

LETTER OF UNDERSTANDING BETWEEN THE NATIONAL ENERGY BOARD AND NATURAL RESOURCES CANADA

COMMITMENTS REGARDING INDIGENOUS ENGAGEMENT FOR THE TRANS MOUNTAIN EXPANSION PROJECT RECONSIDERATION HEARING AND PHASE III CONSULTATIONS

I. BACKGROUND

On 20 September 2018, the Governor in Council (GiC) issued an Order in Council to the National Energy Board (NEB) to reconsider certain aspects of its 19 May 2016 Recommendation Report (the 2016 NEB Report) for the Trans Mountain Expansion Project (the Project). The NEB is required to complete the Reconsideration and issue a report (the Reconsideration Report) with a recommendation on the Project to the Minister of Natural Resources by 22 February 2019.

Natural Resources Canada (NRCan) is preparing a Consultation and Accommodation Report (CAR) in advance of a final GiC decision on the Project. NRCan is also acting as the Crown Consultation Coordinator for the Project, and is implementing a whole-of-government approach, in collaboration with the National Energy Board and other Federal Authorities, to consultations with potentially impacted Indigenous groups.

II. PURPOSE

This Letter of Understanding (the Letter) describes the roles and responsibilities of NEB and NRCan as it relates to the Reconsideration Process and to consultation with Indigenous groups potentially impacted by the Project during the Reconsideration.

The commitments outlined in this Letter do not fetter the statutory powers or authorities of the signatories to this Letter.

III. ROLES AND RESPONSIBILITIES

Trans Mountain Expansion Project Reconsideration Hearing

National Energy Board

Public Hearing. The NEB held a public hearing in order to complete the reconsideration and prepare the recommendation (the Reconsideration Process). The Reconsideration Process considers any necessary changes or additions to the 2016 NEB Report in light of the inclusion of Project-related marine shipping in the “designated project” under the *Canadian Environmental Assessment Act, 2012* (CEAA 2012). This includes issues related to the factors described in paragraphs 19(1)(a) through (h) of the CEAA 2012 and in section 79 of the *Species at Risk Act*. The NEB maintains a public record for the Reconsideration Process on its REGDOCS website (the NEB Public Record). The NEB provided Process Advisors to support Indigenous and non-Indigenous Intervenor in the Reconsideration Process. The NEB published timelines for the Reconsideration Process on its website, as set out in the [Hearing Order](#) and the [revised hearing events and steps table](#).

Consultation with Indigenous groups. Through the Reconsideration Process, the NEB consulted with Indigenous groups registered as Intervenor on issues arising from the Amended Factors and Scope of the Factors for the Environmental Assessment (the Amended Scope) and the List of Issues established by the NEB as set out in the [Hearing Order](#).

The NEB enabled the participation of Indigenous Intervenor in accordance with applicable legislation and procedural fairness. Indigenous groups that intervened in the OH-001-2014 Trans Mountain Certificate Hearing at the time that the 2016 NEB Report was issued were guaranteed Intervenor status in the Reconsideration Process. Indigenous groups that did not apply to be Intervenor in the OH-001-2014 Trans Mountain Certificate Hearing were able to apply to participate in the Reconsideration Process, or could file a letter of comment. Participant funding was made available to eligible Intervenor in accordance with the Terms and Conditions of the NEB’s Participant Funding Program to support participation in the Reconsideration Process.

The Reconsideration Report will highlight the NEB’s views on the mitigation of potential impacts from Project-related marine shipping on Indigenous groups (including section 35 Aboriginal and treaty rights) that were not previously identified in the 2016 NEB Report. The NEB’s views will be based on evidence provided in the Reconsideration Process and the initial OH-001-2014 Trans Mountain Certificate Hearing. The NEB will outline how it has contributed to the discharge of the Crown’s duty to consult through its Reconsideration Report. The

Reconsideration Report will include proposed avoidance, mitigation and accommodation measures, through recommended conditions, related to the Amended Scope. The NEB sought feedback from Indigenous groups on proposed avoidance, mitigation and accommodation measures in early January 2019, requesting comments on proposed draft conditions until 22 January 2019.

Tracking of Issues/Concerns Raised by Indigenous Groups. The NEB tracked issues and concerns raised by Indigenous groups during the Reconsideration Process based on all evidence filed by Intervenor on the record relating to the Amended Scope and List of Issues. Information on the issues tracked through the Reconsideration Process are organized by: Concern/Issue Raised; Group(s) Raising the Concern; Proponent Response; NEB Response (including potential recommended conditions and other recommendations to government, and any applicable regulatory and legislative requirements); Concordance/Reference within the Report; and any Federal Authority response.

The tracked issues will be provided as an Annex to the Reconsideration Report. An electronic version of the Annex will be provided to NRCan upon the issuance of the Reconsideration Report.

Separate from the Reconsideration Report, issues or concerns raised by Indigenous groups that are outside of the Amended Scope and List of Issues will be summarized and sent to NRCan by NEB staff for consideration in the context of the Government of Canada's Phase III consultations. NEB staff will make best efforts to send this information to NRCan within two weeks of the issuance of the Reconsideration Report.

Natural Resources Canada (NRCan)

NRCan has compiled a list of Indigenous groups (the Crown List) that could be potentially impacted by the Project.

NRCan has informed all Indigenous groups on the Crown List that the Crown is relying on the NEB's process, to the extent possible, to discharge its duty to consult with Indigenous groups ([A95026](#)).

NRCan filed on the NEB Public Record for the Reconsideration Process information or analysis regarding the Amended Scope on an Indigenous groups' section 35 Aboriginal and treaty rights,

including any mitigation, accommodation, and/or avoidance measures which could be implemented in order to avoid, reduce, and/or offset Project-related impacts, based on existing knowledge from the initial Crown Consultations for the Project ([A95292](#) and [A95299](#)).

Federal Authorities

Federal Authorities (FAs) applied to participate as Intervenors in the Reconsideration Process and provided relevant specialist information and knowledge to the NEB on the Amended Scope ([A94503](#) and [A94688](#)). FAs also, if requested by the NEB pursuant section 20 (a) of the CEEA, 2012, provided the NEB with any specialist or expert information or knowledge with respect to the Project. All information and knowledge from FAs was filed on the NEB Public Record ([A95292](#) and [A95299](#)). All FAs actively monitored the Reconsideration Process to ensure timelines (e.g. filing deadlines) were met.

FAs also provided information on potential effects related to the Amended Scope on an Indigenous groups' section 35 Aboriginal and treaty rights, including any mitigation, accommodation, and/or avoidance measures, which could be implemented, if the Project were to be approved, in order to avoid, reduce, and/or offset these effects in the Reconsideration Process.

Consultation with Indigenous Groups in the Phase III process

National Energy Board

The NEB is providing support for Phase III consultations with Indigenous groups. NEB staff are participating in-person, to the extent possible, in consultations with Indigenous groups. Participating NEB staff are firewalled from staff supporting the NEB Panel appointed for the Reconsideration Process. Participating NEB staff are responsible for:

- explaining the NEB's lifecycle regulatory mandate for pipelines;
- speaking about the NEB's responsibilities under the applicable legislation; and
- explaining how draft conditions could be implemented by the NEB.

Natural Resources Canada

NRCan re-initiated consultations with Indigenous groups potentially impacted by the Project.

NRCan appointed former Supreme Court of Canada Justice, the Honourable Frank Iacobucci, as a Federal Representative to provide oversight and direction to the Government on how to conduct meaningful Phase III consultations and accommodations, and ensure that this process proceeds as prescribed by the Federal Court of Appeal.

NRCan notified Indigenous groups on the Crown List of available participant funding for Phase III consultations, and the depth of consultation owed to the Indigenous group. NRCan asked Indigenous groups to confirm their interest in consultations associated with the Project.

In parallel to the NEB Reconsideration Process, NRCan is consulting with Indigenous groups on the Crown List to identify any of the Project's potential impacts on established or asserted section 35 Aboriginal and treaty Rights. Consultation will be ongoing until the CAR is provided to the GiC for consideration.

Federal Authorities

Federal Authorities (FAs) that applied to participate in the NEB Reconsideration provided relevant specialist information and knowledge in areas of authority, and many are attending the Phase III consultations with Indigenous groups. FAs are contributing to the consultation with Indigenous groups during the Reconsideration Process, and will continue to do so after NEB has issued its Recommendation Report.

Decision on the Project

Governor in Council (GiC)

Following the completion of consultations with potentially impacted Indigenous groups, NRCan will finalize the CAR and provide it to the GiC for consideration in its decision on the Project. The CAR, in addition to the Recommendation Report, is intended to inform the Crown's assessment of the adequacy of its consultations with potentially impacted Indigenous groups. Indigenous groups will have the opportunity to review and comment on aspects of the CAR in advance of its submission to the GiC for a final decision on the Project.

The GiC is, by convention, acting on the advice of Cabinet. It is intended that the GiC will make its final decision based in part on the consultation report and the Reconsideration Report, pursuant to the *National Energy Board Act* (NEB Act) and CEAA, 2012. The GiC will render its decision in accordance with the requirements of the NEB Act.

IV. SIGNATORIES

The Parties hereto have signed the Agreement, in counterpart, on the dates indicated below.

Original signed by
Sandy Lapointe
Executive Vice President, Regulatory
National Energy Board

February 13, 2019
Date

Original signed by
Jeff Labonté
Assistant Deputy Minister
Major Projects Management Office
Natural Resources Canada

February 21, 2019
Date