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Ms. Sheri Young
Secretary of the Board
National Energy Board
Suite 210, 517 Tenth Avenue SW
Calgary, AB T2R 0A8

October 3, 2018

Dear Ms. Young,

Re: Hearing Order MH-052-2018, File OF-Fac-Oil-T260-2013-03 59

In response to your letter of 26 September 2018, I wish to confirm that I request the continuation of my intervenor status in the matter of the Trans Mountain Pipeline Expansion Project. Please confirm the terms of participation that will be accorded to participants in this next phase as soon as possible. Due to the compressed time frame to respond by October 3rd, I reserve the right to submit additional points if necessary.

I submit that the list of issues for reconsideration must be broader than the options set out in your letter. I suggest that the following issues be added:

1. **Climate impacts:**

While the upstream and downstream climate impacts of the project did not form part of the Federal Court of Appeal decision of August 30, 2018, it is clearly unacceptable for the NEB to ignore these effects after the Board specified both upstream and downstream effects in the list of issues it would review with respect to Energy East. After receiving more than 800 submissions during the public comment period, the Board correctly stated in a letter dated August 23, 2017 that consideration of GHG emissions is in the public interest. The letter makes clear that, in addition to the federal government's directive to assess upstream GHG emissions, the Board felt that other indirect emissions were also of concern, not just "downstream GHG emissions," but also “emissions resulting from third-party electricity generation.” The public’s interest in climate impacts is no different whether the pipeline in question goes east or goes west. If upstream *and* downstream emissions were relevant in the NEB’s review of Energy East, Trans Mountain and the federal government owning and operating that pipeline should be held to at least the same standard as a private-sector investor.

2. **The requirement to correct errors in the record:**

The record is so flawed that the Board cannot rely on earlier evidence. I wish to support the following points submitted to the Board by former intervenor Robyn Allan:

Known material errors in the Report must be corrected in a timely fashion since the Governor in Council may return the Board’s recommendation and certificate conditions back to the NEB for reconsideration. A failure to correct the errors in the Report and address how those errors successively compromise the Report’s accuracy, credibility and reliability, means the Report will remain fundamentally flawed even should the Board incorporate the impact of Project-related marine traffic under CEAA 2012 into its Report. Regardless of whether the Board is asked by the Governor in Council to reconsider its recommendation and conditions and resubmit a Report, the existing Report errors need to be addressed in a fulsome manner to set the public record straight. The material errors in the Report include:

1. The statement, “The capital cost of the Project is expected to be approximately $5.5 billion…”

This is incorrect. Kinder Morgan publicly announced the capital cost of the Project had increased to $6.8 billion on October 21, 2015.

Decision, Tsleil-Waututh Nation vs Canada, August 30, 2018, paragraph 201.8 Ibid., page 2839 NEB Trans Mountain Expansion Report May 2016, page xiii - xiv.10 NEB Trans Mountain Expansion Report May 2016, page 262 and 305.11 Robyn Allan, Cost of Kinder Morgan’s Trans Mountain Expansion Quietly Rises to $6.8 billion, 12 National Observer, November 17, 2015. Page of 9

The Board had seven months from the time Trans Mountain increased its budget to delivering its Report to Cabinet. The Board had every opportunity to ensure it had correct information upon which to base its Report in order for Cabinet to understand the implications of a $6.8 billion Project cost. Kinder Morgan’s announcement was made prior to the closure of the Hearing record and thus the Board could have, and should have, ensured that Trans Mountain file an updated capital cost for the Project along with an amendment to any and all evidence that relied on the outdated capital cost estimate. The Board did not. The capital cost estimate had serious implications for the Project’s financial and commercial viability, its economic impact, and whether the shippers could exercise termination rights in their Firm Service Agreements (FSAs). The Board was supposed to consider these issues. It did not.

By pretending in its Report that “the capital cost of the Project is expected to be approximately $5.5 billion” when it was not, the Board could skirt consideration of the implications of a higher capital cost on its List of Issues. Cabinet was not advised by the NEB as to what impact a 25 per cent increase in Project cost might have on its balancing of benefits and burdens because the NEB never considered it. The impact is not trivial. Trans Mountain filed an assessment of benefits from the Project premised on the

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notion that expanded capacity would impact the discount of Canadian crude relative to West Texas Intermediate (WTI). Trans Mountain's assessment is commonly referred to as a netback analysis. The netback analysis relies on Project-related toll rates. Toll rates are determined by the capital cost of the Project. Trans Mountain filed its netback evidence based on a Project capital cost budget of $5.4 billion on October 28, 2015 after it publicly announced its Project cost had increased to $6.8 billion. The final evidence was outdated before it was submitted on the Hearing record. The Report says, "Muse (Trans Mountain's consultant) estimated that…higher prices for Western Canadian crude oil production would provide total producer benefits of $73.5 billion…for the forecast period 2017–2037. Muse said factors that could reduce the "netback" differential (included)…higher Project tolls."

NEB Trans Mountain Expansion Report May 2016, page 409.13 Trans Mountain, Exhibit B431-2, Muse Market Prospects and Benefits Analysis Final, October 14 28, 2015. NEB Trans Mountain Expansion Report May 2016, page 307.15 Page of 10 17

The Board understood that Trans Mountain's benefits were compromised by higher tolls and yet, the Board did not ensure the evidence placed before it reflected toll rates that, at the time, were known to be much higher than Trans Mountain's evidence relied upon. According to netback methodology, if Project cost rises high enough this could result in a net loss to Canadian oil producers. Typically, major projects face increased capital costs as they progress. Certainly, this is the case with Trans Mountain's expansion whose Project costs were north of $9 billion before its certificate was nullified. Nowhere in the Report did the Board alert Cabinet to the potential negative economic impact increasing Project cost would be expected to have on oil producers and projected revenue benefits tabled by Trans Mountain. Had Trans Mountain been required to redo its netback assessment once capital costs increased, the Board would also have had evidence on the record available to it to alert Cabinet as to how sensitive the benefits estimates are to capital cost changes. In this way, Cabinet would have been prepared to evaluate the negative impact on producer benefits when capital costs rose to $7.4 billion in February 2017, as well as when they rose further prior to the government's purchase of the Project from Kinder Morgan. Simply put, under a $7.4 billion capital cost, Trans Mountain's netback (price lift) benefits are effectively overwhelmed by increased toll charges. There is no "likely reduction in the discount" now that Project costs have risen higher. Current capital costs are irrelevant to this request to the Board to correct errors in its May 2016 Report. What is relevant is that by ignoring the first major jump in capital costs—when it should have incorporated them into its review—the Board not only misrepresented the facts, it did a serious disservice to Cabinet. It is incumbent on the Board to correct the misstatement in its Report regarding the $5.5 billion figure and amend any and all discussion, views of the Board and recommendations impacted by a reliance on this error.

2. The statement, "The existing WMT typically loads five tankers per month."

Westridge Marine Terminal (WMT) did not typically load five tankers per month—it was half that number. During the period of the NEB review, Westridge typically loaded two and a half tankers a month. For the five year period 2013 - 2017, Westridge typically loaded two tankers a month. For the five years prior to Trans Mountain filing its application Westridge did not typically load five tankers a month. Publicly available statistics can be provided to the NEB upon request. However, since Trans Mountain knows the number of Panamax and Aframax loaded at its dock by month, volume of the cargo, and grade of cargo, it is unclear why the Board did not request accurate figures directly from Trans Mountain at

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any point during its public interest review. The Board said it assessed Project-related tanker traffic under the NEB Act. This means, by definition, incremental tanker traffic. In order for this assessment to be remotely reliable, the base upon which the increment relies upon, must be accurate. It is not. The Board was advised during its review that Trans Mountain's claim of five tankers a month was exaggerated and suspect. Yet, when the Board was provided with an opportunity to require that Trans Mountain file accurate figures instead of ensuring Trans Mountain did so, the Board sided with Trans Mountain's argument for refusing to supply the information. Trans Mountain claimed that a request for accurate tanker traffic figures was a "fishing expedition". The Board agreed.

All Project-tanker related risk assessments that the Board relied upon are fundamentally flawed because the Board did not test Trans Mountain's tanker traffic claim and ensure the baseline from which incremental risk was measured was accurate. This represents an exponential error imbedded in the tanker risk assessment reports filed at the Hearing, and upon which the Board relied. Not only does the Board need to correct its statement respecting typical tanker traffic in its Report, it needs to correct every consideration it made that accepted this incorrect figure. This issue becomes more important if the Board is asked by the Governor in Council to reconsider Project-related tanker traffic. The Board cannot rely on any of the tanker traffic risk evidence filed with it because that evidence is not based on an accurate and reliable estimate of incremental tanker traffic.

> ***3. (a) The statement that, "As a result of an open season process, 13 companies entered into binding 15 to 20 year transportation service agreements with Trans Mountain for a total of 112 300 m3/d (707,500 b/d), or approximately 80 per cent of the expanded system's nominal capacity. The agreements provide for a sharing of risks between Trans Mountain and its shippers during the development stage, including the construction of the Project, and the longterm operations of the pipeline system.…"***
>
> *[Exhibit B432-2, Burnaby Motion to Compel Full and Adequate Answers, A4U9S1, November 17 2, 2015. Page of 12 17]*

The statement is incorrect. The agreements that provide for a sharing of risks between Trans Mountain and its shippers during the development stage, including the construction of the Project, are not the transportation service agreements (TSAs), they are the firm service agreements (FSAs).

The TSAs are agreements that pertain to the long term operations of the pipeline system. The Board reviewed the TSAs and FSAs as part of the Part IV Toll Methodology Hearing, not the Hearing that resulted in the Report. The Board never asked Trans Mountain to file the contracts with shippers so it could satisfy for itself their terms and conditions and responsibly discuss them in its Report. This may be why the Report suggests that there is only one contract—the TSAs—that cover the relevant agreements with shippers, when in fact, there are two. In effect, the Board relied on hearsay when it made representations to Cabinet about the firmness of the contracts.

(b) The statement that, "the Board placed significant weight on the existence of long-term firm transportation service agreements (TSA) with shippers in determining whether the facilities are needed and likely to be well utilized over their economic life."

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Based on 3(a) above, the Board does not appear to be aware that there are two distinct contracts that are relevant to shipper commitments and that in order to determine the "firmness" of the TSAs, the termination clauses in the FSAs must first be understood. That is, the Board did not alert Cabinet that toll rates triggered by a CPCN capital cost budget could have caused the Project to fail in spite of federal approval.

NEB Trans Mountain Expansion Report May 2016, page 300.18 Final Form of the FSA, March 27, 2012, Exhibit B15-22, Part IV Toll Methodology Hearing, 19 NEB. Final Form of the TSA, February 13, 2012, Exhibit B15-23, Part IV Toll Methodology Hearing, 20 NEB. Page of 13 17

Under Clauses 3.2(b) and 5.4(d) of the FSA, the shippers have a right to exit the project after the CPCN is issued and the shippers have been provided a CPCN budget.

Not only did the Board fail to require Trans Mountain or the shippers to file the contracts at the public interest review, neither Trans Mountain or the shippers alerted the Board to the fact that shippers had an opportunity to exit the contracts—an opportunity that arose for them when Trans Mountain's capital cost rose to $6.8 billion. After receipt of the CPCN budget some shippers terminated their agreement. Other shippers committed to the capacity they freed up. Subsequently, the shippers no longer had an opportunity to terminate the FSA and were bound to proceed with the Project. That's when their commitments became firm—in early 2017. However, since the CPCN issued by the Board has been quashed, the shippers once again have an opportunity to exit the Project. Under the terms of the FSAs, if a new certificate is issued, a new CPCN budget needs to be prepared. If this CPCN Project budget is over $6.8 billion (which in all likelihood it will be since capital costs are now over $9 billion), the 13 shippers will be in a position to cancel their agreement. Had the Board correctly represented the contracts and termination opportunities in its Report, Cabinet would be aware that under the terms of the FSAs, the shippers may cause the Project to fail even if a new CPCN is issued. It is imperative that the Report relay to Cabinet what is included in both the TSAs and the FSAs and how the contracts with shippers were not firm when the Report was written because shippers had termination rights available to them upon receipt of the CPCN capital cost budget. It is also important to note that under the terms of the FSA, shippers are bound to support the Project through regulatory approval, and thus cannot signal a willingness to exit. That is, just because shippers do not say they want to terminate their agreements and walk from the Project—as Kinder Morgan has—does not mean they do not want to—as Kinder Morgan did. Current higher capital costs, and the toll rates they trigger under the existing FSAs, can be expected to render the Project commercially unviable. It is important that the Board get a workable understanding of the FSAs and include this in the Report so that these potential Project failure features are understood on a go forward basis.

Final Form of the FSA, March 27, 2012, Exhibit B15-22, Part IV Toll Methodology Hearing, 21 NEB. Page of 14 17

> ***4. The Project definition statement that Project means: "The Trans Mountain Expansion Project in all its components, including pipeline construction, reactivation, and changes to operating conditions resulting in operation as Line 1 and Line 2; deactivation, reactivation, construction and operation of or at the respective pump stations; decommissioning of 2 tanks and construction and expanded operation at the existing Edmonton, Sumas and Burnaby Terminals and the Westridge Marine Terminal; construction and operation of the new delivery***

> ***pipelines; and all infrastructure. The Project does not include Project related marine shipping."*** *(emphasis added)*

This is not consistent with the definition of Project used during the Hearing. If the NEB intended that the Project definition in its Report explicitly reflect the definition of Project relied on at the Hearing then the definition in the Report needs to be amended to clearly indicate such. As the definition currently stands (see underlined portions) it might be interpreted to suggest operation of Line 1, aggregate storage capacity, and all facilities that existed before the expansion are considered part of the Project such that 'Project' appears to be synonymous with the entire Trans Mountain system, post expansion. This was not the definition relied upon by the Board at the Hearing. I wrote to NEB Chair Peter Watson on August 25, 2017, seeking confirmation that the definition of Project relied on during the Hearing was the same as the definition in the Report and he was unable to provide assurance that it was. I raised this issue 23 in relation to Condition 121 which requires that, "Trans Mountain must file with the NEB for approval, at least 6 months prior to applying for leave to open Line 2, a Financial Assurances Plan" and that "Trans Mountain's Financial Assurances Plan must provide a total coverage, for the Project as a whole, of $1.1 billion." Obviously, if Project as a whole means only the expansion as was considered at the NEB review then, this it is clear an aggregate of $2.1 billion in financial assurances is required once Line 2 is operational—$1 billion under the Pipeline Safety Act for the legacy line and $1.1 billion for the expansion. I was concerned at that time that unless the definition of Project was clarified such that there is no question that the intended aggregate amount of financial assurances for project related (terrestrial and dock) spills is $2.1 billion, Trans Mountain would seek to get approval for an aggregate amount of only $1.1 billion based on the revised Project definition in the Report. Clearly this is not in the public interest and

NEB Trans Mountain Expansion Report May 2016, page 415.22 Robyn Allan Letter to Peter Watson, August 25, 2017, A5T5A0.23

not what the Board intended during its review when it determined an additional $1.1 billion in financial assurances is required to address the terrestrial and dock related environmental risk from the new facilities. The NEB excluded from its review assessment the impact and risk of the sixty-seven year old legacy line, existing terminals, storage tanks, pump stations and other infrastructure. What the Board considered was the incremental impact of new facilities, treating the expansion as if it is not part of a larger, and much more vulnerable system—as if it was being constructed on a stand-lane basis. It is a well-known aspect of prudent risk analysis that aggregate risk—the risk of the entire system everywhere along that system—is the relevant scope, not a selfserving limitation. However that is what the Board's terrestrial and Westridge dock risk assessments reflect. This dangerous limitation in scope is how, for example, Trans Mountain successfully argued that its existing Emergency Management Plan (EMP) documents were "not relevant to the Board's consideration of the Project...Trans Mountain notes that although BC considers the EMP documents for the existing system to be relevant for the Board in considering this Application, the Board itself has never taken that position."

The Board agreed. "The EMP (Emergency Management Plan) documents relate to the existing facilities that are not the subject of the present Project application...The safe operation of the existing Line 1 facilities under current operating conditions is out of scope for this hearing." If the Board asserts that the definition of the Project is synonymous with the system post-expansion, then the Board must request that *the proponent and all intervenors who submitted risk assessment evidence based on the original definition of the Project redo that evidence to incorporate the new and broader definition of the entire system. Then the Board will need to reconsider that evidence in its balancing of benefits and burdens. Clearly, the definition of Project in the Report needs to be clarified to unequivocally confirm whether the definition means the limited scope the Board relied upon in its review or the expanded definition in its Report which suggests the entire system, once expanded.*

> ***5. The statement, "The TMX Shippers also said that it is in the best interest of Canadians to maximize the prices received for Canadian crude oil production."*** *24*

NEB Trans Mountain Expansion Report May 2016, page 294.24

The TMX shippers never said this.

TMX shipper evidence at no time mentions Canadians, the public interest (best or otherwise) or that the Project will maximize prices received for Canadian crude oil. The shipper evidence, in its entirety, dealt with their corporate private interest to secure existing spot capacity under long term arrangements and opportunity for expanded market access. 26 The TMX shippers, in final written argument, said "The evidence shows that the expansion is required to provide Canadian producers with market diversification and optionality and to provide refined product markets in British Columbia and refineries in Washington State with increased access to western Canadian supply." 27

Clearly, the numerous errors in the factual record as enumerated by Ms. Allan make it abundantly clear that the reconsideration exercise will be fatally flawed if the record is not completely corrected.

3. Requirement to fully apply section 79 of the SARA:

Moving to the substantive matters, there should be no question that there is a requirement to fully apply section 79 of the *Species at Risk Act.* I submit that the Board has entirely misunderstood the decision of the Federal Court of Appeal. It is inappropriate to seek public comments about whether project-related marine shipping is "incidental" to the Project. It is correct to say that, as the court writes at para 770in its Trans Mountain decision:

> *Specifically, the Board ought to reconsider on a principled basis whether Project-related shipping is incidental to the Project, the application of section 79 of the Species at Risk Act to Project-related shipping, the Board's environmental assessment of the Project in the light of the Project's definition, the Board's recommendation under subsection 29(1) of the Canadian Environmental Assessment Act, 2012 and any other matter the Governor in Council should consider appropriate.*

But that determination by the Board is guided, not by public comment, but by the clear findings of the court in paragraphs 764- 766:

> *In these reasons I have concluded that the Board failed to comply with its statutory obligation to scope and assess the Project so as to provide the Governor in Council with a "report" that*

permitted the Governor in Council to make its decision whether to approve the Project. The Board unjustifiably excluded Project-related shipping from the Project's definition.

This exclusion of Project-related shipping from the Project's definition permitted the Board to conclude that section 79 of the Species at Risk Act did not apply to its consideration of the effects of Project-related shipping. Having concluded that section 79 did not apply, the Board was then able to conclude that, notwithstanding its conclusion that the operation of Project-related vessels is likely to result in significant adverse effects to the Southern resident killer whale, the Project was not likely to cause significant adverse environmental effects.

This finding—that the Project was not likely to cause significant adverse environmental effects—was central to its report. ***The unjustified failure to assess the effects of Project-related shipping under the Canadian Environmental Assessment Act, 2012 and the resulting flawed conclusion about the environmental effects of the Project was critical to the decision of the Governor in Council. With such a flawed report before it, the Governor in Council could not legally make the kind of assessment of the Project's environmental effects and the public interest that the legislation requires.***

Clearly, the Federal Court of Appeal has given the NEB and the Governor in Council explicit notice that the shipping impacts created by the expansion of the Trans Mountain pipeline *are* an integral part of the project and that the NEB *must* fully consider section 79 of the *Species at Risk Act*:

79 (1) *Every person who is required by or under an Act of Parliament to ensure that an assessment of the environmental effects of a project is conducted, and every authority who makes a determination under paragraph 67(a) or (b) of the Canadian Environmental Assessment Act, 2012 in relation to a project, must, without delay, notify the competent minister or ministers in writing of the project if it is likely to affect a listed wildlife species or its critical habitat.*

(2) *The person must identify the adverse effects of the project on the listed wildlife species and its critical habitat and, if the project is carried out, must ensure that measures are taken to avoid or lessen those effects and to monitor them. The measures must be taken in a way that is consistent with any applicable recovery strategy and action plans.*

(3) *The following definitions apply in this section.*

person includes an association, an organization, a federal authority as defined in subsection ***2(1)*** *of the <u>Canadian Environmental Assessment Act, 2012</u>, and any body that is set out in Schedule 3 to that Act.*

project means

(a) *a designated project as defined in subsection 2(1) of the Canadian Environmental Assessment Act, 2012 or a project as defined in section 66 of that Act;*

(b) *a project as defined in subsection 2(1) of the Yukon Environmental and Socio-economic Assessment Act; or*

(c) *a development as defined in subsection 111(1) of the Mackenzie Valley Resource Management Act.*

All components of the marine environment must be fully reviewed in terms of the impact of the pipeline expansion. This must include noise, risk of direct strikes as well as the high likelihood of a spill of dilbit. As with climate impacts, the National Energy Board included in its list of issues to consider for its review of Energy East the environmental effects of marine shipping. The Board agreed in its letter on 23 August 2017 that these effects were in the public interest. Again, Trans Mountain must be reconsidered with at least the same level of scrutiny.

The non-peer-reviewed, weak analysis conducted by the former pipeline owner (the Gainford Alberta study) must be rejected. In its place there must be a proper review, such as the Royal Society of Canada's report on oil spills.

I also wish to underscore the necessity that this revised process include, fully and respectfully, the views and concerns of Indigenous nations.

Respectfully submitted,

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Member of Parliament
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