's online registry, in the folder titled 2019 - Trans Mountain Detailed Route.

***Statement of opposition (SOO) forms***

- Appendix 2 contains the SOO form that Trans Mountain must provide to all those served with a landowner notice at the same time that service occurs. Trans Mountain must also produce and provide to the Board forthwith an electronic copy of the SOO form in a PDF fillable form, which the Board will place on its website.
- Those persons served with a notice, or anyone that anticipates that their lands may be adversely affected by the proposed detailed route, must file a SOO form with the Board within 30 calendar days from the date of service or publication.

***Treatment of SOO forms***

- Landowners and Indigenous peoples that have a continued or new objection to the proposed detailed route must file a SOO that meets the requirements set out below, even if the filer previously filed a SOO with the Board. The Board will not review a prior detailed route decision, proceed with a detailed route hearing that was underway at the time of the *Tsleil-Waututh* decision or hold a new detailed route hearing if a SOO is not filed.

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<sup>4</sup> [A6V9Q0](#)

<sup>5</sup> Trans Mountain must effect any personal service on Indigenous peoples required.

- The Board will only accept a SOO that meets the following requirements:
  - it is filed on time, made in good faith, not withdrawn, and not frivolous or vexatious; and
  - the objection identifies a material change in circumstances related to the best possible detailed route of the pipeline, or the most appropriate methods or timing of constructing the pipeline.(Valid SOO)

Where the Board issued a detailed route decision before *Tsleil-Waututh*

If no Valid SOO is submitted, the detailed route decision pertaining to those lands will stand and the Board will issue the relevant PPBoR order, subject to any conditions imposed in the detailed route decision. **A landowner does not need to file a SOO to ensure that Trans Mountain continues to be bound by the conditions set out in a prior detailed route decision.**

Where a Valid SOO is filed, the Board will conduct a review of the prior detailed route decision.

Where detailed route processes were underway

For detailed route hearings that were in progress at the time of the *Tsleil-Waututh* decision, landowners and Indigenous peoples will need to register their continued objection by filing a new SOO within the 30-day period. **If no SOO is submitted, the hearing in progress will not resume and the objection will be considered withdrawn.**

A Valid SOO is not required for the Board to rely on the prior record and complete any remaining process steps before issuing a decision. In that case, the only requirements are that the SOO must be filed on time and not withdrawn.

The Board has decided to require a Valid SOO from both landowners and Indigenous peoples, including the requirement to describe a material change in circumstances, in order for the Board to consider adding process steps to obtain and test any new evidence. The Board is of the view that Canada's reinitiated Phase III consultation process constitutes a reviewable change to the extent it is shown that such consultation relates to detailed routing issues (that is, the best possible detailed route of the pipeline, or the most appropriate methods or timing of constructing the pipeline) for specific Indigenous peoples.

Where no prior detailed route process was held

Landowners and Indigenous peoples that did not previously file a SOO or that filed a SOO that was rejected or was subsequently withdrawn may file a new SOO.

The Board will require both landowners and Indigenous peoples to submit Valid SOOs, including the requirement to describe a material change in circumstances. The Board is of the view that Canada's reinitiated Phase III consultation process constitutes a reviewable change

to the extent it is shown that such consultation relates to detailed routing issues (that is, the best possible detailed route of the pipeline, or the most appropriate methods or timing of constructing the pipeline) for specific Indigenous peoples.

If no Valid SOO is submitted, the Board will issue a PPBoR pertaining to those lands.

Where a Valid SOO is filed, the Board will conduct a new detailed route hearing.

### ***PPBoR orders***

- Via separate correspondence, the Board will rescind all existing PPBoR orders and amending orders.
- Via separate correspondence, the Board will issue new PPBoR orders for unopposed lands and following any detailed route processes.

### ***Substituted service orders***

- Trans Mountain is directed to file with the Board, on or before **26 July 2019**, for each substituted service order previously issued by the Board:
  - confirmation that Trans Mountain still requires and intends to rely upon the order;
  - details about which notices under the NEB Act Trans Mountain intends to serve as provided by the substituted service orders; and
  - evidence substantiating that there has been no material change in circumstances with respect to Trans Mountain's ability to personally serve the persons to whom the order relates or how documents could reasonably be brought to that person's attention.
- Upon receipt of this information, the Board will decide, pursuant to section 21 of the NEB Act, whether to confirm, vary or rescind each substituted service order.
- Unless and until the Board decides to amend or overturn prior substituted service orders, the Board's previous orders remain valid.

### **Corridor or routing variances**

The Board has decided the following with respect to corridor or routing variances:

- As an administrative matter, the Board will seek GIC approval to re-issue the necessary orders<sup>6</sup> to amend Certificate OC-065. The NEB Act permits the Board to consider review applications while GIC approval is pending or even after it is obtained.<sup>7</sup>
- Unless and until the Board decides to amend or overturn prior corridor or routing variances following a review, the Board's previous decisions remain valid.

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<sup>6</sup> AO-001-OC-065 through AO-007-OC-065

<sup>7</sup> In the event a routing or corridor variation decision made by the Board and approved by GIC is amended or overturned following a review, the Board would need to return to GIC for approval under subsection 21(2) of the NEB Act to make it effective.

## **Non-routing variances or design changes**

The Board has decided the following with respect to non-routing variances or design changes:

### ***Where the Board has issued a decision and amending order***

- Unless and until the Board decides to amend or overturn prior non-routing variances or design changes following a review, the Board's previous decisions and amending orders remain valid.

### ***Where the Board has yet to issue a decision or order***

- The Board will rely on the record to date, and consider relevant future submissions, in reaching decisions.

## **Right of entry**

The Board has decided the following with respect to right of entry:

### ***Where the Board has issued a right of entry order***

- Unless and until the Board decides to amend or overturn prior right of entry orders following a review, the Board's previous orders remain valid.

### ***Where the Board has yet to issue a decision or order***

- For those right of entry applications where service of notice, filing and service of the application was complete and landowners have had the opportunity to object, the Board will proceed to decision.
- For those right of entry applications already filed with the Board where Trans Mountain complied with the landowner notice requirements in subsection 104(2) of the NEB Act, the Board will resume its assessment and make decisions once:
  - Trans Mountain demonstrates compliance with, or confirms it is seeking relief from section 55 of the *National Energy Board Rules of Practice and Procedure* (Rules) and provides justification for the relief sought; and
  - the opportunity for landowner objections, and for Trans Mountain to reply to those objections, under section 56 of the Rules, has passed.

## **Orders for temporary access**

The Board has decided the following with respect to temporary access orders:

### ***Where the Board has issued a decision or order***

- Unless and until the Board decides to amend or overturn prior orders for temporary access following a review, the Board's orders for temporary access remain valid.

**D. Service by Trans Mountain**

Trans Mountain is directed to serve this letter forthwith on its list of interested parties, including all potentially affected landowners and Indigenous peoples, all participants in the regulatory processes described in this letter, as well as all participants in the OH-001-2014 and MH-052-2018 hearings. It must also serve this letter forthwith on all those that made submissions during the public comment period.

For questions about this process, please contact a Process Advisor by phone at 1-800-899-1265 (toll-free) or by email at [TMX.ProcessHelp@neb-one.gc.ca](mailto:TMX.ProcessHelp@neb-one.gc.ca).

Yours truly,

*Original signed by S. Wong for*

Sheri Young  
Secretary of the Board

c.c. Indigenous Advisory and Monitoring Committee (Trans Mountain)  
c/o Ms. Michelle Wilsdon and Ms. Naina Sloan  
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