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Dear Ms. Young,

I am withdrawing as an expert intervenor from the National Energy Board review of the Trans Mountain Expansion Project. After dedicating professional expertise for more than a year, *pro bono* and in good faith, I have concluded that withdrawal is the only course of action. Continued participation endorses a broken system and enables the pretence of due process where none exists.

The review is not conducted on a level playing field. The Panel is not an impartial referee. The game is rigged; its outcome pre-determined by a captured regulator. The NEB's integrity has been compromised. Its actions put the health and safety of the Canadian economy, society and environment in harm's way.

The NEB has unconscionably betrayed Canadians through a restricted scope of issues, violated the rules of procedural fairness and natural justice, and biased its decision-making in favour of Kinder Morgan. These are discussed below:

1. Restricted Scope of Issues

(a) Review is not of the Pipeline System

Once expanded, the Trans Mountain system will consist of two pipelines, related storage facilities and a three-berth marine terminal at Westridge dock. The cumulative impact and risk of this entire system is of concern to the public, but not to the NEB. The Panel has excluded from its assessment the impact and risk of the sixty year old legacy line, existing terminals and storage tanks—these are outside the scope of its review.

What the NEB is considering is the impact of the "Project" which only includes the incremental, new, facilities. It is treating the expansion as if it is not part of a larger,

and much more vulnerable system, but as if it is being constructed on a stand-alone basis.

It is a well-known aspect of prudent risk analysis that aggregate risk—the risk of the entire system everywhere along that system—is the relevant scope, not a self-serving limitation that restricts the scope of the review to half the system's potential transport capacity, much less than half the system's aggregate risk, and less than half its potential negative consequence.

This dangerous limitation in scope is how Kinder Morgan successfully argued that its existing Emergency Management Plan (EMP) documents *"are not relevant to the Board's consideration of the Project…Trans Mountain notes that although BC considers the EMP documents for the existing system to be relevant for the Board in considering this Application, the Board itself has never taken that position."*[1]

The Panel agrees, "*the EMP (Emergency Management Plan) documents relate to the existing facilities that are not the subject of the present Project application…Whether Trans Mountain is meeting its obligations with respect to its EMP for the existing facilities is a matter for the Board to consider outside of the hearing for this Project. The safe operation of the existing Line 1 facilities under current operating conditions is out of scope for this hearing."*[2]

At the Northern Gateway proceedings the Panel relied on similar polluted logic to conclude that the Kalamazoo oil spill was irrelevant to informing the Board of the risk, and cost, Enbridge's project posed to the Canadian public interest.[3]

(b) Review Restricted to Applied-for Capacity not Designed Capacity

The new pipeline is designed to carry 780,000 barrels a day of oil (for total system capacity of over 1.1 million barrels a day), but the Panel is restricting its review to the applied-for capacity of 540,000 barrels a day.[4]

When Kinder Morgan comes forward to request NEB approval to increase throughput to designed capacity it will not fall within the definition of a designated project under the *Canadian Environmental Assessment Act 2012*. An *NEB Act* section 52 review will not be required. The impact of an almost fifty percent increase in capacity on Line 2, including the marine traffic it triggers, will never undergo proper scrutiny.

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[1] Kinder Morgan Response to the Province of BC Motion December 5, 2014, page 5, Letter

[2] NEB Ruling No. 31, September 24, 2014, page 4, Ruling

[3] Vancouver Sun, NEB Review Panel Violated Public Trust, January 9, 2014, Robyn Allan, Article

[4] Kinder Morgan Pipeline Expansion Designed to Carry Much More Oil, The Tyee, May 28, 2014, Robyn Allan, Article In contrast, the NEB approved the $5.4 billion capital budget that includes costs for the designed capacity and incorporated these into approved tolls to be charged to shippers.

(c) Review Excludes Socio-economic and Environmental Effects of Bitumen Exploitation, Upstream and Downstream Activities

On April 2, 2014, the Board released its List of Issues. Intervenors were offered no opportunity to comment. The Panel excluded economic, environmental and social impact activities that are of significant concern to Canadians. In particular, the Board *"does not intend to consider the environmental and socio-economic effects associated with upstream activities, the development of the oil sands, or the downstream use of the oil transported by the pipeline."*[5]

This means the Board will not consider:

(i) greenhouse gas emissions from the production of diluted bitumen shipped down the pipeline and from its use in foreign markets;

(ii) environmental impacts of tanker traffic beyond a 12 nautical mile territorial sea limit;

(iii) risks and costs of climate change;

(iv) crowding out of economic activity and the erosion of quality of life in British Columbia as English Bay and Burrard Inlet become oil tanker parking lots for Alberta's heavy oil;

(v) the opportunity cost to the Canadian economy when raw bitumen is exported to foreign markets for upgrading and refining at the expense of value added, job creation, and economic wealth generation in Alberta; and

(vi) the cost to the Canadian economy of a condensate import dependency. Roughly one of every three barrels intended for Trans Mountain's expansion consists of imported condensate from the US, much of it brought into Canada on Kinder Morgan Cochin. The expansion is pitched to Canadians as a Made-in-Canada heavy oil export strategy when it is in no small part a US condensate export strategy, making its way to foreign markets via Trans Mountain pipeline and our marine waterways.

The Board received Notices of Motion from the *City of Vancouver* and *Parents from Cameron Elementary School in Burnaby* requesting expansion of the List of Issues. Ten Intervenors supported the motions, including the Intervenor Robyn Allan.

The Board argued that,*"Oil sands projects, including expansions, have and continue to be subject to provincial environmental assessment or combined provincial and federal*

[5] NEB Hearing Order OH-001-2014, Appendix A—List of Issues, page 18, Hearing Order

assessment. This supports the conclusion that the CEAA 2012 does not require the Board to include in its environmental assessment activities that have been so assessed."[6]

The Board provides false assurances. The Board has accepted Kinder Morgan's supply forecasts in Volume 2 of its Application. These forecasts include production volumes from some projects that have not received regulatory approval, therefore it is not possible that the environmental costs of these projects have been considered. The NEB attempts to lull Canadians into the delusion that they have.

The Board also argues that it *"is mindful that the environmental and socio-economic effects of petroleum exploration and production activities in Canada are assessed in other federal and provincial processes that involve those conducting those activities, and that the end use of oil is managed by the jurisdiction within which that use occurs."*[7] This spurious reasoning is nonsense since subsection 52 (2) of the *NEB Act* grants the Board *"authority to determine what is relevant to it in fulfilling its mandate"*.[8]

The duplicity of the Board becomes glaringly apparent when its reasons to exclude upstream activities, oil sands extraction, and downstream use are viewed in light of the Board's decision on marine transport issues. The Board has no authority with respect to marine shipping, navigation, safety and spill prevention and yet, the Board included *"the potential environmental and socio-economic effects of marine shipping activities that would result from the proposed project, including the potential effects of accidents or malfunctions that may occur."*[9]

(d) Review Restricts Marine Shipping Activities Assessment to 12 Nautical Miles

Strangely, the Panel has limited the assessment of marine shipping activities to 12 nautical miles, as if somehow environmental impact and spill threat cease beyond this limit.[10] The Board is deluding us with this territorial limit. The environmental threats from oil tankers must be evaluated throughout the entire marine vessel trip. For example, Canada is a signatory to the North American Emissions Control Area (ECA)[11] requirements, which assist in reducing air pollution from ships, but the boundary extends to only 200 nautical miles. Once past this point, tankers shift to much dirtier,

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[6] NEB Ruling No. 25, page 3, Ruling

[7] Ibid., page 6.

[8] Ibid., page 6.

[9] NEB Hearing Order, List of Issues #5, op. cit. The Board provided a follow-up to Issue #5 on September 10, 2013 titled Filing Requirements Related to the Potential Environmental and Socio-Economic Effects of Increased Marine Shipping Activities, Attachment 1

[10] NEB Letter September 10, 2013, Attachment, Ibid, page 1. 12 nautical miles translates into 22.2 km from the low water mark of the coast.

[11] Canada Implements North American ECA Requirements, May 10, 2013. Article

and more environmentally challenging fuel sources, most notably Bunker C—the same oil that spilled recently in English Bay.

If the Board is purporting to assess the potential environmental and socio-economic effects of marine shipping activities then the full atmospheric and spill threat of oil tankers transiting to and from Westridge must be included, not just the incremental tanker traffic within an arbitrary limit of 12 nautical miles.

2. Compromised Principles of Procedural Fairness and Natural Justice

Much has been written about the Panel's unprecedented exclusion of cross examination and how this undermines the integrity of the review process. The Intervenor, Robyn Allan, formally requested that it be re-introduced into the hearing schedule.[12] Numerous Intervenors sent in letters of support. The Board rejected the request siding with Kinder Morgan, the beneficiary of the Board's decision.

The Board assured participants that two rounds of written requests would be sufficient to test the evidence. The Board's assurances are without merit. The first round of information requests resulted in Intervenors formally petitioning the Board to compel Kinder Morgan to answer thousands of questions, but the Board granted only 5% of them. In the second round, the Board compelled Kinder Morgan to answer less than 3%. Separate Information Requests, required because of late TERMPOL and Seismic reports, have experienced similar, unsatisfactory, responses from the Board.

The absence of oral cross has turned this public hearing into a farce, and the written information request process into an exercise in futility.

"For two centuries past, the policy of the Anglo-American system of evidence has been to regard the necessity of testing by cross-examination as a vital feature of the law. The belief that no safeguard for testing the value of human statements is comparable to that furnished by cross-examination, and the conviction that no statement (unless by special exception) should be used as testimony until it has been probed and sublimated by that test, has found increasing strength in lengthening the experience."[13]

The Board was advised by the Department of Justice that the absence of oral cross is a failure of the process pointing out that beyond any doubt cross examination *"is the greatest legal engine ever invented for the discovery of truth."*[14]

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[12] Notice of Motion, Robyn Allan, April 14, 2014, Motion

[13] Wigmore on Evidence (Chadbourne Rev. 1974) vol 5, p.32, para 1367.

[14] Attorney General of Canada, June 27, 2014, page 5, para 16. Written Response

The Board claims to be an independent regulatory tribunal guided by the principles of natural justice and procedural fairness. It is a court of record and has a duty to act fairly. The NEB has failed in upholding these responsibilities.

3. Biased Decision Making

One of the fundamental features of our market system is that the risk borne by shareholders is balanced against the financial reward they expect to receive. This risk-reward trade-off sends appropriate market signals and supports a more efficient and effective allocation of capital.

In an unprecedented decision—the Firm 50 decision—the NEB violated this important principle by allowing Kinder Morgan to amass $136 million to pay for the pre-development costs related to the Trans Mountain expansion project. This fund was not accumulated through shareholder, at risk, capital, but through a pre-approved surcharge on shipper tolls.[15] Ultimately, this cost is borne by the Canadian economy and public through foregone tax revenue and—as Kinder Morgan told the NEB during the Firm 50 Hearing—higher oil prices.[16] In contrast, there is no risk to Kinder Morgan's shareholders for the pre-development phase of its project.

Not only did the NEB undermine the market system by granting Kinder Morgan a fund to push through its project, it has knowingly stacked the deck in favour of the Proponent. The NEB did not ensure concomitant financial resources would be available to Intervenors during these same NEB proceedings.

The NEB socialized project approval costs onto the backs of Canadians while it knows the project's vast financial returns—some $850 million a year—will be privatized into the pockets of Kinder Morgan's US based investors.[17] When the Intervenor, Robyn Allan, requested the Board compel Kinder Morgan to reconcile inconsistencies between the economic benefits claims in its application against what it has told its shareholders in Texas—that it intends to siphon away close to a billion a year from the Canadian economy while paying almost no Canadian corporate taxes—astonishingly, the Board concluded this is outside the scope of its review.

By its actions it is clear the Board has no intention of considering the economic impact and financial viability of this application but for accepting Kinder Morgan's bogus case in Volume 2. Refusing to compel Kinder Morgan to answer questions, the Board allows Kinder Morgan to pretend benefits exist where they do not. When Intervenors submit evidence on the economic issues the Board will give it little, if any,

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[15] The National Energy Board Guaranteed Kinder Morgan a Fund to Push Pipeline Expansion Through Regulatory Review, June 17, 2014, Robyn Allan, Report

[16] Application for Firm Service to Westridge Marine Terminal, RH-2-2011,Reasons for Decision, page 13.

[17] Ian Anderson, Kinder Morgan Inc. Transcript Part IV Toll Hearing Evidence, January 30, 2013, page 3.

weight; it has already ruled meaningful critique is outside the scope of issues. This is a travesty.

The Board's unfair approach is also reflected in its determination that the application was complete when it was not. This is most clearly illustrated by Kinder Morgan's uncertainty over its route and the Board's accommodation of Kinder Morgan's lack of preparation inside the review process.

Although aware of the Panel's violation of the public trust, Peter Watson, NEB Chair and CEO has not sought to rectify the broken process. The entire National Energy Board is perpetrating a fraud on the Canadian public.

Withdrawing as an expert intervenor is not only a form of formal protest against the broken system, it is also a reasoned decision considered in light of efficiency and effectiveness. Protection of our democracy and market economy is best undertaken outside the industry contrived, and controlled, NEB failed system.

The NEB is not a national energy board; it is a parochial board steeped in Calgary petro culture, run by corporate interests.

Industry bias began in the 1990s when the NEB moved from Ottawa to Calgary, leaving two-thirds of its staff behind and requiring permanent Board members to live in proximity to Calgary. Regulatory capture continued as the Federal Government and Board adopted the practice of offering Board and staff positions to people with energy industry backgrounds, at the expense of establishing a diversification of interests.

The Board abandoned prudent and sound economic and financial analysis when these led to decisions recommending projects be rejected because costs outweighed benefits. Rather than continuing to rely on Cost-Benefit analysis as a sound analytical approach, the NEB rejected it in favour of Input-Output analysis; a flawed and misleading substitute that presents impacts as if they are benefits and ignores known and reasonable costs.

The Board is charged with environmental assessment without appropriately skilled and experienced staff to undertake it. The Board does not have the expertise, or will, to understand complex corporate structures designed to minimize corporate taxes, siphon vast financial wealth out of the country, and leave Canadians holding the bag when major or catastrophic events happen.

I withdraw from this process in defence of the market system and a sound economy. I withdraw from this process in defence of sustainable economic progress that promotes resource development rather than resource exploitation.

The fight to protect the Canadian public interest must be conducted in an open and transparent forum, where those who desire to participate, have a right and opportunity to do so.

The fight to protect the Canadian public interest must include those issues that fully represent the Canadian public interest, not limit them—as the Panel has done—to a definition serving industry. We are being conned by the very agency entrusted to protect us. This must stop. The health and welfare of our economic, social and environmental systems are at stake.

Sincerely,

Robyn Allan

cc Intervenors
Kinder Morgan
Peter Watson, Chair and CEO, NEB