

Via E-File

June 16, 2011
National Energy Board
444 Seventh Ave SW
Calgary, AB T2P 2X8

Attention: Anne-Marie Erickson

Dear Ms. Erickson,

**Re: Hearing Order RH-2-2011
Trans Mountain Pipeline ULC (Trans Mountain) Firm Service Application
File No OF-Tolls-Group 1-T260-2010-04 01
Georgia Strait Alliance's Letter of Comment**

On behalf of the Georgia Strait Alliance, we are pleased to provide our written comments on the above noted application, which is scheduled for an oral hearing on August 22, 2011, in Calgary.

The Nature of Georgia Strait Alliance's Interest in the Application

The Georgia Strait Alliance, a non-profit citizens' organization that has been working to protect and restore the marine environment of Georgia Strait, one of Canada's most at-risk environments, since 1990. The Georgia Strait Alliance has well over 1,000 individual and organizational members and supporters who work collectively to find solutions to the root causes that threaten the Strait.

This application is one of a series of ongoing applications to the National Energy Board (the Board) to steadily increase the capacity of both the Trans Mountain pipeline and its Westridge Terminal. Two earlier phases of expansion were approved by the Board in 2005 and 2006 (TMX-1), increasing capacity from 225,000 barrels per day (bpd) to 260,000 bpd, and then to 300,000 bpd.¹ Additional expansions, which will also require Board approval, are anticipated within the next 5 years: TMX-2 is planned to increase pipeline capacity to 380,000 bpd, and TMX-3, which is anticipated to take place in two phases, would add further capacity of 320,000 bpd by 2016, for a total of 700,000 bpd. Virtually all of this

¹ *Trans Mountain Pipeline ULC – Application for Firm Service to the Westridge Marine Terminal* (29 November 2010) A1W3Y0, at para 12 [*Firm Service Application*].

additional capacity (450,000 bpd) is intended for Westridge Terminal, whereas, 250,000 bpd would be designated to land based destinations.²

One of the main purposes of this Firm Service Application is to increase the approved capacity and create contractual certainty for oil products shipped to the Westridge Terminal. This lays the foundation for increasing the export of oil products by tanker through Vancouver, Georgia Strait, and beyond. Over time, subsequent incremental applications are expected to quadruple the number of tankers travelling through this region. The combined implications of these expansions will be significant, particularly in the event of a tanker spill, collision, or other mishap. In this application, British Columbians are being asked begin to bear these additional risks with effectively no public engagement.

Tankers exiting Vancouver must navigate Second and First Narrows, as well as busy Vancouver Harbour, English Bay and Georgia Strait, before reaching the active channels of the Southern Gulf Islands and Haro Strait, where tidal currents can reach seven knots around Race Rocks in the Strait of Juan de Fuca. A significant oil spill in this area would impact important marine and estuarine ecologies throughout Georgia Strait (threatening cormorant, heron, and shellfish species already heavily impacted), the Fraser estuary (and Fraser salmon populations), and Gulf Islands on both sides of the border (jeopardizing endangered southern resident killer whale populations). A spill would also affect the way of life of residents, the regional economy, and potentially the operations of Port Metro Vancouver if the impacts were severe enough.

Comments on the Firm Service Application

This is a complex application, and as we have reviewed the materials, it has become clear that the implications of this proposal are more significant than would initially appear. On its face, this application seeks to:

- a) Enable the implementation of Firm Service on the pipeline with respect to Westridge deliveries, including the approval of associated Tariff Amendments and pro forma transportation service agreements;³
- b) Reallocate 27,000 bpd of existing land capacity to the Westridge Terminal, as part of the tariff amendments, thereby increasing approved capacity at the terminal to 79,000 bpd (with 54,000 bpd subject to firm service commitments);⁴

² Ian Anderson, "Kinder Morgan Canada" (Presentation delivered at the Kinder Morgan 2011 Analyst Conference, 24 March 2011), online: Kinder Morgan Canada

<http://www.kindermorgan.com/investor/presentations/2011_Analysts_Conf_05_KM_Canada.pdf

> at slide 5, 9 [Analyst Conference Presentation].

³ Firm Service Application, *supra* note 1 at para 6.

- c) Approve the investment of the Firm Service Fees as a customer contribution toward investment in capital projects designed to enhance existing operation and support future expansion of the pipeline system.⁵

If approved, this application will:

- a) Guarantee Trans Mountain the ability to ship a minimum average of 79,000 bpd from the Westridge Terminal. This would not include additional shipments permitted under the Tariff, which in the past have spiked to as much as 143,000 bpd on an on-demand basis;⁶
- b) Increase the number and/or size of tankers travelling through Burrard Inlet and Georgia Strait, with no public engagement other than this Board review and hearing;
- c) Lay the groundwork for an even further expansion of tanker and barge activity at the Westridge Terminal, such as a second berth and additional tanks.

Our comments fall into three categories: (A) the risks of these activities are poorly understood by the government and the public; (B) there is insufficient engagement of stakeholders and coastal communities in this process; and (C) this application gives rise to further questions about the implications of firm service that need to be answered.

A. THE EXTENT OF RISKS POSED BY TANKER AND OIL BARGE ACTIVITIES IN BURRARD INLET AND GEORGIA STRAIT ARE POORLY UNDERSTOOD BY GOVERNMENT AND THE PUBLIC

Concern about the impacts of existing tanker traffic in Burrard Inlet and Georgia Strait is constant. While some agencies have considered limited navigation and shipping issues in the region, such as the Second Narrows Movement Restriction Area (MRA) Procedures, concern about exposure to risk remains, particularly with regard to potential increases to tanker traffic. Kinder Morgan, Trans Mountain's parent company, estimates that in 2010, 71 tankers will have left the Westridge Terminal (or 142 transits), and by 2016, this estimate is 288 tankers (or 576 transits), which would mean more than one per day travelling Burrard Inlet and the Georgia Strait.⁷

⁴ *Firm Service Application, supra* note 1 at para 30.

⁵ *Firm Service Application, supra* note 1 at para 40.

⁶ *Analyst Conference Presentation, supra* note 2.

⁷ *Ibid.*

1. The Auditor General has expressed concern about risks related to oil spills from ships

In 2010, a federal Auditor General report identified gaps and inadequacies in Canada's system for responding to oil spills from ships. This audit examined how the federal government has managed oil and chemical spills from ships in Canada's Arctic, Pacific and Atlantic Ocean waters, with a specific focus on Transport Canada, Environment Canada, and the Canadian Coast Guard's ability to respond to such spills.⁸ The recommendations of the audit include:

- That a risk assessment related to ship source spills be conducted by Transport Canada, Environment Canada and the Canadian Coast Guard, and that a process to review risks on an ongoing basis be established;
- That national and regional emergency management plans need to be reviewed and updated by Environment Canada and the Canadian Coast Guard;
- That the Canadian Coast Guard should evaluate its response capacity, taking into account the response capacity of the private sector against risks related to ship source spills; and
- That procedure for reporting spills should be subject to a quality assurance program so that results of spill responses are consistently documented.⁹

All of these recommendations were fully agreed to by the agencies that were subject to the audit – Transport Canada, Environment Canada and the Canadian Coast Guard. With regard to the risk assessment recommendation, Transport Canada specifically indicated that it intends to begin scoping a risk assessment in 2010, and would complete it by the end of 2011-12.¹⁰

2. Current transboundary spill response capacity is insufficient

In addition to the limitations identified by the Auditor General, a working group of the Pacific States – British Columbia Oil Spill Task Force made over 130 recommendations earlier this year to government and industry stakeholders on both sides of the border to improve current oil spill planning and response capabilities.¹¹ The final report found that

⁸ Office of the Auditor General of Canada, *Report of the Commissioner of the Environment and Sustainable Development*, ch 1 Oil Spills from Ships (Ottawa: OAG, 2010), online: Office of the Auditor General <http://www.oag-bvg.gc.ca/internet/English/parl_cesd_201012_01_e_34424.html> [[Auditor General Report](#)].

⁹ *Auditor General Report*, *supra* note 8 at paras 1.32, 1.41, 1.57, 1.70.

¹⁰ *Ibid.*, at para 1.32.

¹¹ The Stakeholder Workgroup Review of Planning and Response capabilities for a Marine Oil Spill on the U.S./Canadian Transboundary Areas of the Pacific Coast, "Project Report" (April 2011) at 206-

agencies are ill prepared to respond to oil spills in the region that are possible, especially in light of the increase in large oil tankers transiting the waters of Burrard Inlet, Georgia Strait, Strait of Juan de Fuca and Haro Strait.¹²

3. Combined with the cumulative impacts of tanker traffic on the US side of the border, the risks could be even more significant.

In addition to the shipments destined to the Westridge Terminal, the application indicates that shipments to the land based destinations are also destined for marine terminals within the United States,¹³ through the Tesoro¹⁴ and Shell Anacortes refineries,¹⁵ as well as the ConocoPhillips Ferndale refinery,¹⁶ which ship refined oil products via barge and tanker. In addition to evaluating the risk to Canadian coastal waters, we believe that the cumulative risk concern should include a consideration of the additional risk associated with tanker traffic in nearby US waters.

B. THERE IS INSUFFICIENT ENGAGEMENT OF STAKEHOLDERS AND COASTAL COMMUNITIES REGARDING THE RISKS ASSOCIATED WITH IMPACTS OF ACTIVITIES PROPOSED IN THIS APPLICATION

While this Application has provided an opportunity for some stakeholders to become aware of this proposal, a critical issue for Georgia Strait Alliance is that public concern about the impact of tankers in the region is increasing dramatically. It would not be readily apparent to the general public that a tariff application would result in increased tanker traffic.

1. Notable increases in tanker traffic are enabled with effectively no public consultation

If the Board approves Firm Service, it is guaranteeing an increase in committed shippers to the Westridge Terminal. If the Board approves the associated reallocation of capacity to

225, online: The Pacific States – British Columbia Oil Spill Task Force

http://www.oilspilltaskforce.org/docs/notes_reports/Final_US_Canada_Transboundary_Project_Report.pdf>.

¹² The U.S./Canadian Transboundary Spill Planning and Response Project Stakeholder Workgroup identified numerous areas needing improvement to the current spill response capabilities in the Transboundary region.

¹³ *Firm Service Application*, *supra* note 1 at Attachment 1.

¹⁴ “Tesoro Anacortes Refinery”, online: Tesoro <<http://www.tsocorp.com/TSOCorp/SocialResponsibility/Environment/ANACORTESREFINERYENVIRONMENT>>.

¹⁵ “Shell Puget Sound Refinery Fact Sheet”, online: Shell <<http://www.shellpsr.com/go/doc/3/59127/Shell-Puget-Sound-Refinery-Fact-Sheet>>.

¹⁶ “U.S. Refining – PADD V (West Coast): Ferndale Refinery”, online: ConocoPhillips <http://www.conocophillips.com/EN/about/worldwide_ops/country/north_america/pages/west.aspx>.

79,000 bpd, it will lay the foundation for further increases in tanker activity in the region, particularly given the flexible structure of the Trans Mountain Petroleum Tariff, which enables large fluctuations in amounts shipped to the Westridge Terminal provided that increases at the terminal are offset by adjustments to land based destinations.¹⁷

2. Recent changes to Second Narrows transit procedures have increased the nature and size of tankers transiting the region without meaningful public engagement

The Second Narrows, the narrowest point in the harbour, creates a natural bottleneck for water, contains strong tidal currents and includes the Canadian National Railway Bridge and the Ironworkers Memorial Second Narrows Bridge, posing significant hazards to tankers and barges leaving the Westridge Terminal. These risks are identified in the 2008 Pilotage Risk Management Methodology (PRMM) for the Second Narrows,¹⁸ which informed the development of new Second Narrows Movement Restriction Area Procedures (MRA Procedures)¹⁹ released in April 2010. The MRA Procedures, put in place to ensure the safe passage of vessels through the narrows, were amended to allow an increase in the draft of tankers from 12.5 to 13.5 meters, enabling tankers with larger drafts and oil loads to navigate the narrows.

We are concerned that the PRMM procedures were developed with a narrow set of stakeholders and did not include the public, nearby municipalities or local First Nation governments. Instead, these measures were developed in consultation with marine industry and government of Canada stakeholders, which notably did not include the Department of Fisheries and Oceans and Ministry of the Environment.²⁰

This gives rise to a broader concern that the PRMM, and subsequent MRA Procedures, were not developed with adequate consideration of the potential impact of a mishap on ecosystems and Lower Mainland communities and that this shortcoming limits the understanding of risk. Further, the mitigation measures identified in these procedures are confined to the Second Narrows, despite multiple hazards that exist throughout Vancouver Harbour and Georgia Strait.

¹⁷ *Trans Mountain Pipeline ULC. Petroleum Tariff* (11 March 2010), Tariff No. 82 at Rule 14.6, 14.7. The Terminal has been shipping, on average, 80,000 bpd, so this application will formalize the minimum status quo.

¹⁸ Vancouver Fraser Port Authority, "Second Narrows Vessel Transits: Pilotage Risk Management Methodology (PRMM)" (July 2008), online: <http://www.georgiastrait.org/files/share/PRMM_Report.pdf> [PRMM].

¹⁹ Port Metro Vancouver, *Second Narrows Movement Restriction Area Procedures* (14 April 2010) [MRA Procedures].

²⁰ Invited stakeholders included: Vancouver Fraser Port Authority, Pacific Pilotage Authority, British Columbia Coast Pilots Ltd., assist tug companies, terminal operators east of the Second Narrows Bridges, shipping companies, tug & barge/boom companies, Transport Canada, and the Canadian Coast Guard. SEE: *PRMM, supra* note 18 at 4.

3. ***This application is inextricably linked to multiple future applications, which should be evaluated as one package, not incrementally and on a piecemeal basis.***

Kinder Morgan investor materials make clear that the Trans Mountain Firm Service Application is one of a series of ongoing expansion plans and associated applications. By 2016, the company expects to have expanded the Westridge Terminal and have a total of 700,000 bpd of oil products in the Trans Mountain system.²¹ By expressly requesting that the Board approve that a portion of revenues from the Westridge Terminal operations be set aside for investment in pipeline expansion, this application is inextricably linked to future activities that the company would like to undertake but does not yet have approval for.

C. THIS APPLICATION GIVES RISE TO QUESTIONS ABOUT CURRENT AND PROPOSED TRANS MOUNTAIN ACTIVITIES THAT NEED TO BE ANSWERED

The process of inquiring into this application has raised more questions.

1. *Questions about regulatory oversight exist*

The Board does not appear to keep track of pipeline throughput as Kinder Morgan has secured a renewable exemption from the minimum filing requirements established in the Toll Information Regulations.^{22 23} According to the National Energy Board Filing Manual,²⁴ these reports should include “throughput information by service type, broken down by month”. We are concerned that this information is not being made available to the Board, and that there does not appear to be any independent tracking of throughput of the pipeline.

2. ***There may be additional safety issues where Westridge Terminal can, and has, occasionally shipped triple the quantity of product on a monthly basis than is otherwise approved***

While the current capacity allocation indicates that Trans Mountain is able to ship an average of 52,000 bpd of oil products from the Westridge Terminal, it appears that frequently, the quantity of oil being shipped from the terminal has significantly exceeded

²¹ *Analyst Conference Presentation, supra* note 2.

²² Direct communication with the NEB, May 2011.

²³ *National Energy Board Act, RSC 1985, c N-7; Toll Information Regulations, SOR/79-319. See National Energy Board Order TO-06-2006, at para 6, and National Energy Board Order TO-02-2011, at 2.*

²⁴ National Energy Board, “Filing Manual – Guide BB – Financial Surveillance Reports (Toll Information Regulations)” (November 2009).

that capacity, at one point shipping 143,000 bpd in April, 2010.²⁵ As discussed above, these variations are anticipated and permitted in the Trans Mountain Petroleum Tariff. Given that there is so little public understanding of how this system operates, information such as this raises concerns about whether this terminal has the capacity to safely ship quantities well in excess of existing allocations. We note that terminal expansions are intended as part of TMX2 and TMX3, and we question whether more strict limits should be placed on the current flexible tariff, at least until the public is satisfied that such activities are not presenting any undue risk to nearby communities.

3. *The potential application of the Species at Risk Act needs to be verified*

Even if the Firm Service Application is approved by the Board, it is possible that, under Canada's endangered species legislation, additional approvals by the Minister of Fisheries and Oceans may be necessary before any increases in tanker activity could occur. Increased tanker activity could impact southern resident killer whale critical habitat, the subject of a protection order²⁶ under the *Species at Risk Act*.²⁷ The Act envisions that where a protection order exists, any activity that could affect the protected species' habitat must first secure the approval of the Minister of Fisheries and Oceans. This may be an issue for Port Metro Vancouver or tanker companies with respect to any additional tankers in the region.

REQUESTS OF THE BOARD

The Board has already decided that interest in this Firm Service Application is significant enough to warrant determination by a hearing instead of written submissions. Both the *National Energy Board Act*, and the Board's own description of its responsibilities acknowledge the importance of the public interest²⁸ and environmental protection²⁹ in Board deliberations. We make the following requests of the Board in this context.

²⁵ *Analyst Conference Presentation, supra* note 2.


²⁶ *Critical Habitats of the Northeast Pacific Northern and Southern Resident Populations of the Killer Whale (Orcinus orca) Order*, SOR/2009-68.

²⁷ *Species At Risk Act*, SC 2002, c29 a s 58(1).

²⁸ Direct communication with the National Energy Board, May 2011.

²⁸ *National Energy Board Act*, RSC 1985, c N-7, s 12(1)(b). Section 12(1)(b) states "where it appears to the Board that the circumstances may require the Board, in the public interest, to make any order or given any direction, leave, sanction or approval that by law it is authorized to make or give, or with respect to any matter, act or thing that by this Act or any such regulation, certificate, licence, permit, order or direction is prohibited, sanctioned or required to be done."

²⁹ See also: National Energy Board "Our Responsibilities, the Construction and Operation of Pipelines and Power Lines – Environmental Protection" (29 April 2011), online: National Energy Board <<http://www.neb-one.gc.ca/clf-nsi/rthnb/whwrndrgvrnnc/rrspnsblt-eng.html>>.

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1. **The impacts on the marine environment of this application should be considered by the Board.** It is increasingly difficult to isolate projects from their extended impacts. While this Firm Service Application would alter the toll structure for shippers, it also anticipates increasing tanker activity in Burrard Inlet and Georgia Strait. The potential environmental impacts cannot be separated from this application.
 2. **Trans Mountain be required to hold community meetings and undertake broad public consultation, ideally in advance of, or alternatively as a condition of, any approval of Firm Service.** Given that public concern about the risk of increased tanker activity in the region is on the rise, it would be prudent to ensure that stakeholders, the public and First Nations, have a clear understanding of the implications of this Firm Service proposal.
 3. **Firm Service and the associated changes should not be approved until a risk assessment for the risk of oil spills from ships for the West Coast has been conducted, and acted upon, consistent with the recommendations of the federal Auditor General.** The Auditor General has indicated that the current system is inadequate and that updated risk assessments need to be undertaken for Canada's three coasts. The agency responses, indicating full agreement, make clear that such assessments are prudent and timely.
 4. **That any Firm Service arrangement be continuously subject to the results of updated risk assessments.** The Firm Service Application anticipates securing commercial contracts for increased shipments to the Westridge Terminal which would commit Trans Mountain to a certain level of activity. If however, firm service would confirm commercial contracts for shippers that may exceed the recommendations of a risk assessment, then such contracts must be subject to the results of ongoing risk assessments.
 5. **That Trans Mountain not be permitted to allocate a portion of revenues as a capital contribution toward pipeline expansion plans unless and until it has consulted broadly on its comprehensive plan for Trans Mountain pipeline expansion.** In our view, this specific component of the application inextricably links this Firm Service Application to future applications for pipeline expansion, and all should not be approved without a clear understanding of the implications for residents, communities and the environment.

6. **That the Petroleum Tariff provisions allowing large fluctuations in shipments between the land destinations and the Westridge Terminal be amended to remove or severely constrain these fluctuations in order that the public have clear information about the level and nature of tanker activity at the Westridge Terminal.** The current Trans Mountain tariff allows significant fluctuations in shipments out of the two general destinations on the pipeline – land destinations and the Westridge Terminal. This has resulted in significant fluctuations on a monthly basis, and possible safety concerns about excess shipments from the Westridge Terminal. The public should be provided with as much certainty as possible about shipments from the terminal by having clear limits placed on these shipments through the tariff.
7. **Trans Mountain’s exemption from the filing requirements of the Toll Information Regulation should be revoked and the company should be required to file financial surveillance data, including records of pipeline throughput and service type.** Given the increasing public concern, it is important that information be made publicly available about pipeline activity in order to better understand the implications for tankers.

Sincerely,



Karen Campbell
Staff Lawyer, Ecojustice Canada

On behalf of Georgia Strait Alliance

cc.
Bennett Jones LLP, Attn: Loyola Keough and Marie Buchinski
Trans Mountain Pipeline ULC, Attn: D. Scott Stoness