



Tsleil-Waututh Nation səlilwətał



Canada Energy Regulator
Suite 210, 517 – 10th Ave SW
Calgary, AB T2R 0A8
Attention: Mr. Jean-Denis Charlebois, Secretary of the Commission

March 19, 2021

Dear Mr. Charlebois:

**Re: Trans Mountain Pipeline ULC (“Trans Mountain”)
Financial Resource Requirement Plan
Amended Order AO-001-FRO-002-2017 (“Amended Order”)
Request to Treat Certificate of Insurance Information Confidentially
CER File: OF-Gen-06 FRR**

We write in response to Trans Mountain’s February 22, 2021 request to amend their Financial Resource Requirement Plan to treat the certificate of insurance information confidentially. Tsleil-Waututh Nation opposes this request for the reasons set out below and urges the Canadian Energy Regulator (CER) to deny Trans Mountain’s request for more secrecy.

Transparency is a fundamental principle of the CER

The annual Financial Resource Requirement Plan is a fundamental part of the CER’s role as a regulator. It provides a basic level of assurance that regulated companies are financially solvent and able to meet the requirements set out by the CER.

Trans Mountain has filed the certificate of insurance as part of the Financial Resources Plan annually for a number of years. This is public information that is essential for transparency and accountability. It is our view that a culture of secrecy is tarnishing Trans Mountain’s reputation, particularly since it became a Crown corporation, which contributes to the Trans Mountain Expansion Project being so controversial. This controversy is one reason insurers are reconsidering their business relationship with Trans Mountain, even on the original pipeline.

In [Emera Brunswick Pipeline Co \(Re\), GH-1-2006 \(A15654-1\)](#), the National Energy Board (NEB) discussed the extraordinary nature of confidentiality requests as an exception to the fundamental principle of transparency:

This section provides an exception to the fundamental principle that the Board's proceedings are to be open, accessible and transparent. As an exception, the onus is not upon the parties opposing confidentiality to show why the information should be public; rather those seeking a

confidentiality order have the onus to show why this extraordinary order should be granted to keep information in a public proceeding confidential. [...]

The Board must also consider whether the person's interest in confidentiality outweighs the public interest in disclosure of the proceedings.

TWN submits that Trans Mountain has not met the onus set out in *Emera*. In particular, Trans Mountain has not provided any evidence beyond their own speculative claims that (a) their insurance costs have increased; (b) the sole or primary cause of these alleged increases is the disclosure of insurer's names the certificate of insurance list; or (c) a reduction in insurers willing to participate will limit Trans Mountain's ability to access adequate levels of insurance coverage at 'reasonable rates' (which have not been defined).

In order to be granted this extraordinary order which undermines a fundamental principle of the CER, Trans Mountain must, at a minimum, provide evidence of harm and causation, rather than unsubstantiated claims, convenient narratives and vague speculation about the future. The NEB received criticism in the past for being viewed as a captured regulator. The CER is thereby putting their (largely inherited) reputation at risk if they set the dangerous precedent of reducing transparency to the public based on unproven assertions by the companies they are supposed to be regulating. This is an opportunity for the CER to demonstrate its commitment to transparency and accountability.

It appears that Trans Mountain's request arises from the perception that members of the public are reviewing publicly-available records, rather than those records being largely lost in the sea of regulatory filings.

In short, Trans Mountain is asking the CER to deliberately obscure an already difficult-to-navigate transparency regime, based on vague and speculative assertions that it is costing the company more money. This is a dangerous precedent for the CER to set and it should be of major concern.

Tsleil-Waututh Nation adopts and supports the argument letter of Robyn Allan dated February 28, 2021. Ms. Allan has an unparalleled level of expertise into the insurance sector, having been the President of the Insurance Corporation of British Columbia (ICBC) for many years.

Insurance sector, project risk and climate change

TWN further notes that the insurance sector worldwide is revisiting their evaluation of major catastrophes and infrastructure projects, particularly in the fossil fuel sector, as a result of climate change and climate action. This is a significant reason Trans Mountain is finding insurers are refraining from insuring their asset. According to a [recent report from IEEFA](#), as of October 2020, [143 global banks, insurers, pension funds and asset managers](#) currently have policies related to fossil fuels and related infrastructure, and that number is growing.

The insurance sector is experiencing a major shift in the way that they evaluate climate risk. This is, in part, because a business model that looks at historic claims to renew policies on an annual basis does not capture the risk of a rapidly changing climate. As a result, the insurance sector is already losing money due to climate related damages and losses.

Other regulatory bodies in Canada are engaged in this discussion. For example, OSFI (the Office of the Superintendent of Financial Institutions), which regulates insurance companies, banks and other financial institutions, released a discussion paper entitled [Navigating Uncertainty in Climate Change](#) and is currently engaging in a public consultation on the topic. The OSFI discussion paper states: “Canadian insurers paid out over \$1 billion per year in catastrophic insured losses from natural disasters between 2010 and 2019, compared to an average of \$400 million per year for the 26 years prior to 2009.”¹

In addition, insurance industry think tank the Geneva Association recently released a research report entitled [Climate Change Risk Assessment for the Insurance Industry](#). The report discusses physical, transition and liability risk over a range of time horizons.

The Trans Mountain Pipeline transports diluted bitumen across hundreds of kilometres of challenging terrain through British Columbia. The emerging climate weather regime includes an increase in risk of flooding and slope failures presenting an increased risk to infrastructure failure and corresponding risk of oil spill. Human error, equipment failure, natural and climate related weather events are all risks that insurers consider. TWN notes that the summer 2020 oil spill at Sumas marked the 85th reported spill from TMPL since 1961.² An assessment of actual project risk is a reasonable explanation for the hesitation to insure the Trans Mountain Pipeline.

TWN’s Indigenous Title and Rights

In addition to changes related to climate change and climate policy, the insurance sector is also revisiting their assessment of human rights infringements, including Indigenous rights as a matter of risk disclosure. A project without the free, prior and informed consent (“FPIC”) of all impacted First Nations is going to be more risky than a project that has the FPIC of all impacted Nations. As the Supreme Court of Canada sets out in *Tsilhqot’in Nation v. B.C.* (2014), “if the Crown begins a project without consent prior to Aboriginal title being established, it *may be required to cancel the project*” (para. 92, emphasis added).

Tsleil-Waututh Nation has inherent Aboriginal rights including title that are also recognized and protected by the *Canadian Constitution Act 1982*. Tsleil-Waututh asserts these rights in all appropriate forums, including the Canadian Energy Regulator and its predecessor, the NEB, as well as in dialogue with the Crown and in Canadian courts, when necessary.

TWN’s independent assessment of the Trans Mountain expansion, grounded in our own, unextinguished Indigenous laws and governance concluded that the Trans Mountain pipeline and the Trans Mountain pipeline expansion poses an existential threat to our way of life, due to the unacceptable risk of a devastating oil spill, which would have long lasting and significant adverse effects. As a result, TWN has withheld our free, prior and informed consent to both the Trans Mountain Pipeline and its expansion.

TWN cannot rely on the CER alone to acknowledge, protect or exercise our inherent Aboriginal rights. In TWN’s experience, the CER has not been a satisfactory forum to assert our rights – as evidenced by the

¹ Navigating Uncertainty in Climate Change p. 8 citing the Insurance Bureau of Canada and Federation of Canadian Municipalities (2020): *Investing in Canada’s Future: The Cost of Climate Adaptation at the Local Level*, <https://data.fcm.ca/documents/reports/investing-in-canadas-future-the-cost-of-climate-adaptation.pdf>

² See: https://docs.transmountain.com/190516_Spill-Chart-for_w_locations_TMEP.pdf?mtime=20190516205038

continued and ongoing infringement of our Aboriginal rights in relation to Trans Mountain. The original Trans Mountain Pipeline was approved and constructed without TWN's consent or participation, and when it was illegal for Indigenous peoples to hire lawyers.

In order to protect our rights, TWN regularly communicates with companies operating in our territories when our rights and title are at risk of being infringed upon. To this end, TWN has written directly to the insurance companies listed on the certificate of insurance in past years to inform them that the project violates our rights and our unextinguished laws. These companies, by and large, are not aware of these infringements based on the existing CER records and Trans Mountain's own communications which tend to minimize the infringement of Aboriginal rights. Only TWN can speak credibly about TWN's rights and insurance companies have expressed interest in understanding more about how the companies they insure are infringing on our rights. Should CER proceed in granting Trans Mountain's request, it would deprive TWN of our ability to assert our rights and have these dialogues that provide companies with this critical information. By making the certificate of insurance confidential and removing a layer of transparency and confidentiality, the CER will reduce the options for TWN to assert our Aboriginal rights and fulfill our sacred obligation to protect and steward our territory.

Conclusion

TWN therefore submits that Trans Mountain's request for confidentiality is not in CER's or the public interest and should not be granted.

Sincerely,



Gabriel George
Director, Treaty, Lands and Resources Department
Tsleil-Waututh Nation