

Memorandum of Understanding to advance measures to
benefit the recovery of the Southern Resident Killer Whale
through Trans Mountain Expansion Project Conditions

BETWEEN

Her Majesty the Queen in Right of Canada, as represented
by the Minister of Fisheries and Oceans

AND

Her Majesty the Queen in Right of Canada, as represented
by the Minister of Transport

AND

The National Energy Board

Hereinafter referred to as the "Participants"

October 2017

PREAMBLE

On November 29th 2016, the Governor in Council directed the National Energy Board (NEB) to issue a Certificate of Public Convenience and Necessity for the Trans Mountain Expansion Project (TMEP or Project).

On December 1st 2016, the NEB issued Certificate OC-064 authorizing the construction and operation of the TMEP subject to 157 conditions over 8 legal instruments, as set out in the National Energy Board Recommendation Report.

The NEB conducted the environmental assessment of the TMEP and concluded that, among other things, the operation of project-related marine vessels is likely to result in significant adverse effects to the endangered Southern Resident Killer Whale (SRKW) and Indigenous cultural use associated with the SRKW.

There are two communities of resident killer whales in British Columbia, Northern Residents and Southern Residents. The SRKW was listed as Endangered under Schedule 1 of the *Species at Risk Act* upon its coming into force in 2003. Since monitoring of the population started in 1974, it has fluctuated from 70 individuals to 99 individuals (1995). Currently, the population is less than 80 individuals.

Trans Mountain Pipeline ULC (Trans Mountain) has not proposed any direct mitigation for project related impacts on marine mammals, as they do not exercise direct control over TMEP related vessels. Trans Mountain has committed to a number of initiatives to advance recovery of the SRKW.

Mitigation to address effects from TMEP-related vessels is outside of the NEB's regulatory authority and accordingly, the NEB encouraged other regulatory authorities, such as Transport Canada (TC) and Fisheries and Oceans Canada (DFO), which regulate the marine environment and marine traffic, to explore initiatives that would aim to reduce the potential effects of marine vessels on marine mammals.

WHEREAS: Pursuant to the *National Energy Board Act* (NEB Act) the National Energy Board (the Board or NEB) regulates aspects of the energy industry in Canada including the construction and operation of interprovincial and international pipelines; pipeline traffic, tolls and tariffs; the construction and operation of international and designated interprovincial power lines; the export and import of natural gas; the export of oil and electricity;

WHEREAS: The Board completed a comprehensive environmental assessment of the Project in accordance with its authority under the NEB Act and the *Canadian Environmental Assessment Act, 2012* (CEAA 2012);

WHEREAS: DFO is responsible for the administration and enforcement of the *Fisheries Act*, more specifically the fisheries protection provisions including sections 6, 20, 21, 35, 37 and 38, related to the conservation and protection of Canada's marine and freshwater fisheries resources and their habitats from the impact of human activities;

WHEREAS: the *Species at Risk Act* (SARA) identifies the Minister of Fisheries and Oceans as the competent minister with respect to listed aquatic species other than those individuals in or on federal lands administered by the Parks Canada Agency and, in that capacity, the Minister of Fisheries and Oceans has powers and duties with respect to protecting aquatic species listed under that Act; and

AND WHEREAS: TC is responsible for the administration and enforcement of the *Canada Shipping Act, 2001*, an Act respecting shipping and navigation and promoting marine safety by regulating safety requirements of pleasure craft and commercial vessels; monitoring pleasure craft, commercial vessels, foreign-registered vessels entering Canadian waters and offshore drilling rigs to verify that they meet safety standards; and helping promote the safe operation of commercial shipping by certifying officers and crews on Canadian ships.

NOW THEREFORE: The Participants (the NEB, DFO and TC) have entered into the following Memorandum of Understanding (MOU) to clarify the intended activities among the NEB, TC, and DFO to promote the efficient and effective coordination of responsibilities with respect to verifying compliance with conditions associated with the construction and operation of the TMEP.

The Participants will rely on this MOU to support the Government of Canada's commitment to more than mitigate the effects of Project-related marine shipping on SRKW before shipping from the Project begins (anticipated in December 2019).

1. PURPOSE

Certain conditions for the TMEP are of relevance to TC as the federal department responsible for oversight of marine shipping and navigation and promoting marine safety and to DFO as the federal department responsible for managing and protecting Canada's fisheries and safeguarding its waters.

1.1 The purpose of this MOU is to clarify how the Participants will cooperate to verify compliance to those conditions, as set out in Annex I to this MOU, as well as Trans Mountain's commitments, as set out in Annex II to this MOU, that apply to the SRKW. Specifically, this MOU sets out the areas in relation to which the Participants will share information and expertise, and enables the facilitation of linkages, where possible, between Trans Mountain's activities and TC and DFO-led actions to support recovery of the SRKW population.

1.2 The NEB will advise DFO and TC by e-mail when Trans Mountain has filed information pursuant to the Conditions set out in paragraph 2.1 of this MOU and invite DFO and TC to comment on the filings.

1.3 In respect of Trans Mountain's condition compliance filings as referred to in paragraph 1.2 above, DFO and TC will support the NEB's assessment of the filings by:

- Sharing information and expertise under each of their respective mandates to verify that Trans Mountain will meet all conditions and commitments described in Annex I and II, to minimize impacts on the SRKW population;
- Sharing information and expertise on (but not limited to): documentation relating to these conditions and commitments, underwater noise, marine safety and security, species at risk, new or emerging technologies or practices in the international or domestic marine environment, and the recovery of the SRKW, including scientific expertise and socio-economic considerations with respect to mitigation measures; and,
- Ensuring alignment, where applicable, between Trans Mountain's commitments and Government of Canada initiatives to assist in the recovery of the SRKW and the

associated commitment to more than mitigate the effects of project-related marine shipping on SRKW.

1.4. The NEB will consider expertise and advice provided by TC and DFO in making its determination on whether a condition has been met. This includes the determination of compliance with commitments included in Annex II.

1.5 The Participants agree to submit all their respective filings and comments in writing on the NEB's electronic Regulatory Document System.

2. SCOPE

2.1 The Participants have identified two National Energy Board conditions within the eight legal instruments authorizing the construction and operation of the Project. The legal instruments are:

Certificates OC-064, AO-003-OC-2 and AO-002-OC-49; and

Orders MO-015-2016, XO-T260-007-2016, XO-T260-008-2016, XO-T260-009-2016 and XO-T260-010-2016 (collectively, the Certificates and Orders).

The Conditions for the Project that apply to actions to potentially mitigate effects on the SKRW or support recovery efforts are: conditions 2, 3, 6 of the Certificates and Orders; conditions 132, 134 of Certificate OC-064 (collectively referred to as the Conditions).

2.2 Certain Trans Mountain commitments contained in the Project record (OH-001-2014), which also apply to actions to support SRKW recovery efforts, are captured under Conditions 2 and 3. TC and DFO, guided by Conditions 2 and 3, will evaluate the potential for, and where possible, engage with Trans Mountain to develop measures that could contribute to meeting these conditions and commitments and advancing SRKW recovery efforts.

3. GENERAL

3.1 The NEB will encourage Trans Mountain to engage TC and DFO as early as possible in developing the plans required to meet the relevant Conditions and commitments.

3.2 TC and DFO will endeavour to provide departmental expertise in the development of such documents within the timeframe requested by the NEB.

4. DIFFERENCES IN INTERPRETATION AND APPLICATION

The Participants will resolve issues regarding implementation of this MOU in a timely manner.

5. REVIEW

After the first year this MOU is in effect, and every second year thereafter, the Participants will review the effectiveness of activities under this MOU.

6. AMENDMENT

This MOU may be amended by the Participants at any time provided such amendment is in writing. An amendment will be confirmed by an exchange of letters by the Participants setting out the amendment and its effective date.

7. FINANCIAL ARRANGEMENTS

This MOU will not impose any financial responsibilities on its Participants, except that each Participant will be responsible for the staff and funding costs it incurs in its own interest, in support of the MOU.

8. DURATION AND TERMINATION

8.1 This MOU will be in force for as long as matters related to the previously noted Conditions are active.

8.2 Any Participant may withdraw this MOU by providing at least 3 months (90 days) written notice to the other Participants.

8.3 This MOU may be terminated without notice if all Participants are in agreement regarding dissolution.

9. LEGAL DISCLAIMER

9.1 This MOU is an expression of the mutual intentions of the Participants and is not legally binding on them or enforceable against them.

9.2 This MOU should not be construed as imposing any additional conditions or oversight on Trans Mountain, rather the MOU is intended to clarify the roles and responsibilities of all the Participants with respect to supporting the work of Trans Mountain to meet its commitments and Project conditions, while assisting the Government of Canada in fulfilling its commitment to more than mitigate the effects of Project-related marine shipping on SRKW before shipping from the Project begins (anticipated in December 2019). Trans Mountain is neither a signatory, Participant nor party to this MOU.

10. PRIMARY CONTACTS

Transport Canada:

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Fisheries and Oceans Canada:

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11. EFFECTIVE DATE AND SIGNATURE

Fisheries and Oceans Canada

Date

Transport Canada

Date

National Energy Board

Date

This Agreement comes into effect on the latest date noted above.

ANNEX I TO MOU AMONG NEB, DFO and TC:

TRANS MOUNTAIN EXPANSION PROJECT CONDITIONS WHICH APPLY TO ACTIONS THAT MITIGATE THE EFFECTS OF PROJECT-RELATED MARINE SHIPPING ON THE SOUTHERN RESIDENT KILLER WHALE OR SUPPORT RECOVERY EFFORTS¹

Conditions
<p>#2 Compliance with commitments</p> <p>Without limiting Conditions 3, 4 and 6, Trans Mountain must implement all of the commitments it made in its Project application or to which it otherwise committed on the record of the OH-001-2014 proceeding.</p>
<p>#3 Environmental protection</p> <p>Trans Mountain must implement or cause to be implemented, at a minimum, all of the policies, practices, programs, mitigation measures, recommendations, and procedures for the protection of the environment included or referred to in its Project application or to which it otherwise committed on the record of the OH-001-2014 proceeding.</p>
<p>#6 Commitments tracking table</p> <p>Without limiting Conditions 2, 3 and 4, Trans Mountain must implement the commitments contained within its commitments tracking table and must:</p> <ul style="list-style-type: none">a) file with the NEB, at the following times, an updated commitments tracking table including the status of each commitment:<ul style="list-style-type: none">i) within 3 months after the [certificate/order] date;ii) at least 30 days prior to commencing construction;iii) monthly, from the commencement of construction until the first month after commencing operations; andiv) quarterly thereafter until:<ul style="list-style-type: none">1. all commitments on the table are satisfied (superseded, complete or otherwise closed), at which time Trans Mountain must file confirmation, signed by an officer of the company, that the commitments on the table have been satisfied; or2. 6 years after commencing operations, at which time Trans Mountain must file with the NEB a summary of any outstanding commitments and a plan and implementation timeline for addressing these commitments; whichever comes earlier; andb) post on its company website the same information required by a), using the same indicated timeframes; andc) maintain at each of its construction offices:<ul style="list-style-type: none">i) the relevant environmental portion of the commitments tracking table listing all of Trans Mountain's regulatory commitments, including those from the Project application and subsequent filings, and environmental conditions or site-specific mitigation or monitoring measures from permits, authorizations, and approvals for the Project issued by federal, provincial, or other permitting authorities;ii) copies of any permits, authorizations, and approvals referenced in i); andiii) copies of any subsequent variances to permits, authorizations, and approvals referenced in i).

¹ To be updated as required by agreement of the Participants during the course of the MOU.

#132 Marine Mammal Protection Program

Trans Mountain must file with the NEB, at least 3 months prior to commencing operations, a Marine Mammal Protection Program that focuses on effects from the operations of Project-related marine vessels.

The program must include:

- a) the goals and objectives of the program, including a discussion on how they align with the objectives of applicable Fisheries and Oceans marine mammal Recovery Strategies and Action Plans;
- b) a summary of the issues related to marine mammals from Project-related marine vessels;
- c) a summary of the initiatives that Trans Mountain has supported or undertaken to date, including the goals of each initiative and how they relate to the objectives of the program;
- d) a discussion of the outcomes or progress updates of the initiatives identified in c), and how these outcomes have met or are contributing to the objectives of the program;
- e) a discussion of how any relevant outcomes of the initiatives identified in c) are being or will be applied to Project-related marine vessels;
- f) a summary of relevant initiatives that have been implemented or proposed from other national or international relevant jurisdictions to reduce effects from marine shipping on marine mammals, and an analysis or rationale for why these initiatives will or will not be incorporated into the program;
- g) any other initiatives that Trans Mountain intends to undertake or support in the future that are relevant to the program; and
- h) a description of how Trans Mountain has taken available and applicable Aboriginal traditional land use and traditional ecological knowledge into consideration in developing the Program, including demonstration that those Aboriginal persons and groups that provided Aboriginal traditional land use information and traditional ecological knowledge, as reported during the OH-001-2014 proceeding and/or pursuant to Condition 97, had the opportunity to review and comment on the information.

#134: Updated Tanker Acceptance Standard

Trans Mountain must file with the NEB, at least 3 months prior to loading the first tanker at the Westridge Marine Terminal with oil transported by the Project, and thereafter on or before 31 January of each of the first five years after commencing operations, an updated Tanker Acceptance Standard and a summary of any revisions made to the Standard.

ANNEX II TO MOU AMONG NEB, DFO AND TC:

TRANS MOUNTAIN COMMITMENTS WHICH RELATE TO CONDITIONS 2 AND 3 AND RELATE TO MEASURES TO BENEFIT THE RECOVERY OF THE SOUTHERN RESIDENT KILLER WHALE ²

Commitment #	Team Responsible	Description
358	Environment	Trans Mountain will consult with Fisheries and Oceans Canada (DFO) to determine whether the Pacific Salmon Foundation multi-year comprehensive 'Salish Sea Marine Survival Project' initiative can also be considered to be a scientifically defensible and useful recovery measure for resident killer whales by restoring an adequate and accessible food supply.
406	Environment	Through the Proposed Marine Mammal Protection Program and other regional collaborative Initiatives, Trans Mountain commits to implementing mitigation measures that are within its control to implement and manage potential Environmental effects (both Project-related and cumulative) on marine mammals.
1471	Environment	Three months prior to the start of pile installation, a draft Marine Mammal Protection Program will be developed and submitted to the National Energy Board (NEB) for review. The draft will include further details on construction mitigation and the monitoring program, as well as an update on the status of the marine transportation collaborative initiatives, including a summary of all consultation activities to date, and planned 'next steps'. Copies will also be made available to appropriate regulatory authorities, Aboriginal communities, and other interested stakeholders for comment. The Marine Mammal Protection Program will be a living document and, therefore, may go through multiple iterations over the life of the project as the various programs develop over time; all updates will be filed with the NEB.
393	Marine Shipping	Trans Mountain is committed to working with Fisheries and Oceans Canada (DFO) and other stakeholders on implementing the Action Plan for the Recovery of the Southern Resident Killer Whale as well as developing other strategies to assist in southern resident killer whale recovery.
400	Marine Shipping	Trans Mountain is committed to working with the Department of Fisheries and Oceans (DFO) and other stakeholders on implementing the "Action Plan for the Recovery of the Southern Resident Killer Whale (SRKW)" as well as developing other strategies to assist in SRKW recovery.
407	Marine Shipping	Trans Mountain will provide copies of its Port Information and Terminal Operations Manual to Transport Canada, the Canadian Coast Guard, the Pacific Pilotage Authority, and Vancouver Fraser Port Authority DBA Port Metro Vancouver for information at least six months before the start of terminal operations.
836	Marine Shipping	Vancouver Fraser Port Authority DBA Port Metro Vancouver's Enhancing Cetacean Habitat and Observation (ECHO) Program and the Green Marine's Underwater Noise Committee are two initiatives engaged in working collaboratively with industry to develop future guidelines for reducing underwater noise from large commercial vessels. Trans Mountain is committed to participating in both initiatives. Once such

²To be updated as required, currently based on initial submission provided by Trans Mountain to the NEB.

		guidelines are available, Trans Mountain shall require project tankers to adopt those as best practice as part of its Tanker Acceptance Standards.
868	Marine Shipping	Should Vancouver Fraser Port Authority DBA Port Metro Vancouver develop a particular facet of its EcoAction Program affecting tankers, Trans Mountain will publicize it through its Tanker Acceptance Standard and thereby encourage vessel operators to try and meet the program's standards as far as it is possible for the vessels to do so.
941	Marine Shipping	Trans Mountain will continue to liaise with regulatory authorities such as the US Coast Guard and Washington State Department of Ecology.
1453	Marine Shipping	Trans Mountain will include in its Port Information and Terminal Operations Manual guidance the reporting requirements for mammal vessel strikes and mammals in distress. The information will be updated for the Fisheries and Oceans Canada (DFO) reporting requirements change in the future to ensure reporting requirements remain consistent with DFO.
2114	Marine Shipping	Trans Mountain will develop a tug matrix for inclusion as part of its Tanker Acceptance Standard to prescribe minimum tug capabilities required upon departure of the tanker.
3002	Marine Shipping	<p>Trans Mountain will continue to provide information about TMEP Project-related shipping to other marine users. Specifically:</p> <ul style="list-style-type: none"> - provide regular updated information on Project-related marine vessel traffic to fishing industry organizations, Aboriginal communities and other affected stakeholders, where possible, through the Chamber of Shipping of BC; and - initiate a public outreach program prior to Project operations phase. Communicate any applicable information on Project-related timing and scheduling with fishing industry organizations, Aboriginal communities and other affected stakeholders.