



File OF-Fac-Oil-T260-2013-03 02
23 July 2014

Ms. Frances J. Connell
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Mr. Tong Pil Min
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Dear Ms. Connell and Mr. Min:

**Hearing Order OH-001-2014
Trans Mountain Pipeline ULC (Trans Mountain)
Application for the Trans Mountain Expansion Project (Project)
Motions requesting that the Board include in the List of Issues the environmental
and socio-economic effects associated with upstream activities and downstream use
Ruling No. 25**

The National Energy Board (Board or NEB) has received motions from the [Parents from Cameron Elementary School Burnaby](#) (Parents) and the [City of Vancouver](#) (Vancouver) requesting that the OH-001-2014 List of Issues be expanded to include environmental and socio-economic effects associated with upstream activities, including development of the oil sands (upstream effects) and the downstream use of the oil intended to be shipped on the pipeline (downstream effects).

On 30 May 2014, the Board [indicated](#) that it intended to rule on both motions together.

Although the motions requested that the Board consider all environmental and socio-economic effects of upstream activities and of all downstream uses, they focused on the effects of greenhouse gas (GHG) emissions from the production of oil sourced from the oil sands that would be shipped by the Project and from the end use of that oil.

Trans Mountain filed a [response](#) to the Vancouver motion on 26 May 2014 and Vancouver filed a [reply](#) on 4 June 2014. In the Board's 30 May 2014 letter, it noted that the 10-day period to file comments had passed, in accordance with the [National Energy Board Rules of Practice and Procedure, 1995](#). The following intervenors made submissions supporting the Vancouver motion prior to the 10-day period elapsing:

- Cowichan Tribes;
- Andrew Weaver, MLA;

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- Robyn Allan;
- Living Oceans Society and Raincoast Conservation Foundation;
- Township of Langley;
- Squamish Nation;
- Calvin Taplay;
- Tsawout First Nation;
- Upper Nicola Band; and
- City of Burnaby.

The Canadian Association of Petroleum Producers (CAPP) filed comments on 26 June 2014 on the Vancouver motion with its submission on another motion. On 27 June 2014, Vancouver [requested](#) that the Board either strike from the record CAPP's late submissions on Vancouver's motion or, alternatively, allow Vancouver a further reply. The Board confirms that it has not considered CAPP's comments, just as it has not considered other intervenors' comments filed after the 10-day period.

Intervenors supporting the Vancouver motion asked the Board to consider environmental effects such as:

- effects of upstream production on caribou (Living Oceans Society and Raincoast Conservation Foundation);
- effects of climate change on Fraser River sockeye salmon and on the Aboriginal right to fish (Cowichan Tribes and Squamish Nation);
- the carbon footprint of oil sands development and the effects of water use in producing oil (Calvin Taplay); and
- effects of all marine shipping, not just within the 12-nautical-mile limit (Ms. Robyn Allan).

Vancouver argued that provisions of the [Canadian Environmental Assessment Act, 2012](#) (CEAA 2012) and the [National Energy Board Act](#) (NEB Act) require the Board to consider the upstream and downstream effects.

CEAA 2012

Vancouver submits that subsection 5(1) of the CEAA 2012 obligates the Board to assess possible changes to the global atmosphere as a result of the Project. The Board agrees and will consider GHG emissions from Project construction and operation. However, this provision does not require the Board to assess upstream and downstream effects.

Vancouver focuses more particularly on paragraph 5(2)(a) of the CEAA 2012, which requires the Board to take into account changes in the environment that are "directly linked or necessarily incidental to" the Board's exercise of its functions "that would permit the carrying out, in whole or in part" of the Project.

The Board notes that, under paragraph 5(2)(a), changes in the environment might include direct effects of the Project, as well as changes related to other physical facilities and activities necessary to enable the Project to proceed. These are described in the Board's Filing Manual (Filing Manual) as "including directly-related ancillary facilities, such as access roads including temporary and permanent bridge crossings, construction camps, or pipe lay-up and storage areas, marine terminals and loading facilities."¹

While there is a connection between the Board's possible recommendation that the Project be approved and upstream production, in that the Project would transport a portion of that production, the Board is not persuaded that the effects from that production are directly linked or necessarily incidental to the Board's report to the Governor in Council under the NEB Act. The Project does not include upstream production and is not dependent on any particular upstream development and; therefore, any link to environmental changes caused by such upstream production is indirect and is not necessarily incidental to Project approval.

In addition, no particular upstream development is dependent on the Project. This is evident from the fact that, for a number of years, the existing Trans Mountain pipeline has not been able to transport all the oil that shippers have been prepared to ship. As a result, those shippers have only been able to ship a portion of their oil. This apportionment has existed for many years, during which time oil sands production has continued to increase with oil being carried on other pipelines, by rail², and by truck to meet the demand for it. It is not the Board's recommendation that could directly or necessarily cause growth in oil sands development with its accompanying effects. It may contribute to that development, but the degree of that contribution is dependent on demand and other transportation options available now or in the future.

Oil sands development is subject to provincial and federal environmental assessment processes. Duplication of environmental assessments is discouraged by the following purposes of the CEAA 2012 included in subsection 4(1):

- (c) to promote cooperation and coordinated action between federal and provincial governments with respect to environmental assessments; and
- (f) to ensure that an environmental assessment is completed in a timely manner.

Oil sands projects, including expansions, have and continue to be subject to provincial environmental assessment or combined provincial and federal assessment.³ This supports the conclusion that the CEAA 2012 does not require the Board to include in its environmental assessment activities that have been so assessed.

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¹ See the [Filing Manual](#), Chapter 4, Section A.2.3, p. 4A-19 "The Applicant's Role in Scoping."

² Vancouver argues that transportation by rail will not be possible without the 20 new storage tanks included in the Project. Rail transportation has increased markedly without those tanks and can be expected to do so in the future. There is no reason to believe that these storage tanks would be required to ship oil by rail from the oil sands.

³ See, for example, [Regulations Designating Physical Activities](#) (SOR/2012-147), Schedule sections 8, 9, 14, 15.

In a similar fashion, paragraph 5(2)(a) of the CEAA 2012 does not require the Board to consider downstream effects from the end use of oil shipped by the Project. The Project does not include downstream use and is not tied to, or dependent on, any particular use in any particular destination. Oil, whether from Canada or from elsewhere in the world, will go to where the demand is, whether or not the Project proceeds. The effects of end use are not directly linked or necessarily incidental to the Board's regulatory process regarding the Project.

The Board agrees with Trans Mountain that downstream effects are more effectively assessed and regulated by the jurisdictions where the use occurs.

Accordingly, the Board is of the view that paragraph 5(2)(a) of the CEAA 2012 does not require the Board to consider upstream or downstream effects as proposed by the motions.

Vancouver states that the purposes of the CEAA 2012, such as avoiding adverse environmental effects through a precautionary approach, encouraging sustainable development, and encouraging study of regional cumulative environmental effects in a region, suggest that the Board should consider upstream and downstream effects. These purposes do not require the Board to take into account effects that are not directly linked or necessarily incidental to the Board's process and that are assessed by other regulatory bodies.

NEB Act

Under the NEB Act, the Board must have regard to all considerations that appear to it to be both directly related to the Project and relevant.⁴

As noted in the Filing Manual, in evaluating whether to include other physical facilities and activities directly related to a proposed project, but which may be outside of the Board's regulatory jurisdiction, the Board may consider factors such as:

- Is the physical facility or activity within the control of the applicant for the primary project being applied for under the NEB Act?
- Are mitigation measures and follow-up activities enforceable by the Board, another federal or provincial department or agency, or person or body that will ensure implementation?
- Are effects from the other physical facilities and activities relevant to the Board's decision or recommendation under the NEB Act?⁵

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⁴ NEB Act subsection 52(2)

⁵ Filing Manual, Chapter 4, Section A.2.3, p. 4A-20 "Guidance – Scope of the Project."

The Board has addressed upstream and downstream effects in the Filing Manual in these terms:

The NEB's project assessment involves considering physical works and activities directly related to the proposed project, such as its construction and operations, and related physical works or undertakings. Since upstream and downstream facilities are generally not part of project application, their environmental and socio-economic effects are also generally not considered.

However, the Board may in some cases consider the environmental and socio-economic effects in Canada of upstream or downstream facilities where there is a necessary connection between those facilities and the project before the Board. Some examples where the Board has decided to consider the environmental effects of upstream or downstream facilities as part of its NEB Act assessment include the Board's consideration of a U.S. power plant related to the Sumas Energy 2, Inc. project [see Ruling on the Environmental Effects Motion] and of certain provincially-regulated power plants related to the GSX Canada Pipeline Project.⁶

The Board does not consider that there is a necessary connection between the Project and upstream production or downstream uses.

Vancouver and some supporters note that the Board has indicated that it will look at supply, markets, and economic feasibility. They argue that these relate to upstream and downstream matters and that, if upstream and downstream environmental effects are not considered, then these upstream and downstream economic effects should also not be considered.

Paragraphs 52(2)(a), (b), and (c) of the NEB Act specifically allow the Board to have regard to

- (a) the availability of oil...to the pipeline;
- (b) the existence of markets, actual or potential;
- (c) the economic feasibility of the pipeline...

These factors are directly relevant to the need for, and the continued use of, the Project. The Filing Manual describes the range of required information to address these issues.⁷ This information is necessary to allow the Board to be confident that the pipeline will be sufficiently used over its lifetime. The Board may consider reasonable regulatory- or market-related evidence as relevant if it demonstrates stability or change that could notably increase or decrease confidence in the application's long-term supply, markets, and economic feasibility outlooks.

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⁶ Filing Manual, Chapter 4, Section A.2.3, p. 4A-21 "FYI – Example."

⁷ Filing Manual, Chapter 4, Section A.3, p. 4A-61 – 4A-67 "Economics."

However, a full environmental and socio-economic assessment of upstream and downstream effects is not required or relevant. Such an assessment would have to consider effects on all the relevant biophysical and socio-economic elements listed in the Filing Manual for each potential upstream activity and downstream use, including determining the adequacy of mitigation for both upstream production processes and downstream end use. In addition, assessing effects on most of those elements would be dependent on the particular upstream activity or downstream use, which cannot be known. This would go well beyond the evidence and argument directly relevant to supply, markets, and economic feasibility.

The Board acknowledges that the environmental and socio-economic effects of GHG emissions are different from other effects because they are less dependent on the particular location or timing of the activity that produces them. However, considering those effects without also considering all other effects, both positive and negative, would suffer the same problem raised in the motions and some letters of support; that is, considering one cost or benefit of upstream or downstream activities in isolation of other costs and benefits.

The Board has the authority to determine what is relevant to it in fulfilling its mandate under the NEB Act.⁸ In the circumstances of this hearing, the Board does not consider that upstream and downstream effects, including those of GHG emissions, are relevant. The Board is mindful that the environmental and socio-economic effects of petroleum exploration and production activities in Canada are assessed in other federal and provincial processes that involve those conducting those activities, and that the end use of oil is managed by the jurisdiction within which that use occurs.

For the above reasons, the Board dismisses the motions.

Yours truly,

Original signed by

Sheri Young
Secretary to the Board

c.c. Trans Mountain and all intervenors

⁸ NEB Act subsection 52(2)