



# ENERGY REGULATORY REPORT

*This monthly report summarizes matters under the jurisdiction of the Alberta Energy Regulator (“AER”), the Alberta Utilities Commission (“AUC”) and the National Energy Board (“NEB”) and proceedings resulting from these energy regulatory tribunals. For further information, please contact a member of the [RLC Team](#).*

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## ALBERTA COURT OF APPEAL

**Remington v. Enmax, 2019 ABCA 69***Surface Rights Act - Electricity - Appeal - Granted (in part)*

In this decision, the Alberta Court of Appeal (“ABCA”):

- (a) granted an appeal by Enmax Power Corporation (“Enmax”) of a direction of the Alberta Court of Queen’s Bench (“ABQB”) directing Enmax to withdraw an application before the Surface Rights Board (“SRB”); and
- (b) dismissed Enmax’s appeal from the ABQB decision to refuse to stay the court action.

Background*History of Dispute*

This appeal arose out of a long-standing dispute between Enmax and Remington Development Corporation (“Remington”). The dispute began with Remington’s acquisition of land in downtown Calgary (the “Interlink Lands”), on which operating power transmission lines were located, and Remington wanted those transmission lines removed.

Enmax’s predecessor obtained access to the Interlink Lands through a series of right-of-way agreements with the Canadian Pacific Railway Company, executed in 1948 (the “ROW Agreements”). The ROW Agreements contained a clause permitting termination by either party on three months’ notice.

Remington acquired the Interlink Lands in 2002, at which time the ROW Agreements were assigned to it. Remington gave Enmax notice to terminate the ROW Agreements in 2005. Enmax objected, both to the validity of the assignment of the ROW Agreements to Remington and to Remington’s termination notice. Remington commenced an action against Enmax in the ABQB in 2008 for breach of contract and trespass (the “Action”).

In 2010, the parties agreed (the “Letter Agreement”) to make a special application to the ABQB for a determination of whether the ROW Agreements could be assigned to, and terminated by, Remington (the “Special Application”). The Letter Agreement provided that, if Remington was successful on the

Special Application, Enmax would apply to the AUC for approval to relocate the transmission lines from the Interlink Lands. The Special Application was decided in Remington’s favour, and Enmax then applied to the AUC to relocate the transmission lines.

Application to AUC to Relocate Transmission Lines*AUC Decision*

Enmax applied to the AUC to relocate the transmission lines. However, the AUC denied the application on the basis that relocating the transmission lines was not in the public interest (AUC Decision 3360-D01-2015). Remington’s application to have the AUC review its decision was refused (AUC Decision 20612-D01-2015). The ABCA denied Remington’s application for leave to appeal the AUC’s decision.

*SRB Proceedings*

In 2017, after the AUC proceedings were exhausted, Enmax applied to the SRB for Right of Entry Orders (“ROEs”), to permit Enmax to access the Interlink Lands.

On May 17, 2018, the SRB granted Enmax the requested ROEs. No application for judicial review of that SRB decision was brought within the requisite time period.

*ABQB Decision*

Remington applied to the ABQB for an order compelling Enmax to withdraw its ROE application to the SRB.

The chambers judge concluded that she was not able to determine, based on the evidence before her, whether the parties’ Letter Agreement precluded Enmax from going to the SRB. She viewed the heart of the dispute as determining which forum - the court or the SRB - should determine compensation payable to Remington for Enmax’s use of the Interlink Lands. The chambers judge concluded that the balance of convenience favoured having the dispute decided by the court. She dismissed Enmax’s appeal from the master’s refusal to stay the Action, and also “directed Enmax to withdraw the SRB Compensation Application.”

The chambers judge found that the compensation issue should not be determined by the SRB.

#### Grounds of Appeal

Enmax appealed both the refusal to stay the Action and the direction to withdraw the "SRB Compensation Application." Enmax advanced multiple grounds of appeal, which were essentially that the chambers judge erred in law by:

- (a) ignoring and failing to address the provisions of the *Surface Rights Act*, which provide that the SRB "shall" set compensation after it has issued an ROE and thereby usurping the exclusive jurisdiction of the SRB;
- (b) failing to afford deference to the SRB in determining its own jurisdiction;
- (c) granting a mandatory injunction without addressing and applying the applicable legal test; and
- (d) dismissing the stay without applying the applicable legal test.

#### Standard of Review

The ABCA found that both applications before the chambers judge involved discretionary orders for interim injunctive relief. An appellate court will not generally interfere with such orders unless they are unreasonable or founded on an error in principle. Questions regarding the jurisdiction of the SRB, based on an interpretation of the *Surface Rights Act*, are reviewable for correctness.

#### ABCA Analysis

##### *ABQB Decision Regarding Appropriate Forum*

The ABCA found that the chambers judge erred in principle when she identified the task before her as determining whether the SRB or the ABQB was the most appropriate forum to determine the amount of compensation payable to Remington.

The ABCA noted that the SRB proceedings and the Action addressed different issues. In the Action, Remington sought compensation for Enmax's alleged breach of the ROW Agreements, trespass, and unjust enrichment. Absent agreement of the parties, these claims, and any associated damages

would be determined in the ABQB. The SRB, on the other hand, is a statutory tribunal which has only those powers expressly or implicitly conferred on it by its enabling legislation. The SRB does not have the mandate or jurisdiction to determine the civil claims advanced in the Action. The ABCA found that the court would ultimately consider whether, and to what extent, compensation awarded by the SRB (including retroactive compensation if the SRB was found to have that authority) affected any damage award in the Action.

The ABCA further found that Remington did not demonstrate any irreparable harm that it would suffer as a result of the SRB proceedings, or that the balance of convenience of more streamlined proceedings outweighed the public interest of having the SRB determine compensation for the ROEs. The ABCA concluded that there was no principled basis to prevent the SRB from exercising its mandate in this case.

The ABCA also found that the chambers judge erred in principle in directing that "Enmax withdraw the SRB Compensation Application." This was because there was no SRB Compensation Application by Enmax that was distinct from the applications for the ROEs, which were finally determined. The SRB, as a statutory tribunal, is required by its enabling legislation to hold hearings to determine the amount of compensation payable after a ROE has been issued (section 25 of the *Surface Rights Act*). The SRB is an expert tribunal charged with that mandate. The determination of compensation was a statutory requirement under the *Surface Rights Act* imposed on the SRB after it makes a ROE order. The ABCA found that there was no application by Enmax for compensation which could be withdrawn. Rather, there was an existing statutory obligation on the SRB to determine compensation that flows from the ROEs granted by it.

##### *ABQB Decision Denying Stay of Action*

The ABCA found that the chambers judge's dismissal of Enmax's application to stay the Action was based on the balance of convenience, flowing from her conclusion that the court was the appropriate forum to decide compensation. The ABCA found that the SRB should proceed to determine compensation for the ROEs, that the court was the appropriate forum to decide the issues in the Action, and that the amount of compensation determined by the SRB may not be coextensive with the damages determined in the Action. Accordingly,

there was no good reason to stay the Action at this time.

The ABCA found that both the SRB compensation proceedings and the Action could proceed.

#### Summary

The ABCA granted the appeal of the ABQB's direction that Enmax withdraw the SRB Compensation Application. The appeal of the dismissal of Enmax's application for a stay of the Action was dismissed.

## ALBERTA ENERGY REGULATOR

**Fort Hills Energy Corporation Application for Fort Hills Tailings Management Plan (AER Decision 20190225A)**

*Tailings Management Plan - Ready-to-Reclaim Criteria*

In this decision, the AER considered Fort Hills Energy Corporation (“Fort Hills”)’ application 1881219, pursuant to section 13 of the *Oil Sands Conservation Act* (“OSCA”), for approval of its tailings management plan (“TMP”) for the Fort Hills oil sands mine (the “Fort Hills Mine”).

For the reasons summarized below, the AER approved Fort Hills’ application, subject to terms and conditions (the “Approval Conditions”).

Fort Hills’ Application

The Fort Hills Mine is located about 80 kilometres north of Fort McMurray, Alberta, in the Regional Municipality of Wood Buffalo.

The Fort Hills Mine started production in December 2017, and tailings placement began in the Out-of-Pit Tailings Area (“OPTA”). Fort Hills proposed to commence fluid tailings treatment and placement in the proposed Dedicated Disposal Area (“DDA”) in 2024.

Fort Hills sought approval of its TMP to 2073, ten years after the end of mine life.

Approval Discussion

The AER found that Fort Hills’ TMP presented significant risks to the achievement of the *Lower Athabasca Region: Tailings Management Framework for Mineable Athabasca Oil Sands* (“TMF”)’s objective and outcomes. The AER was particularly concerned that the TMP relied on a single, yet to be proven tailings treatment technology, referred to as the passive aquatic storage system (“PASS”) to create a single treated tailings deposit (the “Proposed DDA”). The Proposed DDA would not be closed until post end of mine life with a proposed closure outcome that was subject to further assessment, research, and future policy.

As a result of these concerns, the AER did not approve construction of or placement of treated tailings in the Proposed DDA. The AER stated that it first needs to be satisfied that the risks are mitigated and feasible alternative plans exist. The AER

required that Fort Hills conduct a demonstration of phase 1 of the PASS technology with a terrestrial outcome. This would allow Fort Hills to obtain the necessary evidence to provide the AER with assurance of the ability of Fort Hills’ TMP to meet the TMF’s objective and outcomes.

The AER also set conditions to ensure appropriate information is captured and submitted to the AER in a timely manner to manage risk and make appropriate regulatory decisions over the course of the Fort Hills Mine.

The approval terms and conditions addressed:

- (a) stakeholder and Indigenous community engagement;
- (b) project-specific thresholds for fluid tailings volumes;
- (c) tailings treatment technology and deposit performance plans and updates, including a plan for the demonstration, mitigation measures and research, monitoring, evaluation, and reporting; and
- (d) environmental effects and implications.

Fluid Tailings Profiles and Project-Specific Thresholds

The TMF and Directive 085 require that new fluid tailings be treated and progressively reclaimed during the life of a project, with all fluid tailings ready-to-reclaim (“RTR”) within ten years of end of mine life.

The fluid tailings profile represents the volume of fluid tailings that are not RTR.

Fort Hills commenced operations in 2017 and was employing fluid tailings generation reduction measures (i.e., thickeners, enhanced beach capture). Fort Hills proposed to commence fluid tailings treatment and placement in the Proposed DDA in 2024. All new fluid tailings must be RTR within ten years of end of mine life. Fort Hills’ end of mine life is 2063.

The AER found that Fort Hills’ new fluid tailings profile did not meet the TMF’s objective, since under

the proposed TMP all new fluid tailings did not achieve RTR status by 2073.

Fort Hills proposed 4 Mm<sup>3</sup> of new fluid tailings would remain in the fluid tailings inventory in 2073. The AER modified the new fluid tailings profile, requiring Fort Hills to achieve RTR status of all new fluid tailings by 2073 and ensure compliance with the *TMF*.

Fort Hills was managing its fluid tailings growth through the use of thickeners and enhanced beach capture. Therefore, although tailings treatment was commencing later in the life cycle, there was a mechanism for accumulation management in place.

Although the new fluid tailing profile was authorized, the AER noted a number of concerns and uncertainties with respect to Fort Hills' ability to achieve the new fluid tailings profile. The concerns were as follows:

- (a) the actual fluid tailings accumulation would be different from the predicted volumes used to create the new fluid tailings profile;
- (b) greater than expected fluid tailings accumulation might result in Fort Hills being required by the AER to undertake mitigation measures to achieve the new fluid tailings profile; and
- (c) the treatment of fluid tailings and placement of fluid or treated tailings was only authorized for a demonstration.

The AER required Fort Hills to confirm its ability to meet the new fluid tailings profile when it submits an amendment application for the updated TMP by September 30, 2026, or within two years from the commencement of the demonstration, whichever occurs first.

### Thresholds

The volume of accumulated fluid tailings is the primary indicator in the *TMF* used to manage and decrease liability and environmental risk resulting from the accumulation of fluid tailings. Triggers and a limit (collectively referred to as "thresholds") will be set relative to the fluid tailings profiles. The thresholds will ensure that fluid tailings are not accumulating beyond a volume or at a rate that precludes operators from meeting the *TMF*'s objective.

The three project-specific thresholds are the profile deviation trigger, the total volume trigger, and the total volume limit:

- (a) Profile deviation trigger:
  - (i) additional management action is required when the profile deviation trigger is exceeded;
  - (ii) occurs when the volume of fluid tailings is growing 20 percent faster than that approved for the profile; and
  - (iii) allows a five-year rolling average to account for year-over-year variability. The profile deviation trigger applies to both legacy fluid tailings and new fluid tailings profiles.
- (b) Total volume trigger:
  - (i) occurs when the volume of fluid tailings has exceeded its approved maximum accumulation and requires additional management action; and
  - (ii) level is based on 100 percent of the greater of the maximum approved fluid tailings volume profile or the end of mine life target.
- (c) Total volume limit:
  - (i) is the volume of fluid tailings above which presents an unacceptable risk to the environment and potential long-term liability; and
  - (ii) under the *TMF* is based on 140 percent of the greater of the maximum approved fluid tailings volume profile or the end of mine life target.

To allow for year-over-year variability, the AER set the profile deviation trigger for Fort Hills as a five-year rolling average of the annual profile deviation.

The AER set the total volume trigger at 125 Mm<sup>3</sup> and the total volume limit at 175 Mm<sup>3</sup>. Fort Hills' maximum approved fluid tailings volume is 125 Mm<sup>3</sup>, which is greater than the end of mine life target. The AER stated that it will review Fort Hills' new fluid

tailings profile in its updated TMP to ensure the project-specific thresholds are appropriate.

#### Treatment Technology Selection and Performance

The *TMF* stipulates that all fluid tailings must be treated with an accepted technology. The risks, benefits, and trade-offs associated with the proposed technology must be understood, have contingencies identified, and risks mitigated.

As a newly operating mine, Fort Hills Mine only recently began to generate tailings. These tailings are processed through thickeners and the thickened tailings produced are deposited into OPTA, with the Centre Pit Tailings Area (“CPTA”) and North Pit Tailings Area (“NPTA”) also proposed to receive thickened tailings in the future.

Fort Hills plans to continue to employ the thickeners to reduce the volume of fluid tailings generated. The thickeners are used to recover hot water from the tailings. However, the recovery of the hot water will increase the density of the thickened tailings stream, thereby reducing the volume of fluid tailings generated.

In addition, Fort Hills indicated that it intends to use enhanced beach capture. Enhanced beach capture is the placement of coarse sand tailings in areas that contain fluid tailings (i.e., OPTA, CPTA, and NPTA), which improves fines capture and reduces the volume of fluid tailings generated. Fort Hills would use enhanced beach capture whenever practical to reduce the volume of fluid tailings.

The new fluid tailings profile assumed that the thickeners and enhanced beach capture would successfully reduce fluid tailings growth.

The AER authorized the continued use of existing infrastructure, specifically the continued use of thickeners which were expected to provide a benefit to tailings management as they can decrease the volumes of fluid tailings generated.

Given the stage of Fort Hills’ operations and the limited performance data, the AER was concerned that the thickeners and enhanced beach capture might not perform as expected. In addition to affecting the projected fluid tailings volumes, and therefore the new fluid tailings profile, underperformance could impact technology treatment capacity requirements, overall site storage, and long-term reclamation outcomes.

#### PASS Technology - Phase 1

PASS technology has four phases. Phase 1 adds a coagulant and a flocculant to fluid tailings pumped or dredged from OPTA (or NPTA later in the mine life) prior to placement in the Proposed DDA. This phase was proposed to occur between 2024 and 2073.

The AER considered that PASS technology was still under development. The AER did not authorize the use of PASS technology, as proposed by Fort Hills, because the AER did not find sufficient evidence to support the viability of the PASS technology at the scale proposed at the Fort Hills Mine. Success of a yet to be proven tailings treatment technology must be demonstrated at a scale large enough to be representative of the Proposed DDA.

The AER required Fort Hills to conduct a demonstration of phase 1 of the PASS technology, at a scale large enough to be representative of the Proposed DDA, with a terrestrial closure outcome. Following several years of implementation of the demonstration, Fort Hills must submit an amendment application updating its TMP.

The AER found it was necessary to investigate potential end of life performance issues. The AER identified PASS uncertainties as a high risk and therefore did not permit Fort Hills to execute its TMP as proposed.

However, the AER authorized a demonstration of phase 1 of the PASS technology.

The required demonstration must be a deep deposit (approximately 40 metres) located in the South Pit. The depth should be sufficient to be representative of and allow Fort Hills to draw correlations to future proposed deposits (e.g., the Proposed DDA). Further, the deposit formed for the demonstration cannot exceed a volume of 40 Mm<sup>3</sup> of tailings treated by the PASS technology.

The AER required Fort Hills to submit a plan for the demonstration by September 30, 2021.

Fort Hills’ demonstration research must provide timely and site-specific information with respect to

- (a) the implementation and performance of phase 1 of PASS technology in a deep, in-pit deposit; and

- (b) the constraints or limitations to establishing a self-sustaining terrestrial boreal forest ecosystem.

The AER only authorized the demonstration and restricted the volume of fluid tailings treated through phase 1 of the PASS technology to be placed in the South Pit to 40 Mm<sup>3</sup>. Therefore, Fort Hills was required to submit an amendment application for an updated TMP. The updated TMP is required by September 30, 2026, or within two years from the commencement of the demonstration, whichever date occurs first.

#### PASS Technology - Phase 2, 3, and 4

Water capping technology involves the placement of water above untreated or treated tailings for the purpose of creating a water-capped deposit as a closure landscape feature ("water-capped pit lake"). Fort Hills stated that it does not use water capping as its tailings treatment technology. Rather, Fort Hills stated that it places an aquatic cover and that the tailings deposit is aquatically closed.

However, after all treated tailings have been placed, Fort Hills plans to cap the Proposed DDA with water in phase 2 of the PASS technology process to form an aquatic closure landscape. Phase 3 is controlled water flow return and phase 4 is water return under natural flow and pit lake development.

The AER found that this was, in effect, a water-capped pit lake. The AER understood that phase 2 of the PASS technology process involves placing water above treated tailings for the purposes of creating a water-capped deposit as a closure landscape feature.

There were various uncertainties and risks associated with water capping. As a consequence, water capping is subject to further assessment, research, and future policy. Fort Hills' approval prohibited the creation of water-capped pit lakes and phase 2, 3, and 4 activities.

#### Feasible Alternative

The *TMF* states that "...until it is determined whether or not the technology is a successful treatment method, plans will be required to consider alternatives" and "...technologies that have yet to be proven will require contingency plans for treatment, including alternative technology options for meeting requirements."

While Fort Hills described the technologies it evaluated in determining its proposed TMP, Fort Hills did not provide an alternative to PASS technology or to creating a water-capped pit lake, indicating that it believed the plan provided the best outcome.

The AER acknowledged that Fort Hills provided descriptions of technology alternatives to PASS technology as part of application 1881219. However, the description of alternatives provided to justify the selection of PASS technology did not constitute a feasible alternative technology and implementation plan for the Fort Hills Mine. The alternative provided must meet the TMF's outcomes and *Directive 085* requirements, including RTR criteria and identification of risks and uncertainties and associated mitigation measures.

#### Tailings Solvent Recovery Unit Tailings

In the froth treatment plant, a paraffinic solvent is added to froth to help separate bitumen from water and solids. The water and solids (i.e., tailings) from the froth treatment plant are sent to the tailings solvent recovery unit ("TSRU") to recover the paraffinic solvent. Once the tailings are processed by the TSRU, they are known as TSRU tailings. Although TSRU tailings generally account for less than 10 percent of the total fluid tailings generated, these tailings can pose higher environmental risks because they can contain a residual paraffinic solvent, other hydrocarbons, and sulphides.

Fort Hills proposed to place TSRU tailings in the west side of the OPTA until end of mine life (2063).

The AER was concerned with the management of TSRU tailings as these tailings pose unique risks and uncertainties. Where TSRU tailings are introducing risk, mitigation would be required.

The AER required Fort Hills to address the uncertainties with and treatment of TSRU tailings in an update on TSRU tailings management by September 30, 2023.

#### RTR Criteria

As stated in the *TMF* and *Directive 085*, fluid tailings are considered RTR when they have been processed with an accepted technology, placed in their final landscape position, and meet performance criteria.



RTR criteria are used to track the performance of a tailings deposit towards its ability to be reclaimed as predicted and in the time predicted. Consequently, RTR criteria are critical in evaluating trends and managing performance.

There are two subobjectives that address different aspects of performance:

- Sub-objective 1: the deposit's physical properties are on a trajectory to support future stages of activity.
- Sub-objective 2: to minimize the effect the deposit has on the surrounding environment and ensure that it will not compromise the ability to reclaim to a locally common, diverse and self-sustaining ecosystem.

The TMF and *Directive 085* allow operators to develop RTR criteria that are suitable for their type of tailings, technology, deposit, and future reclamation activities. *Directive 085* provides guidance on RTR criteria and requires operators to include information that supports their choice of RTR criteria. Sub-objective 1 and Sub-objective 2 RTR Criteria

#### Sub-objective 1 and Sub-objective 2 RTR Criteria

Fort Hills proposed the following RTR criteria:

- Sub-objective 1: clay to water ratio  $\geq 0.5$  annual average basis; and
- Sub-objective 1 and 2: total suspended solids (TSS)  $\leq 500$  parts per million (ppm) annual average basis.

The AER authorized a demonstration only and did not authorize Fort Hills' proposed use of PASS technology, the Proposed DDA, or the preferred aquatic outcome for the Proposed DDA, or the preferred aquatic outcome for the Proposed DDA (i.e., a water-capped pit lake). The AER did not authorize the RTR criteria as it considered it premature.

#### Environmental Effects and Implications

No *EPEA* approval air emission limits were amended as a result of the TMP.

Fort Hills did not propose to alter the existing surface water and groundwater control measures for OPTA

during operations, which manage surface water and groundwater risks during the operating phase. However, the AER acknowledged that Fort Hills will expand surface water and groundwater control measures (e.g., perimeter groundwater seepage collection system) to the expanded OPTA area.

Fort Hills did not seek authorization to release water from Fort Hills Mine as part of its TMP application.

#### Summary

The AER did not approve construction of or placement of treated tailings in the Proposed DDA. The AER held that it must first be satisfied that the risks are mitigated and feasible alternative plans exist.

The AER required that Fort Hills conduct a demonstration of phase 1 of the PASS technology with a terrestrial reclamation outcome. The AER expects this demonstration to commence by 2024 and required that Fort Hills submit feasible alternative treatment technologies and an implementation plan by September 30, 2023.

The approval also required Fort Hills to provide an amendment application for an updated TMP by September 30, 2026, or within two years from the commencement of the demonstration, whichever date occurs first.

#### ***AER Bulletin 2019-02: Update to Disposition Renewal Applications***

##### *Public Lands Act - Forms*

In this bulletin, the AER announced that effective immediately, disposition renewal applications no longer require a statutory declaration or affidavit.

Alberta Environment and Parks revised the Process for the Issuance and Maintenance of Applications/Amendments and Dispositions for Commercial, Industrial and Recreational Operations on Public Land document.

The AER updated the Disposition Renewal Application form to reflect this change. The form is now available on the AER website under Forms > *Public Lands Act* Forms. Completed applications are to be submitted through the Electronic Disposition System.

**AER Bulletin 2019-03: Applications for Partial Upgraders***Mining - In Situ Operations*

In this bulletin, the AER announced that it clarified the application processes for partial upgraders related to mining and in situ operations under *Directive 023 (Draft): Oil Sands Project Applications* and *Directive 078: Regulatory Application Process for Modifications to Commercial In Situ Oil Sands Projects*. The AER clarified the application process in support of the Government of Alberta's *Partial Upgrading Program*.

Partial upgraders are reviewed as "processing plants" under the *Oil Sands Conservation Act* and as "oil sands processing plants" under the *Environmental Protection and Enhancement Act*. The AER requirements for processing plants did not change.

**AER Bulletin 2019-04: Update to Survey Plan Requirements When Applying for a Reclamation Certificate***Update - Reclamation Certificates*

In this bulletin, the AER announced that it updated the *Specified Enactment Direction 002: Application Submission Requirements and Guidance for Reclamation Certificates for Well Sites and Associated Facilities* ("SED 002"). This update was in response to a change in policy by Alberta Environment and Parks. Disposition holders now have the option to submit either a survey plan or a sketch that was used to apply for, amend, or renew the surface rights.

The new edition of SED 002 takes effect immediately and is available on the AER website.

## ALBERTA UTILITIES COMMISSION

***EPCOR Water Services Inc. E.L. Smith Solar Power Plant (AUC Decision 23418-D01-2019)****Solar - Excess Electricity*

In this decision, the AUC approved EPCOR Water Services Inc. (“EPCOR Water”)’s application to construct and operate a power plant designated as the E.L. Smith Solar Power Plant (the “Project”) and an application to interconnect the power plant to the Alberta Interconnects Electric System (“AIES”)

The AUC found that approval of the project was in the public interest with regard to the social, economic, and other effects of the project, including its effect on the environment.

The AUC found that EPCOR Water’s proposal to provide a portion of the energy produced by the project to the adjacent water treatment plant and to export the excess energy to the AIES was not contemplated by the legislative scheme. However, the AUC approved the interconnection of the power plant on the basis that, as a municipally owned company, EPCOR Water’s intended purpose could be achieved through alternative means contemplated by the legislative scheme.

Background

EPCOR Water filed applications with the AUC for approval to construct and operate a 12-megawatt (“MW”) solar power plant in the City of Edmonton, pursuant to section 11 of the *Hydro and Electric Energy Act* (“HEEA”), and to interconnect the power plant to the AIES, pursuant to section 18 of the *HEEA*.

Legislative Scheme

The AUC regulates the construction and operation of power plants in Alberta. Section 11 of the *HEEA* states that no person may construct or operate a power plant without prior approval.

When considering an application for a power plant and associated infrastructure, the AUC is guided by sections 2 and 3 of the *HEEA*, and section 17 of the *Alberta Utilities Commission Act*.

Section 2 lists the purposes of the *HEEA*. Those purposes include:

- to provide for the economic, orderly and efficient development and operation, in the public interest, of the generation of electric energy in Alberta;
- to secure the observance of safe and efficient practices in the public interest in the generation of electric energy in Alberta; and
- to assist the government in controlling pollution and ensuring environment conservation in the generation of electric energy in Alberta.

Section 3 of the *HEEA* requires the AUC to have regard for the purposes of the *Electric Utilities Act* (“*EUA*”) when assessing whether a proposed power plant and associated infrastructure is in the public interest under section 17 of the *Alberta Utilities Commission Act*. The purposes of the *EUA* include the development of an efficient electric industry structure and the development of an electric generation sector guided by competitive market forces.

Section 17 of the *Alberta Utilities Commission Act* describes the AUC’s public interest mandate.

Pursuant to section 18 of the *HEEA*, no party shall connect a power plant to the electric distribution system without an order from the AUC.

Power Plant Application

The AUC found that the technical, siting, emission, environmental, and noise aspects of the power plant were met.

The AUC found that the participant involvement program for the project was adequate and met the requirements set out in Rule 007: *Applications for Power Plants, Substations, Transmission Lines, Industrial System Designations and Hydro Developments*.

The AUC found that the power plant would not result in negative social or environmental impacts. The AUC accepted the conclusion from Stantec’s environmental evaluation that the potential environmental effects of the project would be “not significant” and that the environmental impacts of the project could be adequately mitigated, given diligent implementation of the mitigation measures proposed

in the evaluation and having regard for the additional commitments made by EPCOR Water.

The AUC found that EPCOR Water's alterations to the project to reduce the footprint, increased the separation from the river, and allowed access to its property to enhance the river valley's trail system demonstrated EPCOR Water's willingness to adapt its project in response to concerns raised by stakeholders. The AUC accepted EPCOR Water's commitments to develop an environmental protection plan prior to construction that would include mitigation measures. In assessing the social and environmental effects of the project, the AUC relied upon EPCOR Water's commitments to integrate the trail system into its project.

The AUC found that concerns with the potential visual impacts of the project would be mitigated to an extent because the site is located adjacent to the water treatment plant, was previously disturbed, and situated on an empty field with no public access. While the AUC recognized that the presence of solar panels would have a different visual impact than its existing use, the AUC considered that EPCOR Water's plans to enhance the natural aesthetics of the site using fence design, natural screening, and other landscaping would help mitigate the visual impacts of the power plant. The AUC found it reasonable that the Project had a low potential to result in hazardous glare conditions at any of the measured points surrounding the project.

The AUC noted that the *Conservation and Reclamation Regulation* was recently amended to address the reclamation of solar projects in Alberta specifically. The effect of these amendments is that "renewable energy operations," which include solar plants, are now expressly subject to the reclamation obligations set out in section 137 of the *Environmental Protection and Enhancement Act*. Operators of renewable energy operations are now required to obtain a reclamation certificate, a process that is managed by AEP pursuant to the *Conservation and Reclamation Directive for Renewable Energy Operations* and provides more detailed information on conservation and reclamation planning and reclamation certificate requirements for renewable energy operators in Alberta.

The AUC was satisfied that the Noise Impact Assessment demonstrated that cumulative sound levels for the project would be below the daytime and nighttime permissible sound levels as required in Rule 012.

Finally, the AUC was satisfied that EPCOR Water, as a municipal subsidiary, may hold an interest in the power plant in accordance with section 95(9) of the *EUA* based on its intention to utilize the majority of the electric energy produced annually on-site.

The AUC found the power plant to be in the public interest in accordance with section 17 of the *Alberta Utilities Commission Act*.

### Exemption Request

#### *Summary*

EPCOR Water sought to rely on the exemption set out in subsection 2(1)(b) of the *EUA* in support of its contention that it was entitled to both self-supply and export electric energy from its power plant.

The AUC found that EPCOR Water's proposal to directly consume approximately 70 percent of the power plant's annual output on-site and export the remaining 30 percent to the wholesale market was inconsistent with sections 18 and 101 of the *EUA* and Section 2(f) of the *Fair, Efficient and Open Competition ("FEOC") Regulation*.

Notwithstanding this conclusion, the AUC recognized that EPCOR Water was not precluded from pursuing other alternative arrangements consistent with the statutory scheme that could allow it to meet its on-site power needs while still satisfying the requirements of section 95(9) of the *EUA*.

#### *Legislative Scheme*

- Section 18(2) of the *EUA* provides that all electric energy entering or leaving the AIES must be exchanged through the Power Pool of Alberta unless regulations made under sections 41, 99, or 142 of the *EUA* provide otherwise.
- Section 101(1) of the *EUA* states that a person wishing to obtain electricity for use on a property must make arrangements for the purchase of electric distribution service from the owner of the electric distribution system in whose service area the property is located.
- Section 2(1) of the *EUA* sets out the forms or types of electric energy that are exempt from the operation of the Act. Section 2(1)(b) provides as follows:

- Electric energy produced on the property of which a person is the owner or a tenant, and consumed solely by that person and solely on that property.
- Section 2(f) of the *FEOC Regulation* compliments subsection 2(1)(b) of the *EUA* and provides that “not offering to the power pool all electric energy from a generating unit that is capable of operating, except where the electric energy is used on property for the market participant’s own use” is conduct that does not support the fair, efficient and openly competitive operation of the electricity market.

#### *Interpreting Exemption under Section 2(1)(b) of the Electric Utilities Act*

In accordance with its plain and ordinary meaning, the AUC found that subsection 2(1)(b) of the *EUA* established three pre-conditions for the exemption to apply:

- (a) the electric energy must be produced on EPCOR Water’s property;
- (b) the electric energy must be consumed solely by EPCOR Water; and
- (c) the electric energy must be consumed solely on EPCOR Water’s property.

The AUC understood EPCOR Water’s interpretation of subsection 2(1)(b) of the *EUA* to be that the exemption applied to the portion of the electric energy produced and consumed by EPCOR Water on its property (i.e., the 70 percent), but that it did not apply to electric energy produced on its property but consumed off-site (i.e., the 30 percent).

The AUC found that the effect of this interpretation was that two of the pre-conditions to the exemption were not satisfied: the electric energy produced on EPCOR Water’s property would not be consumed solely by EPCOR Water, and would not be consumed solely on EPCOR Water’s property. The AUC found that EPCOR Water’s interpretation was entirely at odds with the plain and ordinary meaning of the provision.

The AUC found that analysis of the broader statutory scheme supported its interpretation of subsection 2(1)(b) of the *EUA*. For instance, the AUC found that the statutory scheme specifically authorized the owners of industrial systems and micro-generators

to self-supply and transact any electric energy that is in excess of their own use through the interconnected electric system. Absent from the statutory scheme, however, was any express authorization for a party that relies upon the exemption in subsection 2(1)(b) of the *EUA* to export electric energy that is in excess of the person’s own use on the property. Given that such express authorization exists for the other two self-supply mechanisms, the AUC considered its omission for subsection 2(1)(b) operations to be intentional and reflective of the drafter’s intent to require that all the electricity produced on-site be consumed on-site.

#### Summary

Pursuant to section 11 of the *HEEA*, the AUC approved EPCOR Water’s application.

Pursuant to section 18 of the *HEEA*, the AUC approved EPCOR Water’s application, subject to the following condition:

- As of the interconnection date of the project, EPCOR Water is required to file a compliance plan, endorsed by its chief executive officer, consisting of a written confirmation of statutory compliance and a detailed written description of the mechanism it is using to ensure compliance with the statutory scheme.

#### ***AUC Bulletin 2019-02: Amended AUC Rule 030: Compliance with the Code of Conduct Regulation***

##### *Code of Conduct Regulation - Amendment*

In this bulletin, the AUC announced its approval of an amended Rule 030: *Compliance with the Code of Conduct Regulation*. The amended rule was effective on April 1, 2019.

Section 40(4) of the *Code of Conduct Regulation* permits the AUC to make exemptions from audits for a period not exceeding 36 months. The table in Section 6 of Rule 030 was amended to reflect the audits completed in 2018-2019, the revised timing due to updated compliance plans, and was reorganized for ease of reference. The amendments were considered to be minor and were made without stakeholder consultation.

The amended rule and a blacklined version of the rule may be found in the rule-related section of the AUC website, under Rule 030.

## NATIONAL ENERGY BOARD

***NEB Reconsideration of Aspects of its OH-001-2014 Report - Trans Mountain Pipeline ULC Application for the Trans Mountain Expansion Project (MH-052-2018 Report)****Trans Mountain Expansion Project*

In this Reconsideration Report (the “Reconsideration”), the NEB undertook the reconsideration directed by the Governor in Council (“GIC”) in Order in Council P.C. 2018-1177 (“OIC”).

As directed by the OIC and, as reflected in the NEB’s list of issues from Hearing OH-001-2014, the Reconsideration was focused on whether Project-related marine shipping was likely to cause significant adverse environmental effects on the Southern resident killer whale.

In the Reconsideration, the NEB confirmed the recommendation and replaced certain conditions that it provided to the GIC in its OH-001-2014 Report and recommended additional conditions.

The NEB recommended that the GIC approve the Project by directing the issuance of a certificate of public convenience and necessity (“CPCN”) to Trans Mountain Pipeline ULC (“Trans Mountain”), subject to conditions.

Pursuant to the *Canadian Environmental Assessment Act, 2012* (“CEAA 2012”) the NEB found that the designated Project was likely to cause significant adverse environmental effects. Specifically, Project-related marine shipping was likely to cause significant adverse environmental effects on the Southern resident killer whale, and on Indigenous cultural use associated with the Southern resident killer whale. This was despite the fact that effects from Project-related marine shipping would be a small fraction of the total cumulative effects, and the level of marine traffic was expected to increase regardless of whether the Project was approved.

The NEB also found that greenhouse gas (“GHG”) emissions from Project-related marine vessels would result in measurable increases and, taking a precautionary approach, were likely to be significant. While a credible worst-case spill from the Project or a Project-related vessel was not likely, if it were to occur, the environmental effects would be significant.

Pursuant to the *Species at Risk Act* (“SARA”), the NEB identified the adverse effects of the Project and its related marine shipping on each SARA-listed wildlife species and its critical habitat, imposed conditions, and recommended to the GIC measures to avoid or lessen those effects and to monitor them.

Background

The Project would expand the existing Trans Mountain Pipeline system between Edmonton, Alberta and Burnaby, British Columbia (“BC”), nearly tripling its capacity to ship oil from 300,000 to 890,000 barrels per day. Almost 90 percent of the Project route paralleled existing disturbance, including the right-of-way for the existing pipeline. The Project included approximately 987 kms of new pipeline, new and modified facilities such as pump stations and tanks, and the reactivation of 193 kms of the existing pipeline. The Westridge Marine Terminal (“WMT”) would also be expanded. Oil would be loaded onto tankers at the WMT for transit to Washington State, California, and Asia.

Regulatory and Judicial History

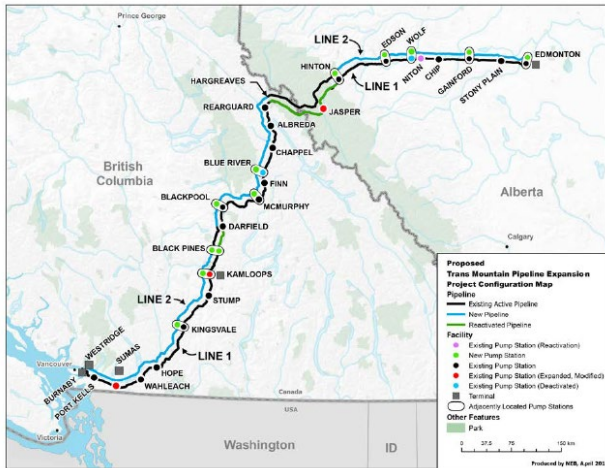
Project-related marine shipping was considered as part as part of the NEB OH-001-2014 hearing, but only under the *NEB Act* – not under the *CEAA 2012*. On November 29, 2016, the GIC approved the Project, issuing OIC P.C. 2016-1069. Accordingly, on December 1, 2016, the NEB issued CPCN OC-064 to Trans Mountain, along with amendments to other existing CPCNs.

On August 30, 2018, the Federal Court of Appeal (the “FCA”) in *Tsleil-Waututh Nation v. Canada (Attorney General)* (“*Tsleil-Waututh*”) set aside OIC P.C. 2016-1069, in part because, in the FCA’s view, the NEB unjustifiably excluded Project-related marine shipping from the scope of the “designated project” reviewed under the *CEAA 2012*.

On September 20, 2018, the GIC issued the OIC directing the NEB to conduct a reconsideration taking into account the environmental effects of Project-related marine shipping in view of the requirements of the *CEAA 2012*, and the adverse effects of Project-related marine shipping on species at risk in view of any requirements of section 79 of the *SARA*.

## NEB Review of the Trans Mountain Expansion Project

Below is a map of the Project.



Following the direction from the GIC in OIC P.C. 2018-1177, the NEB concluded that Project-related marine shipping between the WMT and 12-nautical-mile territorial sea limit was “incidental” to the Project and therefore part of the “designated project,” as those terms are defined in the *CEAA 2012*.

### Regulatory Framework and Summary

#### *Recommendation under the CEAA 2012*

Pursuant to the *CEAA 2012*, the NEB found that Project-related marine shipping was likely to cause significant adverse environmental effects on the Southern resident killer whale, and on Indigenous cultural use associated with the Southern resident killer whale. The NEB also found that greenhouse gas emissions from Project-related marine vessels would result in measurable increases and, taking a precautionary approach, are likely to be significant. The NEB found that, although a credible worst-case spill from a tanker associated with the Project would result in significant adverse environmental effects, such an event is not likely.

However, the NEB found that the potential to cause significant adverse environmental effects could be justified in the circumstances.

#### *Justification Analysis Under the CEAA 2012*

The justification analysis under *CEAA 2012* involves balancing adverse environmental effects against social, economic and other benefits.

The NEB found that the expected significant social and economic benefits outweighed the significant adverse environmental effects. The NEB also identified a recommended follow-up program to be implemented with respect to the designated project. The NEB made this finding considering Trans Mountain’s commitments, NEB conditions, and recommendations to the GIC to mitigate and reduce adverse environmental effects.

The NEB concluded that the Project was in the Canadian public interest.

In the NEB’s view, the benefits of the Project were considerable, including:

- increased access to diverse markets for Canadian oil;
- jobs created across Canada;
- the development of capacity of local and Indigenous individuals, communities, and businesses;
- direct spending on pipeline materials in Canada; and
- considerable revenues to various levels of government.

However, the NEB also found that the Project and its related marine shipping carried risks. Its burdens include the significant adverse effects that are likely to be caused by Project-related marine shipping on the Southern resident killer whale and Indigenous cultural use associated with the Southern resident killer whale.

On the whole, the NEB found that the benefits of this Project outweighed the residual burdens and concluded that the Project was in the present and future public convenience and necessity, and in the Canadian public interest.

The NEB set out conditions regarding Project-related marine shipping that it considered necessary or desirable in the public interest, should the Project be approved by the GIC. Conditions include technically and economically feasible mitigation measures to eliminate, reduce, or control the adverse environmental effects of Project-related marine shipping in accordance with *CEAA 2012*.

The NEB also provided recommendations for measures to mitigate, avoid, or lessen the effects of Project-related marine shipping that are within the authority of the GIC, but beyond the scope of the NEB's regulatory authority and Trans Mountain's control. Furthermore, the NEB considered measures that would avoid or lessen any adverse environmental effects of Project-related marine shipping on all SARA-listed species and their critical habitat, and to monitor them under subsection 79(2) of the SARA.

Accordingly, the NEB confirmed its recommendation that a CPCN should be issued and the Project should be approved.

### Consultation

#### *Trans Mountain's Stakeholder Engagement Program*

The NEB found that Trans Mountain developed and implemented a broadly based public consultation program, offering numerous venues and opportunities for the public, landowners, governments and other stakeholders to learn about the Project, and to provide their views and concerns to the company.

The NEB imposed Condition 102 requiring Trans Mountain to confirm that it created, and will maintain, a process/system that tracks Project-related landowner and tenant complaints or concerns and how Trans Mountain addresses them, up until the Project is abandoned or decommissioned pursuant to the *NEB Act*.

The NEB found that with Trans Mountain's commitments and the NEB's recommended conditions, Trans Mountain could continue to engage the public, landowners and other stakeholders effectively, and address issues raised throughout the Project's operational life.

#### *Trans Mountain's Consultation Activities with Indigenous Groups*

The NEB recognized Trans Mountain's plans for future engagement on marine-related Project conditions that would occur through workshops, ongoing one-on-one meetings and Indigenous Engagement Roundtables planned for 2019.

The NEB noted that Trans Mountain engaged with Indigenous communities since the close of the OH-

001-2014 hearing, and committed to continue to work with Indigenous communities.

The NEB was satisfied that Trans Mountain would continue to engage with Indigenous communities in order to learn more about their interests and concerns and address issues raised by Indigenous communities throughout the Project's operational life.

#### *Section 35 of the Constitution Act, 1982*

Section 35 of the *Constitution Act, 1982* recognizes and affirms the existing Indigenous and treaty rights of Indigenous peoples. The NEB found that its recommendations and decisions with respect to this application were consistent with both subsection 35(1) and procedural fairness requirements. The NEB found the consultation process was appropriate, recognizing the complexity of this application, the importance of the constitutionally protected rights of Indigenous peoples, and the many and varied societal interests that must be considered in its assessment.

#### *Government of Canada's Duty to Consult*

The NEB explained that its mandate was to reconsider its recommendation, taking into account the effects of Project-related marine shipping. It was the GIC's role to make the final decision on the Project, taking into account the NEB's MH-052-2018 Report and the information to be provided by the Federal Authorities regarding the adequacy of the Crown's consultation and accommodation.

In response to concerns raised about the Crown relying on the NEB's reconsideration process to meet its duty to consult, the NEB affirmed that the Crown may rely on the NEB MH-052-2018 hearing, to the extent possible, to identify, consider and address how the Crown's conduct in relation to Project-related marine shipping might adversely impact potential or established Indigenous and Treaty rights.

#### *Conclusion on Consultation*

The NEB found that adequate consultation and accommodation for the purpose of the NEB's recommendation on this Project was undertaken.

Any potential Project impacts on the interests, including rights, of affected Indigenous communities, after mitigation, were not likely to be significant and



could be effectively addressed, with the exception of the impacts on the traditional use of Southern resident killer whales by Indigenous peoples.

The NEB found that its recommendations with respect to this Project were consistent with section 35 of the *Constitution Act, 1982* and the honour of the Crown.

#### Summary

The Reconsideration process and the resulting report discharged the relevant requirements of the NEB under the *NEB Act*, *CEAA 2012*, and *SARA*. The NEB found that the Trans Mountain Expansion Project was in the Canadian public interest and recommended to the GIC that it be approved.

If the Project is approved, the NEB will regulate it throughout its full lifecycle. The NEB will oversee Project construction and operation, and will hold Trans Mountain accountable for meeting its commitments and applicable regulatory requirements, keeping its pipelines and facilities safe and secure, and protecting people, property, and the environment.