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VIA PARTICIPATION PORTAL

September 7, 2016

National Energy Board
517 Tenth Avenue SW
Calgary, Alberta
T2R 0A8

Attention: Ms. Sheri Young, Secretary of the Board

Dear Ms. Young:

**Re: Hearing Order OH-002-2016
File Of-Fac-Oil-E266-2014-01 02
Energy East Project, Asset Transfer and Eastern Mainline Project
Comment on notices of motion from Stratégies Énergétiques and the Association
Québécoise de lutte contre la pollution atmosphérique, and Transition Initiative
Kenora**

I represent the intervenor **Équiterre** in this proceeding.

Équiterre provides these comments in reply to the **23 August 2016** call for comments issued by the National Energy Board (the Board) in relation to two motions by intervenors requesting that Members Gauthier and Mercier recuse themselves from the Hearing Panel.

Specifically, Équiterre submits this letter to express support for the notice of motion filed by **Transition Initiative Kenora** on 22 August 2016.¹

Équiterre agrees with the position of Transition Initiative Kenora (TIK) that Members Gauthier and Mercier's conduct, as detailed in TIK's motion, gives rise to a reasonable apprehension of bias. In fact, Équiterre asserts that the Members' meeting with Hon. Jean Charest in his capacity as advisor to Trans Canada, alone, supports a determination of a reasonable apprehension of bias and requires that these Members recuse themselves from the NEB Panel hearing the Energy East application.

Équiterre is also concerned with Member Gauthier's impartiality in the NEB's Energy East hearing in light of information brought to light by Nature Canada in its comments on the notices of motion seeking recusal of Members Gauthier and Mercier² and in Nature Canada's February 26, 2016 letter to the

¹ Transition Initiative Kenora's Notice of Motion may be accessed here: [https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/2432218/2540913/2797619/2997663/3027605/A79060-2 Transition Initiative Kenora Notice of Motion re Recusal motion - part 1 - A5E6I7.pdf?nodeid=3027825&vernum=1](https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/2432218/2540913/2797619/2997663/3027605/A79060-2%20Transition%20Initiative%20Kenora%20Notice%20of%20Motion%20re%20Recusal%20motion%20-%20part%201%20-%20A5E6I7.pdf?nodeid=3027825&vernum=1).

² Nature Canada's comments on the recusal motions, including its letter to the Hon. Jim Carr may be accessed here: [https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/2432218/2540913/2797619/2997759/3027787/A79210-1 Nature Canada comments on recusal motion - A5E8G8.pdf?nodeid=3028004&vernum=-2](https://docs.neb-one.gc.ca/ll-eng/llisapi.dll/fetch/2000/90464/90552/2432218/2540913/2797619/2997759/3027787/A79210-1%20Nature%20Canada%20comments%20on%20recusal%20motion%20-%20A5E8G8.pdf?nodeid=3028004&vernum=-2).

Honourable Jim Carr, federal Minister of Natural Resources, which was attached to Nature Canada's comments on the recusal motions.

In its comments on the notices of motion concerning recusal, Nature Canada raised questions about "Member Gauthier's involvement and interests in LVM, a company contracted to carry out work for Trans Canada on the Energy East application." Nature Canada further mentions that, "Member Gauthier was President and CEO of LVM Inc. from December 2010 until his appointment to the NEB in December 2012. LVM performed work for the Energy East application to the NEB between 25 September and 4 October 2013."

Équiterre echoes Nature Canada's concern with the temporal proximity between Member Gauthier's departure from LVM and the negotiation, contracting and execution of the work that LVM performed under contract to TransCanada in relation to the Energy East application. As a result, Équiterre asks that the Board review closely the facts relating to Member Gauthier's close relationship with LVM and take such facts into consideration when it decides the recusal motions that are the subject of these comments.

Équiterre, however, asserts that, even apart from the situation described in Nature Canada's comments, the information outlined in TIK's notice of motion demonstrates clearly that the threshold of "a reasonable apprehension of bias" on the part of Members Gauthier and Mercier has been crossed. This reasonable apprehension of bias concerning two members of the Hearing Panel in the present proceeding puts principles of natural justice at serious risk.

In conclusion, Équiterre, strongly supports TIK's motion that Members Gauthier and Mercier recuse themselves from the Panel hearing the Energy East application, and respectfully requests the Board grant the relief sought in TIK's motion – namely that Members Gauthier and Mercier recuse themselves from this proceeding, and if they do not, that the Panel refer the matter on an agreed statement of facts to the Federal Court of Appeal under s. 18.3(1) of the *Federal Courts Act*.

Équiterre asserts that although granting this relief will not, by itself, rectify all of the procedural problems occurring in relation to this proceeding, it will at least represent a necessary and preliminary step in that direction.

Yours truly,



Shelley Kath, for Équiterre