

File OF-Fac-Oil-T260-2013-03 59

January 21, 2019

National Energy Board  
517 Tenth Avenue S.W.  
Calgary, AB, T2P 0A8

Attn: Ms. Sheri Young, Secretary of the Board

**VIA ELECTRONIC SUBMISSION**

Dear Ms. Young:

Re: Trans Mountain Pipeline ULC Application for the Trans Mountain Expansion Project, National Energy Board Reconsideration of aspects of its Recommendation Report as directed by Order in Council P.C. 2018-117, NEB File OF-Fac-Oil-T260-2013-03 59, Hearing Order MH-052-2018

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**NOTICE OF APPLICATION of the Intervenor Stand.earth**

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**I. Relief sought on this application**

1. The intervenor, Stand.earth, respectfully seeks the following relief on this Notice of Application:

That the National Energy Board (the “Board”):

- a. set aside Ruling No. 25 (dated 23 July 2014) and the October 12, 2018 Ruling, Appendix 2 (the “October 12, 2018 Ruling”);
- b. meaningfully consider the general impact (up and downstream) the Trans Mountain Expansion Project (the “Project”), if approved, would have on greenhouse gas (“GHG”) emissions and climate change;
- c. refrain from making any recommendations to the Governor-in-Council until such time as the Board has received and considered reliable evidence with respect to how the Project will contribute to ocean acidification, the impact of increased acidification on species at risk and the cumulative effects of the Project on the marine environment, including after meaningfully considering the impact the Project will have on GHG emissions and climate change (including up and downstream effects).

**II. Basis for the relief sought**

*The material change in circumstances: the Board must consider climate change*

2. In Ruling No. 25 (dated 23 July 2014), over an objection from the intervenor Stand.earth (formally Forest Ethics Advocacy), the Board explicitly excluded any consideration of the environmental and economic effects associated with upstream activities (including development of the oil sands (upstream effects) and downstream use of the oil intended to be shipped on the pipeline (downstream effects)). In other words, the Board refused to even consider evidence in relation to the impact of the increase in GHG emissions caused by the Project.

3. Since 2014, there has been a material change in circumstances that justify a reconsideration of Ruling No. 25, and which make it imperative that the Board consider how the Project will impact GHG emissions and therefore climate change, as the Board set out to do with respect to the proposed Energy East pipeline project.
4. The evidence Mr. Sven Biggs filed with the Board on December 5, 2018 (in particular, the *Intergovernmental Panel on Climate Change's* ("IPCC") report *Global Warming of 1.5 C* released on October 10, 2018 and appended to his affidavit) attests to this material change of circumstances and demonstrates that an assessment of the impact of the Project on climate change is essential to the determination of whether this Project is in the public interest. At para. 4 of his affidavit, Mr. Biggs states, referring to the IPCC report:

This report makes it clear that we have much less time than previously thought, as little as 12 years, to act to avoid the worst impacts of climate change. The report goes on to lay out several scenarios to avoid these impacts, none of them allow for the continued expansion of fossil fuels or fossil fuel infrastructure.

5. Indeed, the catastrophic impacts of climate change are already bearing down on us with a ferocity that has never been witnessed before. On September 10, 2018, the Secretary-General of the United Nations, António Guterres, stated that climate change is the "*defining issue of our time*" and that climate change is a "*direct existential threat*".<sup>1</sup>
6. In October 2016, the Government of Canada ratified the *Paris Protocol Agreement* and now has a legal obligation under it to achieve substantial economy-wide GHG emission reductions of 30% below 2005 levels by 2030.
7. The Board cannot possibly fulfill its mandate of determining whether the Project is in the public interest without considering whether the Project is reconcilable with Canada's international obligations to substantially reduce GHG emissions. Stand.earth respectfully submits the Project is clearly not reconcilable with these international obligations.

*The Board's consideration GHG emissions of the proposed Energy East pipeline*

8. Furthermore, on August 23, 2017, the Board issued a letter of intent to the proponent and other interested parties in the Energy East pipeline project indicating that it had expanded its review of the proposed project to include climate change impacts. The Board stated: "*given increasing public interest in GHG emissions, together with increasing governmental actions and commitments (including the federal government's stated interest in assessing upstream GHG emissions associated with major pipelines), the Board is of the view that it should also consider indirect GHG emissions in its NEB Act public interest determination for each of the projects* [emphasis added]."<sup>2</sup>
9. There is no principled reason for deviating from the Board's reasoning in Energy East and for ruling that the Energy East project is distinguishable from this Project (as the Board did in the October 12, 2018 Ruling). The exact same reasoning should apply here. It would be arbitrary and

<sup>1</sup> <https://www.un.org/sg/en/content/sg/statement/2018-09-10/secretary-generals-remarks-climate-change-delivered>

<sup>2</sup> 23 August 2017 Letter from Board: <https://apps.neb-one.gc.ca/REGDOCS/Item/View/3322976>

unreasonable for the Board not to assess the impact on up and downstream GHG emissions of this particular Project, while considering it for other similar projects.

*The Board erred in its interpretation of the CEAA*

10. In addition, the Board made a material error in section 2.8 of its October 12, 2018 Ruling by finding that the Project has no relationship to increased oil sands production, such that s. 5(1) of the *Canadian Environmental Assessment Act, 2012* (“CEAA”) does not apply. As a result, the Board held that it was not required to assess possible changes to the global atmosphere resulting from upstream or downstream effects caused by the Project.
11. As outlined in Mr. Biggs’ affidavit, recent public pronouncement, including by the Premier of Alberta and the CEO of Suncor, make it very clear that there has been, and will continue to be, significant economic impacts if the Project is not completed due to average production costs exceeding sale value of bitumen and a cessation of further or continuing inbound investment into oil sands expansion. These statements clearly attest to the impact the Project will have on increased overall production in the oil sands contrary to the Board’s statements in its October 12, 2018 Ruling, where, at page 9, it stated that upstream and downstream effects are “*not directly linked or necessarily incidental to the Project*”. Furthermore, the Board cited no evidence in support of that finding in the October 12, 2018 Ruling.
12. Stand.earth maintains that, contrary to 5(2)(a) of the *Canadian Environmental Assessment Act, CEAA 2012*, the Board’s rulings unduly limit and contravene the Board’s duty to assess possible changes to the global atmosphere as a result of the Project<sup>3</sup> and changes in the environment that are “directly linked or necessarily incidental to” the exercise of the Board’s duties or functions, including the determination of whether the Project is in the public interest.<sup>4</sup>
13. For there to be a meaningful reconsideration the Board must therefore *reconsider* and set aside Ruling No. 25 (July 23, 2014) and its October 12, 2018 Ruling, such that the Board will properly consider the impact the Project will have on climate change as it set out to do with respect to the Energy East project.

*Ocean acidification and climate change: Dr. Green’s affidavit*

14. Furthermore, in *Tsleil-waututh Nation v. Canada (AG)*, 2018 FCA 153, the Federal Court of Appeal ordered the Board to meaningfully consider the impact the Project will have on the marine environment, including the Southern resident killer whale population.<sup>5</sup> Board Order MH-052-2018 states that the Board will consider evidence and submissions on the environmental effects of Project-related marine shipping, and the significance of these effects. This includes adverse effects on species at risk, the environmental effects of malfunctions or accidents that may occur, and any cumulative environmental effects, as well as mitigation measures.
15. Stand.earth submits that the Board cannot meaningfully assess the impact of the Project on the marine environment, including species at risk, without assessing the impact of the Project on

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<sup>3</sup> As required by subsection 5(1) of the CEAA 2012

<sup>4</sup> As required by subsection 5(2)(a) of the CEAA 2012

<sup>5</sup> See para 770 *Tsleil-waututh Nation*.

ocean acidification. The Board must therefore also consider the impact climate change has had, and will continue to have, on the acidification of the ocean if a global reduction in GHG emissions, as mandated by the Paris Protocol, is not achieved.<sup>6</sup>

16. As part of the reconsideration phase, Stand.earth filed with the Board evidence from Dr. Stephanie Green (affidavit of Stephanie Green sworn December 4, 2018). Dr. Green, is the lead author of a study entitled: "*Oil Sands and the Marine Environment: current knowledge and future challenges*" (the "Report") which is appended to her affidavit. Dr. Green and her colleagues demonstrate that there are serious scientific gaps in knowledge with respect to how the Project will impact the marine environment. Dr. Green opines that to meaningfully assess the impacts of the Project, its adverse impact on climate change, and therefore on ocean acidification, must also be meaningfully considered.
17. The Report describes, *inter alia*, how climate change is increasing the acidification of our oceans at an alarming rate creating adverse impacts on the food supply of ocean species. Elevated carbon dioxide concentrations in the atmosphere lead to higher concentrations of dissolved carbon dioxide in seawater, which in turn lowers the pH level of seawater. This acidification can alter growth, survival, and reproduction of species. The Report also states that at particular risk: "*are organisms with calcareous shells or skeletons that cannot form properly in acidified seawater. These species tend to be at the base of marine food webs, amplifying the impacts throughout marine ecosystems*" (Report, p. 6).
18. Dr. Green's evidence is indispensable to the Board's reconsideration of the issues raised in *Tsleil-wututh* and reinforces the need for the Board to reconsider the October 12, 2018 Ruling to meaningfully address the general impact the Project will have on climate change, with a specific focus on ocean acidification and the impact of increased acidification on the marine environment.
19. Respectfully, it would be arbitrary and unreasonable for the Board to make a recommendation to the Governor-in-Council without first considering the impact of ocean acidification on the Southern resident killer whale population; and, it is impossible for the Board to meaningfully consider the impact of ocean acidification without assessing how the Project will exacerbate climate change.

ALL OF WHICH IS RESPECTFULLY SUBMITTED

Dated at Vancouver, British Columbia, this 21<sup>st</sup> day of January 201.

Casey L. Leggett MARTIN+ASSOCIATES, Barristers	
Counsel for the Intervenor, Stand.earth	

<sup>6</sup> Canada ratified the *Paris Protocol Agreement* in October 2016 and now has legal obligations under it. Canada's current official international pledge is to achieve economy-wide GHG emission reductions of 30% below 2005 levels by 2030.