



## KINDER MORGAN CANADA

### Submission to the Expert Panel Review on National Energy Board Modernization

March 30, 2017

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#### **Background**

Kinder Morgan is one of the largest energy infrastructure companies in North America. Kinder Morgan Canada operates a number of pipeline systems and terminal facilities including the Trans Mountain pipeline, the Cochin pipeline, the Puget Sound and Trans Mountain Jet Fuel pipelines, the Westridge marine and Vancouver Wharves terminals in British Columbia as well as various terminal and crude oil loading facilities in Edmonton, Alberta.

The Trans Mountain pipeline currently transports approximately 300,000 barrels per day (bpd) of crude oil and refined petroleum products from the oil sands in Alberta to Burnaby, British Columbia and Washington State. On November 29, 2016, the Government of Canada granted approval for the \$7.4 billion Trans Mountain Expansion Project, which will increase the nominal capacity of the system to 890,000 bpd. The expanded pipeline is expected to be completed in 2019. During construction of the Project, the anticipated workforce will reach the equivalent of 15,000 jobs per year, followed by the equivalent of a further 37,000 direct, indirect and induced jobs per year of operations.

#### **Review Context**

In response to the Federal Government's interest and effort in looking at ways in which to modernize the National Energy Board (NEB), Kinder Morgan Canada (KMC) appreciates the opportunity to participate in and comment on this initiative with the aim to position the NEB as a modern, efficient, and effective energy regulator and to regain public trust. With the recent decision to approve of the Trans Mountain Expansion Project (TMEP), the Company has undergone a regulatory process that has taken five years including both application development (2 years) and regulatory review and approval (3 years).

As such, KMC is very much interested in seeing that the government's modernization efforts and the work of the NEB Modernization Panel will result in recommendations that ensures a regulatory oversight and review process that is efficient, transparent, fair and provides certainty in all aspects of full lifecycle regulation of pipelines under the NEB's jurisdiction.

Furthermore, as an active member of the Canadian Energy Pipeline Association (CEPA), KMC has been part of the recent discussions that have gone into the findings and recommendations included in the recently written submission by CEPA to the NEB Modernization Panel.

## Regulatory Reform Principles

In the context of the government's efforts to modernize the NEB, KMC supports and subscribes to the following regulatory reform principles.

- The NEB review process is one of the most rigorous and robust regulatory systems in the world. It is transparent, science, evidence and fact based, grounded in sound administrative legal principles and has prescribed timelines. While it has evolved over time, it is recognized that, as with all processes, there is always room for improvement. KMC believes that there is sufficient flexibility within the current NEB Act to make many of the changes that are directed to making the review process even more efficient, effective and meaningful for all concerned.
- Pipeline reviews should be premised on being completed in a timely fashion with clear rules and be structured to provide a degree of protection to a proponent to ensure that capital investment decisions are made with some certainty that a project is in the national interest.
- The process should be efficient, utilizing a single review process for each project. A single process is fair to the proponent and focuses participants' efforts. A single process implies a single regulator. The NEB remains the only federal government agency with in-depth knowledge and expertise of the full pipeline lifecycle, (including their impact on the environment and people). Whether there is a single or dual process (e.g. federal and provincial), there needs to be coordination across jurisdictions to avoid duplication of process.
- Pipeline reviews and environmental assessments should rely on science and fact-based evidence.
- Pipeline reviews and environmental assessments should be transparent, timely (based on predictable timelines), consistent and replicable – essential for being conducive to investment.
- Pipeline reviews should be inclusive and accessible but not at the expense of natural justice and procedural fairness.
- Pipeline reviews should take place within a policy framework developed by government that address broader "national interest" issues such as climate change, transition to a lower carbon economy, and Indigenous matters and consultation, etc. that are outside the scope of a proponent's project.
- Pipeline reviews should be de-politicized whereby the NEB's Reasons for Decision are the final approval based on the arguments and evidence presented and tested and bound by the rules of Natural Justice.
- Pipelines should be designed, constructed and operated and abandoned using industry best practices.

- The roles and expectations of all parties need to be clarified for the purpose of ensuring appropriate Indigenous consultation is undertaken especially that of the federal government which retains the final obligation and discharging of its Duty to Consult obligations.

### **NEB Modernization Panel Terms of Reference**

The comments that follow are intended to further elaborate on and contribute to the CEPA submission on topics of interest to KMC that speak to the Modernization Panel's terms of reference noted below.

- Governance and Structure
- Mandate
- Decision Making, Public Interest and the Role of Policy
- Tools for Lifecycle Regulation
- Public Participation
- Indigenous Engagement

### **Governance and Structure**

- There is a clear desire to broaden the Board's composition to reflect society at large including Indigenous interests. Board members must have generalized knowledge of the energy industry in Canada and have key skills or areas of expertise needed to effectively adjudicate regulatory applications including procedural and legal matters, engineering, economics, environmental, land, stakeholder relations, and traditional knowledge. Furthermore, Board members could be located anywhere in Canada where telecommuting is supported and which could assist in getting appropriate regional balance and the necessary skill mix including Indigenous representation.
- KMC strongly advocates for a de-politicization of the project review process. KMC supports a clear distinction between the role of government in formulating policy and the role of the regulator in implementing policy and applying fact and science based evidence when making decisions.
- For cost and efficiency reasons, it is important for the NEB to be located near the companies it regulates due to the ongoing, long-term nature of the lifecycle regulation. As such, the NEB headquarters should remain in Calgary given the concentration of pipeline companies and other energy-related firms.

- The Board should keep focus on interprovincial pipeline and electricity regulation and include delegation of further authority to Board staff. There is benefit from having a consistent approach to decision-making that would be further advanced with more delegation within the NEB. Many routine matters, (including compliance related filings which do not require adjudication, some operational and highly technical matters, audits, inspections, etc.), that currently require Board approval could be delegated to expert senior Board staff. This would speed up processes that currently require formal Board involvement and approval.

### **Mandate**

- In KMC's view the NEB is a highly regarded regulatory agency both nationally and internationally with well defined process and precedents. Their staff and expertise are world class and competent. NEB staff work hard and are committed to balancing the environment and sustainable development through their actions.
- Many of the concerns being raised on issues outside of the NEB's mandate do not speak to a deficiency in the NEB but to a deficiency related to the lack of broader policy direction from government that needs to define the direction on issues like climate change, low carbon future national energy strategy and Indigenous Rights and Title.
- The NEB has decades of experience in energy adjudication and lifecycle regulation of pipelines. As a lifecycle regulator, it is familiar with industry best practices for pipeline construction and operating standards, and has the expertise to take environmental effects that are unique or potentially significant to pipeline projects into consideration. NEB modernization should focus on identifying where further improvement in the expertise of the NEB in its core areas of responsibility and in the context of full lifecycle regulation may be needed.
- A lifecycle approach by a single regulator is efficient and effective, since the same staff can be involved in oversight of both construction and operations. It is more effective because the staff of a single lifecycle regulator will have full exposure to all aspects of pipeline construction and operation and therefore develop enhanced expertise in the interactions of the environmental aspects of both construction and ongoing operations.
- KMC takes the preferred position that the NEB should continue to oversee the Environmental Assessment (EA) review process. Over the decades the Board has amassed extensive expertise in the environmental effects and matters related to pipelines. As a

lifecycle regulator, KMC believes the NEB is best positioned for rigorous EA follow up and compliance enforcement.

- Removing the EA process from the NEB would require additional regulatory authorities and processes for project proponents. This is inefficient, costlier in both time and money and may result in fragmented consultations and condition compliance. Furthermore, involving additional agencies can create confusion and conflict with stakeholders and Indigenous communities. With more agencies involved the risk for poor coordination between agencies or processes increases and typically results in significant delays in decision making.
- KMC believes that the principle of “one-project-one-review” is at the core of regulatory efficiency and excellence and that any changes contemplated by the government will need to uphold the principles of regulatory efficiency to include a fixed timetable, a clear understanding of requirements to be met, and a predictable process with rational and transparent decision making. The overall objective should continue to be only one review, one decision, with one comprehensive approval.
- Energy data, information and analysis may distract from the NEB’s core mandate and therefore should be managed by the respective government departments (not the NEB), including NRCan and Environment and Climate Change Canada. Especially in the case of producing information and data related to climate change, it would be more appropriate to house this function with an outside agency. The energy information function might be better placed with a government Department(s) or a separate agency similar to the US Energy Information Administration, which collects this kind of data in the United States.

### **Decision Making, Public Interest and the Role of Policy**

- Much of the public’s concerns with the current regulatory process stems from the lack of consideration of where the project fits within the overall Canadian public policy picture. The existing quasi-judicial and technical review process should not be the forum to confront and debate broader policy issues like those previously mentioned which are beyond the scope of a proponent’s project.
- From KMC’s perspective and having experienced this through the Trans Mountain Expansion Project review process, companies are now faced with an approval process that creates unacceptable risk and uncertainty, polarization within the review process, lengthy process delays and in the worst case, can result in a final Cabinet decision that can be at odds with an NEB recommendation which is based on science and facts.

- Project proponents will spend hundreds of millions of dollars and several years in getting to a regulatory decision with little certainty that a project would be approved. Knowing that there is a very real risk that the application could be denied not on the basis of science, technical or economic merits, but because of a risk of change in public policy or, in some instances, evolving political interest considerations, going forward, proponents and investors may be reluctant to risk proceeding through lengthy, expensive and uncertain regulatory reviews. As a consequence, future investment and economic growth provided by responsible resource development projects may become missed opportunities.
- By way of example KMC's recently approved Trans Mountain Expansion project has taken 36 months from the time the application was submitted to receiving final approval. In total, KMC has spent nearly \$600 million to date throughout this regulatory process with no certainty that an approval would be granted at the end of the day.

#### **Two-part review for major pipelines**

- To reduce the considerable regulatory risk which has been introduced by the expansion of the scope of the decision-making process into the policy realm, (for section 52 applications), KMC like CEPA is proposing a two-part review that would separate out the broader policy issues from the traditional technical and environmental reviews, engineering and land matters.
- Part I as proposed, would be a national interest determination that addresses the issue of public need and necessity, and broader policy issues like climate change, transition to a low carbon economy, energy policy, need for new infrastructure, and Indigenous matters and consultation obligations.
- Part I would include a detailed project description that covers need, project economics and benefits, route corridor, key environmental, social and economic issues, high level engineering and design challenges and engagement and consultation with Indigenous groups (including discharging the Crown's Duty to Consult). The result of Part I would answer the question of whether the project is in the national interest and should the project proceed.
- A Part I national interest determination decision would help mitigate investor risk by signaling whether a project should proceed to a more detailed assessment before proponents invest years of preparation and hundreds of millions of dollars developing technical proposals and participating in multi-year regulatory reviews.

- The proposed timing to complete Part I would be 12 months including a binding GIC decision from Cabinet, (subject to a complete and successful Part II review), with more reasonable costs approaching \$50 million vs hundreds of millions. In addition, the issues reviewed and addressed in Part I would not be reconsidered in the more detailed Part II review recognizing that some issues, such as environmental impacts would be explored at a broad level in Part I and at a more detailed level in Part II.
- If in Part I a project is found to be in the national interest, the project would then proceed to a more detailed technical assessment in Part II of the review. Part II should also take 12 months and would include the more well-established and thorough examination of the technical aspects of the project that covers, standard technical review of routing, engineering and design, detailed route and environmental and land matters more typically required for section 52 applications.
- Part II would consider project-specific mitigation measures to address routing considerations raised by landowners, Indigenous communities and other stakeholders directly impacted by the proposed project. Part II would assess “how” a project could proceed and which conditions would need to be applied to mitigate or enhance expected environmental, social and economic impacts from the project. The assessment in this part would be based on well-established scientific and engineering principles that would typically be of interest to a narrower group of stakeholders who are directly affected by the project.
- With the broader public policy issues and national interest determination dealt with in Part I, Part II would result in a timely decision by the NEB that would be final and NOT require a GIC (Cabinet) approval.
- The 2 part review process should be considered as another option that proponents could choose to go through or they could opt for the existing NEB review process for major pipeline projects depending on their circumstances. Smaller projects, whether under provincial or federal jurisdiction, would not likely have the same perceived significant impact on issues of national concern. For those projects, the current review process within the NEB is working effectively.

## **Tools for Lifecycle Regulation**

### **Lifecycle oversight**

- Kinder Morgan Canada does not believe new tools are required in this area. With the New Pipeline Safety Act and supporting regulations, the Board has full authority to oversee pipelines from approval through to abandonment.

### **Safety and Emergency Response**

- KMC supports a goal based approach to regulation for pipeline safety and integrity. Having strong industry standards (like CSA) also lends itself to a process for managing safety and integrity which is transparent and inclusive.
- The NEB can manage common standards for emergency preparedness including working with industry associations. Emergency preparedness however needs to be managed by pipeline companies themselves as it is facility specific and in the interests of the pipeline company to manage reputational risk.
- The NEB should balance and exercise discretion between security matters and transparency of emergency response plans to ensure public awareness and expectations are satisfied but that sensitive and compromising information is considered.
- KMC strongly believes in the importance of creating more meaningful opportunities for Indigenous communities to become more actively involved in pipeline safety – this includes both environmental monitoring, operations maintenance work as well as the development of robust emergency management plans.
- With respect to decision making, KMC takes the position that the NEB maintain the decision making role in lifecycle regulation activities but ensuring that these decisions are appropriately tailored to the specific nature of Indigenous interests impacted and takes into account any pre-existing arrangements with Indigenous communities.
- Involvement of Indigenous groups brings great understanding of the pipeline industry and is of value to proponents in demonstrating first-hand to community liaisons the high standard of regulation that must be achieved by pipeline operators so that they can share this information within the community.
- Developing a culture of safety among all communities along KMC's pipeline systems is of high value to KMC. There is mutual benefit in working to build capacity within Indigenous groups to be first responders and to work in coordination with industry and other government entities in the event of an emergency. This can be further enhanced by developing communications protocols and skills through regular training exercises and updates to emergency response plans. Most rural Indigenous communities have volunteer fire halls that can be leveraged as a starting point for housing equipment and identifying interested individuals.
- KMC is working with Indigenous groups to develop “Geographic Response Plans” that encourage a partnership approach to emergency preparedness. Working with Indigenous

groups who have knowledge of lands and waterways within a region provides valuable information into planning strategies.

**Land Matters:**

- The current regulatory process addresses route selection and land access and there are mechanisms in place to adjudicate conflicting interests between the public need vs private land owner or community interests. Processes for negotiating fair compensation for land access and ROW is more effectively managed outside of the regulatory process and the legal basis for doing so is well established.

**Public Participation**

- Procedural fairness and natural justice must be preserved and allow for proponents to have the ability to address the comments and arguments made against a project. It will also require that decisions are based on science, fact and evidence, as opposed to opinions and positions that are not subject to testing through cross examination or response by a project proponent.
- In keeping within fixed timelines, public consultation should occur in parallel to the formal process with the NEB striking a committee that would consult with the public separate from the more formal NEB panel review process. This approach could be done early in the process and would provide the public with an opportunity to provide their comments to the body overseeing these informal sessions resulting in a report prepared for the NEB Panel that would be used as formal evidence for testing and questions from the NEB to the proponent. The integrity of the process could be maintained by having separation of the NEB Panel vs the committee involved in conducting the public consultation.
- More formal opportunities of participation such as Intervenor status should be reserved for those that are either directly affected by a proposed project or have relevant expertise. However, all parties, whether they have formal standing or not, should have opportunities to provide comments through flexible and appropriate processes. As is the case now, the NEB considers all relevant evidence before it when making its recommendations and decisions.
- The decision making process must be transparent. For the public to be able to accept decisions, it is important to understand how those decisions were made and how their input was reflected in that decision. Decisions should reflect the factors that are considered in reaching those decisions, including input received from the public.
- An inclusive approach to public involvement that allows for timely decisions can be accomplished with scalable and flexible levels of involvement, including written

submissions, expert witnesses and live statements. It can improve the quality of the decision and ultimately help legitimize the process and build public trust.

## **Indigenous Engagement**

- KMC recognizes the inherent and constitutionally protected rights of Indigenous groups and respects their traditional knowledge, values and beliefs. KMC has invested significant time and resources in building and sustaining positive and beneficial relationships with the many Indigenous groups in those traditional territories where the Company operates. This includes providing significant and tangible benefits through increased training, education, and employment, as well as procurement, construction, and other business opportunities.
- KMC recognizes the duty of the Crown to consult with Indigenous groups and is committed to meaningful engagement, including when the Crown delegates procedural aspects of consultation, with Indigenous groups to address interests and concerns of those who may be affected by the construction and ongoing operation of its pipeline projects and operations. KMC engages with those communities and their leadership where and whenever possible to ensure that any concerns and potential impacts to Indigenous rights and interests are addressed and works to obtain the support of affected Indigenous groups where possible.
- KMC's own experience with the Trans Mountain Expansion Project was such that numerous Indigenous communities were engaged with the Company in consultation and accommodation and KMC's learnings from this will go a long way in helping improve Indigenous engagement going forward.
- Some observations speak to issues that are unrelated to project approval, such as historic grievances relating to prior Crown conduct in traditional territories and ongoing disputes over Indigenous rights and title, including overlapping claims, treaty implementation, or treaty interpretation that cannot be effectively addressed in the context of project reviews. These can be significant for Indigenous groups and they all require broader government action that goes beyond what proponents can do. These issues should be recognized and dealt with as Nation-to-Nation issues rather than proponent issues.
- As in the case of the Trans Mountain Expansion Project, there is value in being able to rely upon the federal government's commitment to 'nation to nation' discussions with groups that choose not to meet with proponents directly. That the federal government can then facilitate communication back to the proponent for consideration is valuable and ensures that all opportunities to learn about interests, impacts and possible areas of mutual benefit

are explored. It is therefore imperative for the federal government to work early and often in coordination with proponents and provincial government regulatory bodies.

- Linear projects like pipelines require extensive engagement and consultation with a large number of Indigenous groups that will have widely varying interests and concerns, different levels of capacity and knowledge about pipeline developments and operations, and different expectations about how they want to be consulted and engaged with throughout the lifecycle process. This too poses additional challenges for proponents who aim to be inclusive and respectful of individual community interests. To provide some context, Trans Mountain undertook consultation with over 100 Indigenous groups for the Trans Mountain Expansion Project.
- While obtaining unanimous consent when several Indigenous groups are involved is the goal, it is a challenging goal that must be recognized for what it is. In addition, managing outright opposition to a project poses further issues for a proponent. As such a one-size-fits-all approach towards Indigenous consultation and engagement may not be workable since not all projects are the same, not all impacts are the same, and not all Indigenous rights and interests at issue are the same.
- With respect to Indigenous involvement in pipeline lifecycle oversight, KMC takes the position that the NEB should remain responsible for both project review as well as lifecycle regulation of pipelines for safety and integrity purposes. However KMC supports greater involvement of Indigenous groups in the lifecycle process working within an NEB led committee structure that would include Indigenous representation related to lifecycle reviews. This would include committees that provide feedback for example to the NEB on condition compliance and construction monitoring. Indigenous representatives could also be selected to be members of the NEB panel evaluating projects within the same parameters as other panel members.
- In meeting duty to consult obligations, it would be helpful if the government provides specific guidance and criteria as to what level of consultation and accommodation is deemed to be adequate. The following should be considered when determining adequacy: Indigenous rights in question; Impact significance; Land-use (prior and current); Proponent efforts to address Indigenous concerns; Opposing and supporting positions.
- For major pipeline projects, the federal government needs to engage Indigenous communities much earlier in the process in order to identify whether there are issues that cannot be addressed within a project review and require a separate Nation-to-Nation process. If this engagement is left until the current GIC decision-making step, there is a high likelihood that the timing of the regulatory decision process will be unavoidably lengthened. That in turn, will have a negative impact on project construction and in-service timing,

potential legal challenges, and significant financial and commercial impacts to the project proponent and their industry clients.

- Any steps by the federal government to implement a Nation-to-Nation dialogue on project reviews are welcomed and should support existing relationships between Indigenous groups and industry. Building and sustaining positive relationships helps to advance reconciliation and are important given the long operational life of many projects which will go well beyond the Crown's initial involvement.
- Finally on the issue of identifying which Indigenous groups need to be consulted for a particular project, the federal government needs to develop a set of objective, consistent, and transparent criteria including a national traditional territory database that proponents and government can refer to in determining which Indigenous groups should be engaged and consulted with. These decisions should be made at the outset of the process, with a mechanism to enable proponents to seek early advice from the federal government on Indigenous groups that need to be consulted for the purposes of early engagement. We also recommend that a process be set up to address groups who are not captured on contact list at the outset of engagement but who come forward during or after the NEB process, based on revised territorial boundaries, to seek some form of consultation and accommodation from the proponent.

In closing, KMC would like to take this opportunity to thank the Panel for allowing it to provide written commentary into the Government's NEB Modernization review and trusts that the comments provided both from an industry perspective and KMC's own experience will provide useful input for the Panel as it deliberates and puts forward its recommendations to the federal government on NEB modernization.