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VIA ELECTRONIC FILING

National Energy Board
Suite 210, 517 Tenth Avenue SW
Calgary, AB T2R 0A8

Attn: Ms. Sheri Young, Secretary of the Board

**RE: Trans Mountain Expansion Project (the “Project”)
Hearing Order MH-052-2018; File OF-Fac-Oil-T260-2013-03 59
Comments of BC Nature and Nature Canada**

We are counsel to BC Nature (Federation of BC Naturalists) and Nature Canada, co-intervenors in the above-referenced hearing (the “Reconsideration”). By letter dated September 26, 2018, the National Energy Board (“NEB”) sought comments on the following:

1. whether, “on a principled basis,” Project-related marine shipping should be included in the “designated project” to be assessed under the *Canadian Environmental Assessment Act, 2012* (“CEAA, 2012”)¹;
2. the draft Amended Factors and Scope of the Factors for the Environmental Assessment pursuant to the *CEAA, 2012*, and the draft List of Issues to be considered in the Reconsideration hearing;
3. the design of the hearing process to be used for the Reconsideration; and,
4. which government departments or bodies that the NEB should require information from during the hearing.

In the sections that follow, BC Nature and Nature Canada provide their responses to the above questions.

A. Project-related Marine Shipping

We submit that, on a principled basis, Project-related marine shipping must be included in the assessment of the designated project.

The starting point is the decision of the Federal Court of Appeal in *Tsleil-Waututh*.² The Court held, in no uncertain terms, that the NEB’s decision to exclude Project-related marine shipping

¹ *Canadian Environmental Assessment Act, 2012*, S.C. 2012, c. 19, s. 52 (“CEAA, 2012”).

² *Tsleil-Waututh Nation v. Canada (Attorney General)*, 2018 FCA 153 (“*Tsleil-Waututh*”).





from its assessment under the *CEAA, 2012* was “unjustified” and a “critical error”.³ This “unjustified exclusion” led to “successive deficiencies such that the Board’s report was not the kind of ‘report’ that would arm the Governor in Council with the information and assessments it required to make its public interest determination and its decision about environmental effects and their justification”.⁴ In fact, this exclusion of Project-related marine shipping “resulted in a report so deficient that it could not qualify as a ‘report’ within the meaning of the legislation and it was unreasonable for the Governor in Council to rely upon it”.⁵ Given the Court’s findings, we submit that the only reasonable interpretation of “designated project” in this case is one that includes Project-related marine shipping.

In *Tsleil-Waututh*, the Court directed the NEB to “reconsider on a principled basis whether Project-related shipping is incidental to the Project”.⁶ We submit that a principled approach confirms that the reasonable interpretation of “designated project” is one that includes Project-related marine shipping.

Firstly, the legislative scheme of the *CEAA, 2012* supports a broad interpretation of “incidental” beyond that held by the NEB in its original decision to exclude marine shipping under its *CEAA, 2012* assessment. As held by the Federal Court of Appeal, the NEB had unreasonably applied a narrow interpretation that restricted incidental physical activities to only those within the regulatory authority of the NEB.⁷ Nothing in the Act supports this “impermissibly restrictive” interpretation.⁸ In contrast, the purpose provisions of the Act support a broader interpretation of the NEB’s role as a responsible authority: “to protect the components of the environment that are within the legislative authority of Parliament from significant adverse environmental effects caused by a designated project”.⁹ Likewise, “environmental effect” is defined in the Act as “a change that may be caused to the following components of the environment that are within the legislative authority of Parliament”.¹⁰ There is no contention that marine waters and impacts thereto are within the legislative authority of Parliament.

Secondly, the application of the criteria for “incidental” physical activities under the Canadian Environmental Assessment Agency (“CEA Agency”)’s *Guide to Preparing a Description of a Designated Project under the Canadian Environmental Assessment Act, 2012* support the conclusion that Project-related marine shipping is incidental to the Project. The term “incidental” is not defined in the Act, but the CEA Agency’s guidance document provides a list of criteria for determining incidental physical activities, which are:

1. nature of the proposed activities and whether they are subordinate or complementary to the designated project;
2. whether the activity is within the care and control of the proponent;

³ *Ibid.* at para. 5.

⁴ *Ibid.* at para. 470.

⁵ *Ibid.*

⁶ *Ibid.* at para. 770.

⁷ *Ibid.* at paras. 397-401.

⁸ *Ibid.* at para. 402.

⁹ *CEAA, 2012, supra* note 1, s. 4(1)(a).

¹⁰ *Ibid.*, s. 5(1)(a).





3. if the activity is to be undertaken by a third party, the nature of the relationship between the proponent and the third party and whether the proponent has the ability to “direct or influence” the carrying out of the activity;
4. whether the activity is solely for the benefit of the proponent or is available for other proponents as well; and,
5. the federal and/or provincial regulatory requirements for the activity.¹¹

The Federal Court of Appeal held in *Tsleil-Waututh* that the NEB failed to grapple with any of these criteria.¹² Had the NEB done so, the Court further held, it would have “particularly considered whether marine shipping is subordinate or complementary to the Project and whether Trans Mountain is able to ‘direct or influence’ aspects of tanker operations”.¹³ On both criteria, the Court’s findings favour interpreting marine shipping as incidental to the Project. As the Court stated, “primary purpose of the Project is to provide additional capacity to transport crude oil from Alberta to markets in the Pacific Rim, including Asia”.¹⁴ Shipping crude oil products to Asian markets is not merely “subordinate or complementary” to the Project, we submit that this is the primary reason to construct and operate the Project. Further, the Court found sufficient evidence on the record to demonstrate that the proponent would be able to “direct or influence” tanker operations through the proponent’s Tanker Acceptance Standard program, NEB’s conditions, and commitments that the proponent made under the TERMPOL process.¹⁵

Based on the foregoing, BC Nature and Nature Canada submits that, on a principled basis, Project-related marine shipping is “incidental” to the Project and therefore must be assessed as part of the designated project under the *CEAA, 2012*.

B. Draft Amended Factors and Scope of Factors

The NEB seeks comments on the *Draft Amended Factors and Scope of Factors* document, where the NEB proposes to delete its original decision to exclude marine shipping and replace it with the following: “The Board determined that Project-related marine shipping between the Westridge Marine Terminal and the 12-nautical-mile territorial sea limit is also part of the ‘designated project’ under the CEAA 2012.”

BC Nature and Nature Canada submit that the sentence should instead read: “The Board determined that Project-related marine shipping to and from the Westridge Marine Terminal is also part of the ‘designated project’ under the CEAA 2012.” There are two related reasons for a more expansive assessment: 1) the scheme of the Act, and 2) evidence that the NEB would need to collect and consider in order to provide the Governor in Council with the necessary information to make the ultimate decision.

¹¹ Canadian Environmental Assessment Agency, *Guide to Preparing a Description of a Designated Project under the Canadian Environmental Assessment Act, 2012* (updated March 2015): <https://www.canada.ca/en/environmental-assessment-agency/services/policy-guidance/guide-preparing-description-designated-project-under-canadian-environmental-assessment-act-2012.html>.

¹² *Tsleil-Waututh*, *supra* note 2 at para. 404.

¹³ *Ibid.*

¹⁴ *Ibid.* at para. 14.

¹⁵ *Ibid.* at paras. 405-407.





We submit that the wording proposed by the NEB falls into the same trap that the NEB had fallen into when it excluded Project-related marine shipping from its original assessment. In the original decision, the NEB had unreasonably restricted its assessment to only considering those physical activities falling within its regulatory authority. The Federal Court of Appeal held instead that the Act required the NEB to consider broader physical activities within the “legislative authority of Parliament”.¹⁶ Here, the NEB’s proposed wording impermissibly restricted the assessment to only those physical activities within the territorial sea limit of Canada. In a similar fashion to the Court’s finding, we submit that the scheme of the Act requires a broader interpretation.

As stated above, the Act requires responsible authorities such as the NEB to consider impacts within the “legislative authority of Parliament”. The *Constitution Act, 1867* confers upon Parliament legislative authority over “navigation and shipping” and “Lines of Steam Ships between the Province and any British or Foreign Country”.¹⁷ The *CEAA, 2012* and various other Acts of Parliament show that regulation over impacts that may cross international borders falls within the legislative authority of Parliament. For example, in the *CEAA, 2012*, “environmental effects” is defined, among other things, as a “change that may be caused to the environment that would occur... outside Canada”.¹⁸ Part 1 of the *Canada Shipping Act, 2001* expressly applies “in respect of Canadian vessels everywhere” regardless of whether they are within Canadian waters.¹⁹ And, the *Canadian Environmental Protection Act, 1999* confers upon the competent minister statutory authority in respect of international water pollution.²⁰

The restrictive scope proposed by the NEB would also hinder its ability to adequately collect the information and conduct the assessment necessary for the Governor in Council to properly make a final determination. Firstly, as discussed, the scheme of the Act requires the NEB to collect information on and assess marine shipping impacts that may extend beyond Canada’s territorial sea. The restrictive scope in the NEB’s proposal would risk depriving it of the ability to discharge its statutory function.

Secondly, Project-related marine shipping may impact marine species at risk that span across international borders. Section 79 of the *Species at Risk Act* requires that the NEB “must identify the adverse effects of the project on the listed wildlife species and its critical habitat and, if the project is carried out, must ensure that measures are taken to avoid or lessen those effects and to monitor them”.²¹ In *Tsleil-Waututh*, the Federal Court of Appeal held that the NEB’s unjustifiable exclusion of Project-related marine shipping led to the cascading error of failing to apply s. 79 of the *Species at Risk Act*.²²

A key example is the Southern Resident Killer Whale (“SRKW”), a listed endangered species that the Federal Court of Appeal focused on in its decision in *Tsleil-Waututh*. The range of this species straddles both sides of the Canada-U.S. border in Boundary Pass, Haro Strait, and the Salish Sea,

¹⁶ *Ibid.* at para. 402.

¹⁷ *Constitution Act, 1867* (UK), 30 & 31 Vict., c. 3, reprinted in R.S.C. 1985, App. II, No. 5, s. 91(10) & 92(10)(b) (emphasis added).

¹⁸ *CEAA, 2012*, *supra* note 1, s. 5(1)(b).

¹⁹ *Canada Shipping Act, 2001*, S.C. 2001, c. 26, s. 8.

²⁰ *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33, s.

²¹ *Species at Risk Act*, S.C. 2002, c. 29, s. 70(2).

²² *Tsleil-Waututh*, *supra* note 2 at para. 449.





through which Project-related tankers are expected to traverse.²³ Both the published recovery strategy for SRKW dated 2011 and the proposed update to the recovery strategy dated 2018 identify the transboundary waters of Boundary Pass, Haro Strait, and the Salish Sea as part of their critical habitat.²⁴

In addition, there are a number of marine bird species at risk that may be adversely impacted by Project-related marine shipping, whose range straddles the transboundary waters traversed by Project-related tankers or otherwise spans from the tanker route to beyond Canada's territorial sea. In the original hearing, BC Nature and Nature Canada, through a series of information requests, written evidence, and legal submissions, argued that the proponent's and the NEB's assessment of these species at risk were inadequate, which include the Marbled Murrelet, Black-footed Albatross, Short-tailed Albatross, and Pink-footed Shearwater.²⁵ While marine critical habitats for these species have yet to be identified, they are listed wildlife species for which the NEB is required under s. 79 of the *Species at Risk Act* to identify potential adverse impacts from Project-related marine shipping. By unduly and impermissibly restricting the scope of the Reconsideration to only physical activities within Canadian territorial waters, the NEB could deprive itself of the ability to gather the necessary information to discharge its duty under s. 79 of the *Species at Risk Act*.

Lastly, it must be remembered that the Governor in Council is the ultimate decision-maker, and that the NEB's role is to provide the Governor in Council with all the necessary information to make an informed decision. In the context of mitigation measures for the Southern Resident Killer Whale, the Federal Court of Appeal held in *Tsleil-Waututh*:

Because marine shipping was beyond the Board's regulatory authority, it assessed the effects of marine shipping in the absence of mitigation measures and did not recommend any specific mitigation measures. Instead it encouraged other regulatory authorities "to explore any such initiatives" (report, page 349). While the Board lacked authority to regulate marine shipping, the final decision-maker was not so limited. In my view, in order to substantially comply with section 79 of the *Species at Risk Act* the Governor in Council required the Board's exposition of all technically and economically feasible measures that are available to avoid or lessen the Project's effects on the Southern resident killer whale. Armed with this information the Governor in Council would be in a position to see that, if approved, the Project was not approved until all technically and economically feasible mitigation measures within the authority of the federal government were in place. Without this information the Governor in Council lacked the necessary information to make the decision required of it.²⁶

Similarly, the ambit of the Governor in Council's consideration is broader than impacts within Canada's territorial sea. In order to decide whether to accept the NEB's recommendations, the

²³ Fisheries and Oceans Canada, *Recovery Strategy for the Northern and Southern Resident Killer Whales (Orcinus orca) in Canada 2018* (proposed) (4 September 2018) at Figure 1: http://www.sararegistry.gc.ca/virtual_sara/files/plans/Rs%2DResidentKillerWhale%2Dv00%2D2018Aug%2DEng%2Epdf.

²⁴ *Ibid.* at Figure 5; Fisheries and Oceans Canada, *Recovery Strategy for the Northern and Southern Resident Killer Whales (Orcinus orca) in Canada* (12 October 2011) at Figure 4: http://www.sararegistry.gc.ca/virtual_sara/files/plans/rs%5Fepaulard%5Fkiller%5Fwhale%5Fv02%5F1011%5Feng%2Epdf.

²⁵ BC Nature and Nature Canada IR No. 1, Exhibit C24-1-1; BC Nature and Nature Canada IR No. 2, Exhibit C24-7-1; BC Nature and Nature Canada Written Evidence, Exhibit C24-12-2; BC Nature and Nature Canada Written Argument-in-Chief, Exhibit C24-19-2.

²⁶ *Tsleil-Waututh*, *supra* note 2 at para. 456 (emphasis added).





Governor in Council may also consider transboundary impacts from this Project, including those that may affect or relate to the federal government's ability to meet its obligations under both domestic and international law. The NEB is required to provide this information to the Governor in Council so that it can ensure that "the Project was not approved until all technically and economically feasible mitigation measures within the authority of the federal government were in place" with respect to transboundary impacts. In our submission, this is Parliament's intent behind including effects occurring "outside Canada" as part of the definition of "environmental effects" under the *CEAA, 2012*. As the Court said above, without this information about transboundary impacts, the Governor in Council would lack the necessary information to make the decision required of it.

C. Draft List of Issues

The NEB has provided a list of six draft issues:

1. "The environmental effects of Project-related marine shipping, including adverse effects on species at risk, and the significance of those effects.
2. "Measures that are technically and economically feasible, and that would mitigate any significant adverse environmental effects of Project-related marine shipping. Given that the Board found four significant adverse effects related to Project-related marine shipping in its original assessment (i.e., greenhouse gas emissions, Southern resident killer whale, traditional Aboriginal use associated with Southern resident killer whale, and the potential effects of a large or credible worst-case spill), the consideration of mitigation measures will focus on these four matters. This will include consideration of whether the mitigation measures will change the Board's previous significance findings.
3. "Alternative means for carrying out Project-related marine shipping that are technically and economically feasible, and the environmental effects of such alternative means.
4. "Requirements of any follow-up program in respect of Project-related marine shipping.
5. "Measures to avoid or lessen the adverse effects of Project-related marine shipping on SARA-listed wildlife species and their critical habitat, including monitoring, and consideration of how the undertaking of such measures could be ensured. The Board's original assessment identified the SARA-listed marine fish, marine mammal, and marine bird species that could be found in the area of, or affected by, Project-related marine shipping, providing a focus for this issue. Any marine species that have been newly listed, or any species that have seen a change to their designation, since the issuance of the Board's Report and that could be affected by Project-related marine shipping would also require consideration under the SARA.
6. "Whether there should be any changes or additions to the Board's recommendations for the Project, or recommended terms or conditions, in light of the above issues."

With respect to Issue #1, the NEB has indicated that: "The Board is of the view that certain issues described above, in particular Issue #1, were thoroughly canvassed in the OH-001-2014 Certificate hearing and may not require additional evidence."





BC Nature and Nature Canada have four responses to this draft list of issues:

1. The decision of the Federal Court of Appeal in *Tsleil-Waututh* places an obligation on the NEB to consider environmental effects of Project-related marine shipping, which the NEB cannot ignore;
2. The NEB has an obligation to provide the Governor in Council with the best available science and most up-to-date information in this Reconsideration;
3. We disagree that the NEB has “thoroughly canvassed” certain issues, in particular Issue #1, such that no additional evidence would be required; and,
4. For the NEB to discharge its statutory function and duties, the NEB must do more than consider mitigation measures for only those matters that the NEB had found significant adverse environmental effects from Project-related marine shipping.

1) *NEB must consider environmental effects of Project-related marine shipping*

BC Nature and Nature Canada submit that the NEB cannot simply rely on its assessment from the original hearing and must conduct a proper assessment of Project-related marine shipping.

As canvassed above, the Federal Court of Appeal in *Tsleil-Waututh* held, in no uncertain terms, that the NEB’s decision to exclude Project-related marine shipping from its assessment under the *CEAA, 2012* was “unjustified” and a “critical error”.²⁷ This exclusion of Project-related marine shipping “resulted in a report so deficient that it could not qualify as a ‘report’ within the meaning of the legislation and it was unreasonable for the Governor in Council to rely upon it”.²⁸ By remitting the matter back to the Governor in Council, the Court also directed the NEB to reconsider its “environmental assessment of the Project in the light of the Project’s definition [and] the Board’s recommendation under subsection 29(1) of the *Canadian Environmental Assessment Act, 2012*”.²⁹ We submit that the Court’s direction places an obligation on the NEB to consider environmental effects of Project-related marine shipping.

Moreover, the NEB’s statutory duties under the *CEAA, 2012* must be carried out in light of the Court’s direction. If the NEB decides, on a principled basis, that Project-related marine shipping is incidental and therefore needs to be assessed, then must consider the factors enumerated in section 19 of the Act, which include:

1. the environmental effects of the designated project, including the environmental effects of malfunctions or accidents that may occur in connection with the designated project and any cumulative environmental effects that are likely to result from the designated project in combination with other physical activities that have been or will be carried out;
2. the significance of those effects; and,

²⁷ *Ibid.* at para. 5.

²⁸ *Ibid.* at para. 470.

²⁹ *Ibid.* at para. 770.





3. mitigation measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the designated project.³⁰

These are mandatory duties that the NEB must carry out as part of its Reconsideration. The NEB cannot shirk this statutory responsibility and the Court's direction by relying on an assessment and report that, for the reasons canvassed in greater detail below, failed to provide the Governor in Council with the necessary information to make a legally defensible decision about impacts from Project-related marine shipping.

2) NEB must provide best available science and most up-to-date information

The NEB has an obligation to provide the Governor in Council with the best available science and most up-to-date information on Project-related marine shipping. The proponent's original application was filed in December 2013 and the original hearing process took place in 2014 to 2016, with the NEB's report being published in May 2016. It has been over two years since the NEB's report, and approximately three years since the information request process in the original hearing. Since then, new scientific information has surfaced. The NEB should not establish a process for this Reconsideration that would unduly foreclose the NEB's ability to collect and consider new evidence relevant to its assessment of Project-related marine shipping impacts.

For example, as mentioned above, Fisheries and Oceans Canada has recently published a proposed revision to the Southern Resident Killer Whale recovery strategy.³¹ New scientific information has also emerged regarding various marine bird species since the original hearing. Particularly in relation to marine bird species at risk that appear along the tanker route, new developments since the NEB's original assessment and report include the following:

1. Various action plans under s. 47 of the SARA have been published for Marbled Murrelet, Black-footed Albatross, Short-tailed Albatross, and Pink-footed Shearwater;
2. Management plan under s. 65 of the SARA was published in 2017 for the Black-footed Albatross; and,
3. New COSEWIC assessment and status report was published in 2017 for the Pink-footed Shearwater.

In particular and as an example, in its 2017 assessment and status report for Pink-footed Shearwater, COSEWIC elevated the status of this species from Threatened to Endangered.³² According to COSEWIC's report, threats to this species include impacts from chronic and acute oil spills.³³

In our submission, for the NEB to properly discharge its statutory duties under the CEAA, 2012 and conform to the direction of the Federal Court of Appeal, the NEB cannot simply rely on its original assessment and report for marine shipping impacts. Instead, it must conduct a

³⁰ CEAA, 2012, *supra* note 1, s. 19(1)(a), (b), and (d).

³¹ DFO (2018), *supra* note 23.

³² COSEWIC, *COSEWIC Assessment and Status Report on the Pink-footed Shearwater *Ardenna creatopus* in Canada* (24 October 2017): https://sararegistry.gc.ca/virtual_sara/files/cosewic/sr_Pink-footed%20Shearwater_2016_e.pdf.

³³ *Ibid.*





reconsideration that properly reviews the best available science and most up-to-date information on impacts from Project-related marine shipping.

3) *Impact of shipping was not “thoroughly canvassed” with respect to marine birds*

BC Nature and Nature Canada disagree that the issue of Project-related marine shipping was “thoroughly canvassed”, particularly with respect to marine birds. The original hearing left many key issues unresolved and the state of the evidence at times at conflict with respect to impacts on marine birds. With this Reconsideration, the NEB has the opportunity and the duty to conduct a fulsome and legally adequate assessment of marine shipping impacts.

Firstly, Trans Mountain’s evidence relating to potential impacts of a marine spill on birds in the uses a “habitat-focused approach” that fails to take into account differences in species abundance and distribution, species behaviour, and shoreline types, nor does it provide adequate detail regarding population level impacts.³⁴ When BC Nature and Nature Canada requested Trans Mountain to provide information on potential impacts based on seasonal distribution and abundance information for marine bird populations, Trans Mountain declined on the basis that no existing data existed at the time.³⁵ We submit that lack of existing information cannot serve as a basis for providing an inadequate application to the NEB, nor as an excuse to avoid conducting further investigation. As stated in the NEB Filing Manual, “it is ultimately the responsibility of the applicant to make its case before the Board”.³⁶ Other deficiencies in the evidence surrounding impacts from marine shipping include failures by Trans Mountain not provide the NEB with:

1. estimates of marine bird mortality rates in the event of a marine oil spill;
2. information on potential ecological consequences to wildlife and wildlife habitats exposed to submerged and sunken oil;
3. potential ecological impacts of credible worse-case oil spill scenarios; and,
4. adequate justification of lethal exposure thresholds used by Trans Mountain to assess impacts to marine birds from acute exposure to oiling.³⁷

Secondly, there was insufficient baseline information in the record for the NEB to make an adequate assessment of potential marine shipping impacts on birds. For example, Trans Mountain failed to explain how it developed baseline estimates for marine bird diversity, abundance, and distribution from the various sources of information that it claimed to have used for this purpose.³⁸

Thirdly, the evidence provided by Trans Mountain on the time that marine bird populations are expected to take to recover from a large marine oil spill was unsubstantiated and highly questionable.³⁹ Trans Mountain’s estimates were largely based on studies conducted following the Exxon Valdez oil spill (“EVOS”). However, there are significant disagreements among scientists about the impact of EVOS and recovery by marine bird populations that we submit remained unresolved in the record in the original hearing. Moreover, the over-reliance by Trans

³⁴ BC Nature and Nature Canada Written Argument-in-Chief, Exhibit C24-19-2 at paras. 41-46 and citations therein.

³⁵ *Ibid.*

³⁶ NEB Filing Manual (January 2015) at 1-1.

³⁷ BC Nature and Nature Canada Written Argument-in-Chief, Exhibit C24-19-2 at paras. 47-51 and citations therein.

³⁸ *Ibid.* at para. 52-55 and citations therein.

³⁹ *Ibid.* at paras. 56-58 and citations therein.





Mountain on one spill example renders the evidentiary record inadequate in ascertaining potential impacts on marine bird species.

Fourthly, the evidence on potential impacts on marine birds was compromised by the failure of Trans Mountain to select appropriate indicator species.⁴⁰ For example, Trans Mountain failed to select a marine bird indicator species that would adequately represent several key marine bird species or groups of species.⁴¹ None of the selected 26 marine bird indicator species that Trans Mountain selected adequately represented either alcids or shorebirds.⁴² Moreover, none of the selected indicator species adequately represented Red-necked Phalarope, which is a COSEWIC-listed species of special concern and a Blue-listed species in British Columbia.⁴³ The evidentiary record was also devoid of a proper assessment of the impacts of sensory disturbance and prey-mediated impacts on marine birds.⁴⁴

Fifthly, the evidentiary record is deficient in the assessment of contribution from Project-related marine shipping on chronic oiling, and its impact on marine birds.⁴⁵ Chronic oiling refers to the phenomenon characterized by the smaller (< 1000 L), but more frequent, discharge of oil into a particular area. Trans Mountain failed to identify chronic oiling in itself as a Project-related effect, either as a result of routine operations or as a result of a malfunction or accident, even though risk from chronic oiling has been identified as a threat to marine bird species at risk found in the BC coast, such as Marbled Murrelet, Short-tailed Albatross, Black-footed Albatross, and Pink-footed Shearwater.⁴⁶

Sixthly, the record before the NEB in the original hearing failed to properly canvass potential impacts from marine shipping on marine bird species at risk.⁴⁷ For example, in the evidence Trans Mountain provided, Trans Mountain did not consider the at-risk status of marine bird species and populations when determining their sensitivity to oiling, even though an at-risk species has an elevated risk of extinction.⁴⁸ Further, Trans Mountain understated the number of marine bird species at risk that occur or could potentially occur within the vicinity of the two hypothetical spill locations that it modelled.⁴⁹ Also, Trans Mountain's assessment that potential impacts on marine bird species at risk as not significant was based on limited scientific evidence.⁵⁰ As canvassed above, the NEB required by the *SARA* to identify the adverse effects of the Project-related marine shipping on *SARA*-listed species and their critical habitat and to consider mitigation measures.⁵¹ With this Reconsideration, the NEB has the opportunity and the duty to resolve these and other deficiencies in the evidentiary record surrounding marine shipping impacts on marine birds.

⁴⁰ *Ibid.* at paras. 63-67 and citations therein.

⁴¹ *Ibid.*

⁴² *Ibid.*

⁴³ *Ibid.*

⁴⁴ *Ibid.*

⁴⁵ *Ibid.* at paras. 68-74 and citations therein.

⁴⁶ *Ibid.*

⁴⁷ *Ibid.* at paras. 75-82 and citations therein.

⁴⁸ *Ibid.*

⁴⁹ *Ibid.*

⁵⁰ *Ibid.*

⁵¹ *Species at Risk Act*, S.C. 2002, c. 29, s. 79(2).





Lastly, as discussed above, new information and better science has emerged since the NEB's assessment and report. Project-related marine shipping impacts has not been "thoroughly canvassed" unless and until the NEB grapples with the best available science and most up-to-date information that are available in this Reconsideration. Furthermore, as will be discussed in greater detail in the section that follow, the NEB failed to adequately consider mitigation measures in relation to impacts on marine birds, particularly marine bird species at risk.

4) *NEB must consider mitigation measures*

In the draft list of issues, the NEB proposes to consider mitigation measures only in relation to four matters for which the NEB had found significant adverse effects related to Project-related marine shipping in its original assessment: greenhouse gas emissions, Southern Resident Killer Whale, traditional Aboriginal use associated with Southern Resident Killer Whale, and the potential effects of a large or credible worst-case spill. BC Nature and Nature Canada submit that such a narrow approach would unduly and impermissibly restrict the NEB's ability to carry out its statutory duties under the *CEAA, 2012* and the *SARA*. In our view, the NEB must consider mitigation measures for all Project-related marine shipping impacts.

In understanding the NEB's legal duty, it is important to appreciate the division of labour that Parliament has imposed under the *CEAA, 2012* on a responsible authority (here the NEB) on the one hand, and the ultimate decision-maker (here the Governor in Council) on the other. In the environmental assessment, the NEB has no decision-making function on its own. The role of the NEB is to "assemble information, analyze, assess and study it, and prepare a report that makes recommendations for the Governor in Council to review and decide upon".⁵² The Governor in Council is the entity vested by Parliament with the responsibility of making the ultimate decision. One of the key functions of the *CEAA, 2012* is to ensure that the NEB provides the Governor in Council with the evidentiary basis to decide whether the Project should proceed.

The Act provides the list of factors that the NEB must take into account, which include:

1. The environmental effects from a designated project;
2. The significance of those effects; and,
3. "mitigation measures that are technically and economically feasible and that would mitigate any significant adverse environmental effects of the designated project".⁵³

The duty to consider mitigation measures exists separately from the duty to consider environmental effects from the project and the significance of those effects. Even if the NEB were to recommend that a particular environmental effect would not likely to be significant, the NEB is nevertheless under a statutory duty to provide the Governor in Council with information about mitigation measures that may reduce the significance of those effects. The Governor in Council is under no obligation to agree with the NEB on its assessment of significance. Where the Governor in Council disagrees with the NEB's assessment of significance, the ability of the Governor in Council to properly decide whether a significant adverse environmental effect is likely to occur would depend

⁵² *Gitxaala Nation v. Canada*, 2016 FCA 187 at para. 121.

⁵³ *CEAA, 2012*, *supra* note 1, s. 19(1)(a), (b), and (d).





on the adequacy of information provided to it by the NEB, *including information on mitigation measures*.

Here, the Federal Court of Appeal has directed the NEB to reconsider Project-related marine shipping impacts. For the reason set out in Part C.1 above, we submit that the NEB cannot simply rely on its assessment from the original hearing and must conduct a proper assessment of Project-related marine shipping. This obligation includes a duty to consider mitigation measures for all environmental effects from Project-related marine shipping, not simply for those effects that the NEB had already found to be significant.

The NEB's obligation to consider mitigation measures is strengthened by the *SARA* where Project-related marine shipping may affect *SARA*-listed species. As discussed above, the ranges of various marine bird species at risk overlap the tanker route. Regardless of whether the NEB has decided that significant adverse environmental effects would occur for these species, s. 79(2) of the *SARA* requires the NEB to "identify the adverse effects of the project on the listed wildlife species and its critical habitat and, if the project is carried out, must ensure that measures are taken to avoid or lessen those effects and to monitor them".⁵⁴ Just because the NEB has or may purport to determine that adverse effects of the project on marine birds is not significant in no way relieves it of the legal duty under s. 79(2) to ensure that mitigation measures are taken to avoid or lessen project-related harm to *SARA*-listed bird species.

D. Hearing Process Design

In the original hearing, BC Nature and Nature Canada argued that "deficiencies in the [proponent's] Application that they have described ... can be attributed to the lack of cross-examination in this Hearing, and that further testing of the evidence through cross-examination is needed to address some of these deficiencies".⁵⁵ We submit that the NEB should order limited oral questioning of witnesses in this Reconsideration.

While we understand that the NEB is under a strict timeframe of 22 weeks to complete this Reconsideration, we submit that limited oral questioning can and should be imposed. We note that the Joint Review Panel for the Frontier Oil Sands Project is currently undergoing five weeks of oral hearing, which includes cross-examination of witnesses.⁵⁶ In contrast to that hearing, which involves the environmental assessment of an entire designated project, the oral hearing for the Reconsideration would be limited in scope only to the matter of Project-related marine shipping. It would be reasonable to schedule a limited public hearing that should not take longer than the one currently in progress for the Frontier Oil Sands Project JRP.

⁵⁴ *Species at Risk Act*, S.C. 2002, c. 29, s. 79(2).

⁵⁵ BC Nature and Nature Canada Written Argument-in-Chief, Exhibit C24-19-2 at para. 111.

⁵⁶ Frontier Oil Sands Project Joint Review Panel, *Public Hearing Schedule* (1 October 2018): <https://www.ceaa-acee.gc.ca/050/documents/p65505/125252E.pdf>.





E. Government Departments or Bodies

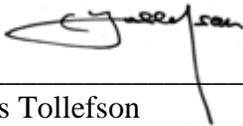
We submit that the NEB should request specialist or expert information or knowledge from the following government departments or bodies:

1. BC Ministry of Environment;
2. Canadian Coast Guard;
3. Canadian Wildlife Service;
4. Environment and Climate Change Canada;
5. Fisheries and Oceans Canada;
6. Parks Canada;
7. Transport Canada; and,
8. Vancouver Fraser Port Authority.

All of which are respectfully submitted 3 October 2018,

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