



Reasons for Decision of the Ministers

TRANS MOUNTAIN EXPANSION PROJECT
PROVINCIAL RECONSIDERATION PROCESS

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EAO

Environmental
Assessment Office

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CONTEXT

The National Energy Board (NEB) (now the Canada Energy Regulator (CER)) issued a report recommending that the Governor in Council (GIC) approve the Trans Mountain Expansion Project (the Project) in May 2016 (the 2016 Report). Certificate of Public Convenience and Necessity (CPCN) OC-064 for the Project was subsequently issued on December 1, 2016. Environmental Assessment Certificate (EAC) #E17-01 was issued to Trans Mountain Pipeline ULC (Trans Mountain) on January 10, 2017. For the provincial environmental assessment (EA) of the Project, the Environmental Assessment Office (EAO) relied on the NEB's review of the Project, consistent with the Environmental Assessment Equivalency Agreement between the NEB and the EAO¹.

The Project will expand the existing Trans Mountain pipeline system, which transports oil and other products between Edmonton, Alberta and Burnaby, British Columbia (B.C.), through the construction and operation of approximately 987 kilometres (km) of new pipeline. The Project will twin the existing system, which consists of a 1147-km, 610-millimetre (mm) (or 24 inch) pipeline between the two cities, a distribution line from the tanks at Trans Mountain's Burnaby terminal to the Westridge Marine Terminal on Burrard Inlet and another pipeline in Washington State.

In 2018, the Federal Court of Appeal overturned the CPCN for the Project. Subsequently, the NEB undertook a 155-day reconsideration process and released its 2019 Reconsideration Report on February 22, 2019. The NEB subsequently issued CPCN OC-065 for the Project on June 21, 2019.

In September 2019 the BC Court of Appeal (BCCA), in two cases, decided that because the Ministers who issued the provincial EAC relied on the 2016 Report, they should have the opportunity to consider the differences between that Report and the 2019 Reconsideration Report to determine if any changes to the EAC conditions, or the addition of new ones, were appropriate, within the limits of provincial jurisdiction.

In response to the BCCA's decisions, in March 2020 we directed the EAO to undertake a provincial reconsideration process and prepare a report to support our decision. Consistent with the direction of the BCCA, the scope of the provincial reconsideration process was to:

- Identify and consider the portions of the 2019 Reconsideration Report that differ from the 2016 Report; and
- Provide recommendations regarding any new or amended EAC conditions in response to those portions, within the limits of provincial jurisdiction, if any.

Consistent with our direction, the EAO invited Squamish Nation, Tsleil-Waututh Nation and the City of Vancouver to actively participate in the provincial reconsideration process. Also consistent with our direction, the EAO engaged Trans Mountain, all potentially impacted marine Indigenous nations, provincial and federal agencies, other interested parties, and the public.

The EAO carried out this process and provided us with a report summarizing it, and its recommendations regarding EAC conditions that should be added or amended. The EAO proposed amendments to EAC Condition 35 and also proposed two new conditions requiring a Human Health Risk Report and a Shoreline Existing Conditions Data Report. The EAO also recommended adding Snuneymuxw First Nation to the list of "Aboriginal Groups – Marine Shipping" in Schedule B of the

¹ <https://www2.gov.bc.ca/assets/gov/environment/natural-resource-stewardship/environmental-assessments/working-with-other-agencies/agreement-with-the-national-energy-board/eao-neb-environmental-assessment-equivalency-agreement.pdf>

EAC, and adding a definition for Potentially Affected Coastal Local Governments, as they are included in the proposed new and amended conditions. The EAO has also provided us with a list of recommendations that would be appropriate for action by other government agencies, in particular the federal government. These would enhance Project-related activities in a manner that is responsive to the concerns raised by interested parties and to improve outcomes for coastal management in relation to the Project. We are communicating these to the federal government and strongly urging that they consider them carefully and take action on them.

In addition to the EAO's Recommendation Report, we have also reviewed separate submissions from Tsleil-Waututh Nation, Squamish Nation, and the City of Vancouver.

We agree with the conclusions reached by the EAO in its Reconsideration Report, and the recommendations provided to us therein. On February 24, 2022, we issued an order amending the EAC consistent with the recommendations of the EAO. These are the reasons for our order.

KEY CONSIDERATIONS

We concur with the approach undertaken by the EAO in its Reconsideration Report (<https://projects.eao.gov.bc.ca/p/5885121eaaecd9001b82b274/project-details>). As we anticipated, there was a great divergence in points of view of what changes to the EAC should be made. Some parties saw the reconsideration process as an opportunity to make extensive changes to the EAC; others were of a diametrically opposed view. As set out in its Reconsideration Report, the EAO determined that they had to develop a set of criteria to analyze the submissions they received through the reconsideration process to ultimately arrive at its recommendations to us for changes to the EAC. The EAO employed the following criteria in this regard:

- Whether issues raised pertained to differences² between the two NEB Reports;
- The Ministers' jurisdiction to make changes to EAC conditions or add new ones;
- Avoiding unnecessary duplication, having regard for:
 - Existing EAC conditions;
 - Existing NEB conditions;
 - Existing federal or provincial regulatory mechanisms;
 - NEB recommendations to the GIC (which, as noted above, were accepted by it); and
 - Federal government accommodation measures³ and other federal government initiatives related to the matters covered in the differences between the two NEB Reports.

These criteria are a logical approach. The first criterion is obviously essential, as it was the basis for the BCCA's decisions. The second criterion is also obvious: we of course only have the power to attach EAC conditions where we have the constitutional authority to do so. We also agree that, in making changes to the existing EAC conditions, we should avoid unnecessary duplication.

Differences Between the NEB Reports

The EAO's first criterion in its consideration of potential new or amended EAC conditions was to identify whether issues raised by interested parties pertained to differences between the two NEB Reports. The EAO conducted a thorough review of the issues raised in relation to differences between the 2019 Reconsideration Report and the 2016 Report. These primarily related to the potential environmental and socio-economic effects of increased marine shipping and the routine operation of Project-related marine vessels, and the potential effects of spills from Project-related marine vessels.

² The EAO considered a difference between the two NEB Reports to be any new content in the 2019 Reconsideration Report that was not found in the 2016 Report.

³ <https://www.canada.ca/en/campaign/trans-mountain/what-is-tmx/the-decision/background11.html>

Issues raised that did not pertain to differences between the NEB Reports were not within the scope of the reconsideration process ordered by the BCCA.

Unnecessary Duplication

Consistent with its criteria following the BCCA's decisions, the EAO sought to avoid unnecessary duplication in its recommendation of new and amended EAC conditions. The EAO received a range of submissions related to Project-related marine shipping and marine spills, as well as specific suggestions to amend or add conditions to the provincial EAC. We agree with the EAO that existing regulatory frameworks, such as Vancouver Fraser Port Authority guidelines regarding noise and light pollution, the *Canada Shipping Act, 2001*, federal initiatives such as the Oceans Protection Plan and Anchorages Initiative, and Canada's response to recommendations resulting from the NEB reconsideration process, such as the Co-Developing Community Response Initiative and the Salish Sea Initiative, address many of the concerns raised that are within the scope of the provincial reconsideration process.

We will not repeat here what is set out in the EAO's Reconsideration Report, but we carefully considered the many initiatives underway identified in the report. We reviewed Sections 5 and 6 of the report and Appendix C to the Report with some care and we agree with the EAO's views that there are existing regulatory regimes in place and programs being implemented by the Government of Canada for most of the concerns raised with the EAO during the reconsideration process. Nevertheless, we believe that the federal government can and should do more. While we appreciate the federal government has these programs and initiatives in place, we strongly encourage the Government of Canada to do as much as possible to respond to the issues raised and identified in the EAO's Reconsideration Report. For that matter, we agree with the recommendations to the federal government proposed by the EAO, and we will communicate them to the federal government, as discussed further in these reasons.

Through the process there was, of course, debate about the proposed conditions. We particularly note that there were requests for shoreline related plans, as opposed to a report, which is what the new condition requires. We agree with the EAO's description of existing programs and regimes, including the work led by Fisheries and Oceans Canada and Transport Canada on the Oceans Protection Plan, Western Canada Marine Response Corporation's (WCMRC) development of coastal mapping and geographic response strategies, Transport Canada's responsibility for Canada's Ship-Source Oil Spill Preparedness and Response Regime, WCMRC's shoreline clean-up plan that would be reviewed and updating during the implementation of the Enhanced Response Regime, the Environment and Climate Change Canada National Environmental Emergency Centre's development of eight coastal Geographic Response Plans for B.C. led by the Canadian Coast Guard, and the development of area response plans by the Canadian Coast Guard through Planning for Integrated Environmental Response. In our view, the existence of all of these initiatives militates in favour of requiring Trans Mountain to prepare a report concerning existing shoreline conditions, rather than requiring it to prepare a plan for how it would address Project-related impacts to shorelines. Nonetheless, we agree that requiring Trans Mountain to prepare a report in this regard will have value because there is no single authority responsible for determining what baseline information may be missing or what consultation has occurred, if any, with respect to the sites identified in the proposed Shoreline Existing Conditions Data Report condition.

We also note that the human health condition includes consultation with federal agencies, in particular, Health Canada and the Canadian Coast Guard. We agree with the EAO that the Human Health Risk Report required by this condition will provide important information to inform the work of the federal government and its agencies as they prepare plans that address the potential impact to human health from spills, including through the federal Planning for Integrated Environmental Response (PIER) project. The report will also provide important information to interested parties and the public.

In short, many regulatory and other initiatives that were or are underway address concerns raised related to Project-related marine shipping and marine spills. We agree with the EAO's view that recommended new or amended conditions should avoid duplicating these efforts that are already underway. As provincial ministers, we recognize the great

importance of addressing the significant effects of projects through EA Certificates. However, we are also mindful of the need for the efficient imposition of regulatory requirements having regard for the requirements being imposed by other regulators - duplication of existing regulatory requirements would not be an efficient approach to the regulation of the Project. This is particularly relevant to the regulation of marine shipping, an area in which the federal government exercises primary regulatory authority, and where it has undertaken a number of initiatives in recent years.

Trans Mountain's Position on Proposed Amended and New Conditions

We note that Trans Mountain argued that, although it is willing to accept the addition of the Human Health Risk Report condition, it strongly opposes the location identified by the EAO in the proposed condition (English Bay) on the grounds that it had been previously identified in Trans Mountain's risk assessment as a non-credible spill. It also asserts that the NEB concluded that a 16,000 m³ spill within Burrard Inlet and English Bay are not credible worst case spill scenarios.

With respect to Trans Mountain's assertion, we do not agree that we are prevented from imposing a condition that requires it to prepare a report in respect of a potential spill that the NEB did not agree was credible. First, we note that the issue of potential impacts to human health was a subject of the 2019 Reconsideration Report, as set out on page 51 of the EAO's Report. Therefore, this issue meets the first criterion set out above.

In addition, as the EAO describes, in order to for the human health report to be valuable, the hypothetical location must be one where a spill could have the potential to impact human health. This led the EAO to deviate from the location that was originally considered, Arachne Reef. The EAO then proposed that Trans Mountain consult on the location of the spill scenario according to certain criteria, which included consideration of Trans Mountain's original risk assessment. Trans Mountain objected to this approach on the basis that it may be challenging to determine a different location from Arachne Reef in consultation with other parties listed. This then led the EAO to propose English Bay as the location for the proposed Human Health Risk Report, as it is in proximity to significant human receptors. Further, this location accommodates Trans Mountain as it was identified in Trans Mountain's application to the NEB as a representative hypothetical incident. We also note that an additional location requested by Tsleil-Waututh Nation and City of Vancouver (east Burrard Inlet) was not selected because the location was not identified in Trans Mountain's application as a representative hypothetical incident or area of highest probability for a ship-sourced spill. In selecting English Bay as the location for the human health condition, the EAO sought to respond to feedback received on the draft condition, and to focus the report on proximity to significant human receptors, all within the scope of the criteria established for the reconsideration process.

With respect to Trans Mountain's position, we have also considered what the BCCA stated in para. 99 of *Squamish Nation v. British Columbia (Environment)*, 2019 BCCA 321:

Squamish seek an order quashing the Certificate, so as to permit the Minister to order further assessments. On the latter request, I understand the further assessment proposed had been proposed to the National Energy Board, and rejected in favour of ongoing study, adaptation, monitoring and Project lifecycle supervision. I am of the view that **the Province cannot order assessments that the National Energy Board expressly refused to order**. I would not open the Certificate to that degree. [Emphasis added]

We have grappled with what the Court intended in this paragraph. We have concluded that the Court intended for the EA Certificate to stand, and to prevent us from re-opening it to the point of ordering a further assessment. We have not ordered a further assessment of the Project. Also, we do not think that the Court intended to bar us from attaching new EA Certificate conditions that respond to the differences in the two NEB Reports; indeed, that would defeat the entire purpose of the reconsideration. We also think that the BCCA did not intend to bar us from attaching a condition that pertains to a particular location, even where the NEB may not have considered this an appropriate location for study, particularly where the location has been chosen in order for the report required by the condition to have value, where the subject matter (affects to human health) arises from a difference between the two NEB Reports, and where the location

was identified by Trans Mountain as a representative hypothetical incident location in its application to the NEB. In short, the BCCA directed us to consider potential condition changes in light of the differences between the two NEB Reports; it did not oblige us to agree with the NEB on every one of its findings.

Recommendations to the Federal Government

Through the EAO's detailed analysis and engagement, several concerns were addressed to the EAO that did not meet the criteria set out above, either because they would appropriately fall within the responsibility of other regulatory authorities and response organizations, they were duplicative, or because there were no changes between the NEB Reports regarding these issues. The EAO sought to ensure that the effort made by engaged parties and the public was recognized, and that their valuable input would be considered by the appropriate agencies responsible for addressing their concerns. The EAO outlined several recommendations to the federal government related to these concerns.

We are aware that the TMX Project is a federally regulated project and the CER has primary regulatory responsibility for the Project: it has the primary responsibility to ensure that the TMX Project is developed, constructed, and operated in a manner that is safe and secure, and protects people, property, and the environment. Nevertheless, within the criteria set out above, and consistent with the direction from the BCCA, we are doing everything within our jurisdiction to strongly protect the interests of Indigenous nations, British Columbians and our environment with respect to the potential impacts of the TMX Project. The EAO received submissions from many parties, including Indigenous nations, that called for additional work in the marine environment. We agree with these legitimate concerns, including engaging with Indigenous nations on marine harvesting impacts, effects of marine vessel wake, the National Anchorage Strategy and federal marine oil spill compensation regime updates, Indigenous engagement in federal marine spill response planning, Indigenous involvement in the Environment Canada and Climate Change Recovery Working Group, WCMRC oversight, and formal commitments to Indigenous engagement by the WCMRC. As the Province relies on federal authority and leadership to regulate, support, and oversee response to ship-source marine spills in the marine environment and marine transportation in Canadian waters and Canadian vessels, we felt it was important to raise these recommendations with the federal government. We agree with the EAO's views that there are existing regulatory regimes in place and programs being implemented by the Government of Canada for most of the concerns raised with the EAO during the reconsideration process and also agree that recommended new or amended conditions should avoid duplicating these efforts that are already underway.

We agree with the recommendations proposed by the EAO, and we will communicate them to the federal government, strongly urging the Government of Canada to carefully consider these important recommendations, and to take action on them, and any other actions, as soon as possible, so that the TMX Project is operated in as safe a manner as possible to protect the interests of Indigenous nations and all British Columbians. Our government understands British Columbians' strong desire to keep the Province and citizens protected from negative environmental, social, economic, health and heritage/cultural impacts that can flow from a spill of diluted bitumen. We will continue to press and work with the federal government to ensure that strong protections that are within its jurisdiction are put in place and enforced.

Separate Submissions

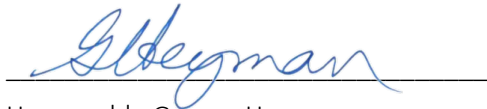
We received letters from Squamish Nation, Tsleil-Waututh Nation, and the City of Vancouver regarding the reconsideration process and conclusions. Squamish Nation and Tsleil-Waututh Nation stated that the reconsideration process adopted was too narrow an interpretation of the BCCA decisions and that this scope reflected an inefficient division of responsibility between the federal and provincial governments. Squamish Nation and Tsleil-Waututh Nation both said that the Project will adversely impact their rights. Squamish Nation urged us to consider proposed conditions and recommendations, including a yearly audit. Tsleil-Waututh Nation and the City of Vancouver urged us to consider more specific recommendations to the federal government, as well as additional proposed conditions. Each of these parties expressed their lack of consent for the Project.

We understand that Squamish Nation, Tsleil-Waututh Nation, and the City of Vancouver are supportive of the changes proposed by the EAO but remain of the view that additional conditions should be added to the EA Certificate and additional recommendations be made to the federal government. We have read the EAO's Reconsideration Report and these separate submissions, and, as described above, agree with the criteria and the EAO's application of the criteria in reviewing concerns raised through the process. We understand that these parties were closely engaged on the reconsideration process and that the concerns they raised were thoroughly considered by the EAO. The EAO advised us that several of the recommendations to the federal government originated from the conditions proposed by Squamish Nation, Tsleil-Waututh Nation, and the City of Vancouver. It is our view that the changes to the EA Certificate and recommendations to government reflect the criteria developed by the EAO to review the NEB reports and are responsive to and guided by the BCCA decisions.

CONCLUSIONS

With respect to the matters relevant to our decision, we agree with the conclusions reached by EAO staff in their Reconsideration Report. Having considered the EAO's Reconsideration Report, the review process undertaken, the engagement conducted by the EAO with Indigenous nations, local governments, Trans Mountain, provincial and federal agencies, the public, and other parties, and the existing regulatory frameworks and initiatives, we decided to make changes to the EAC in accordance with the recommendations as set out by the EAO.

Finally, we would like to extend our thanks to the staff of the EAO for their work on this challenging matter.



Honourable George Heyman

Minister of Environment & Climate Change Strategy



Honourable Bruce Ralston

Minister of Energy, Mines and Low Carbon Innovation