



Canada Energy
Regulator

Régie de l'énergie
du Canada

Suite 210
517 Tenth Avenue SW
Calgary, Alberta
T2R 0A8

517, Dixième Avenue S.-O.
bureau 210
Calgary (Alberta)
T2R 0A8

LETTER DECISION

File OF-Fac-Oil-T260-2013-03 63
23 November 2020

Mr. Hugh David Gray and
Mrs. Barbara Ann Gray
24182 80th Avenue
Langley, BC V1M 3R1
Email barbgray@gmail.com

Mr. Scott Stoness
Trans Mountain Canada Inc.
Suite 2700, 300 – 5th Avenue SW
Calgary, AB T2P 5J2
Email regulatory@transmountain.com

Mr. Shawn H.T. Denstedt, Q.C.
Osler, Hoskin & Harcourt LLP
Suite 2500, 450 – 1st Street SW
Calgary, AB T2P 5H1
Email sdenstedt@osler.com

Dear Mr. and Mrs. Gray, Mr. Stoness, and Mr. Denstedt:

**Trans Mountain Pipeline ULC (Trans Mountain)
Trans Mountain Expansion Project (TMEP)
Detailed Route Hearing MH-018-2020
Hugh David Gray and Barbara Ann Gray
Decision of the Commission of the Canada Energy Regulator (Commission)**

1 Background

On 16 December 2013, Trans Mountain filed an application with the National Energy Board (NEB) under section 52 of the *National Energy Board Act*¹ (NEB Act) for a certificate of public convenience and necessity (Certificate) authorizing the construction and operation of the TMEP.

The TMEP includes twinning the existing 1,147-kilometre-long Trans Mountain Pipeline (TMPL) system in Alberta and British Columbia with approximately 981 kilometres of new buried pipeline; new and modified facilities, such as pump stations and additional tanker loading facilities at the Westridge Marine Terminal in Burnaby; and reactivating 193 kilometres of the existing pipeline between Edmonton and Burnaby. Trans Mountain requested approval of a 150-metre-wide corridor for the TMEP pipeline's general route.

Upon receipt of the application, the NEB commenced a public Certificate hearing process. Following this Certificate hearing, on 19 May 2016, the NEB issued its OH-001-2014 Report ([A77045](#)) recommending that the Governor in Council (GIC) approve the TMEP and its general pipeline corridor.

.../2

¹ R.S.C., 1985, c. N-7 (repealed).

The TMEP was approved by Order in Council (OIC) P.C. 2016-1069 in November 2016. The NEB issued Certificate OC-064 and began work on various regulatory processes, including the 2017/18 detailed route approval process.

On 30 August 2018, the Federal Court of Appeal (FCA) issued its decision in *Tsleil-Waututh Nation v. Canada (Attorney General)*² [FCA Decision], setting aside OIC P.C. 2016-1069 and remitting the matter back to the GIC for appropriate action. Following the FCA Decision, the NEB reconsidered the matter of TMEP-related marine shipping and the Government of Canada reinitiated consultations with Indigenous peoples.

Following a second public hearing process, the NEB issued its MH-052-2018 Reconsideration Report ([A98021](#)) in February 2019. Canada's Crown Consultation and Accommodation Report ([C00219-5](#)) was issued in June 2019. The GIC approved the TMEP again in June 2019 via OIC P.C. 2019-820 ([C00219](#)) and the NEB subsequently issued Certificate OC-065 ([C00061](#)).

On 19 July 2019, following a public comment process, the NEB set out how it would resume the TMEP detailed route approval process ([C00593](#)). The NEB directed Trans Mountain to file its Plan, Profile and Book of Reference (PPBoR) for the entire TMEP route. Trans Mountain served landowners along the length of the TMEP with a notice that the detailed route approval process was underway, and placed notices in local publications. The notices indicated that landowners and Indigenous peoples with a continued or new objection to the proposed detailed route, or to the methods or timing of construction, were required to file a Statement of Opposition (SOO).

Landowners and Indigenous peoples whose 2017/18 detailed route hearings were put on hold following the FCA Decision were required to file a new SOO to continue with their detailed route hearings. Landowners and Indigenous peoples seeking a new detailed route hearing (i.e., those that did **not** have a 2017/18 detailed route hearing underway at the time of the FCA Decision) were required to file SOOs that demonstrated a material change in circumstances. Only SOOs that were filed on time, made in good faith, not withdrawn, and not frivolous or vexatious were accepted.

On 28 August 2019, the *Canadian Energy Regulator Act*³ (CER Act) came into force, repealing the NEB Act. As a result, the Commission is considering approval of the PPBoR under the provisions of the CER Act.

2 Process changes due to the COVID-19 pandemic

The resumed detailed route hearing processes began prior to the COVID-19 pandemic and contemplated an oral cross-examination portion, as well as optional site visits by the Commission to the lands subject to each hearing. When the pandemic struck, the Commission issued a Procedural Direction ([C05817](#)) modifying its processes to exclude steps that involved in-person contact, replacing oral cross-examination with rounds of written questions (called information requests or IRs) and answers. Site visits were replaced with the opportunity for parties to file photographs or videos with their written evidence.

As explained in the Procedural Direction, the process changes were aimed at finding alternative ways to ensure that the detailed route hearings could continue in a manner that is fair and transparent, while protecting the health of those involved.

² 2018 FCA 153.

³ S.C. 2019, c. 28, s. 10.

3 Detailed Route Hearing MH-018-2020

Hugh David Gray and Barbara Ann Gray are the registered owners of lands identified as Tract 2674, PID 008-206-252, in Segment 6.8 on PPBoR Sheet M002-PM03021-003 filed by Trans Mountain ([C00974-9](#)).

In 2017, the Grays filed a SOO ([A83615](#)) and were granted a detailed route hearing ([MH-028-2018](#)). Trans Mountain filed written evidence in the hearing ([A93662](#)).

In 2019, the Grays filed two SOO documents seeking to resume their detailed route hearing ([C00851](#) and [C02100](#)). On 31 January 2020, the Commission issued the Hearing Order applicable to the Grays' detailed route hearing (MH-018-2020) [[C04465](#)]. In the SOO, the Grays did not describe a material change in circumstances since the 2017/18 detailed route approval process was held. The hearing resumed at the place it had left off in 2017/18, with no process changes.

Since the resumption of the detailed route hearing:

- Trans Mountain filed supplemental written evidence ([C04924](#));
- Mr. Gray was provided the opportunity to file two rounds of IRs, but did not use those opportunities;
- Mr. Gray filed written evidence ([C05209](#), [C05662](#));
- Trans Mountain filed reply evidence ([C07123](#)); and
- Trans Mountain filed a response to an IR asked by the Commission ([C07368](#)).

On 22 July 2020, the Commission heard argument from Trans Mountain and Mr. Gray by videoconference, for which a written transcript was produced ([C07481](#)).

The three issues to be decided in this detailed route hearing are:

- 1) Is Trans Mountain's proposed detailed route for the TMEP pipeline the best possible detailed route? (see **Section 5**)
- 2) Are Trans Mountain's proposed methods of constructing the TMEP pipeline the most appropriate? (see **Section 6**)
- 3) Is Trans Mountain's proposed timing of constructing the TMEP pipeline the most appropriate? (see **Section 7**)

Trans Mountain bears the onus to prove its case with respect to these issues on a balance of probabilities.

3.1 Notice of detailed route approval process to Indigenous communities

On 23 August 2019, the NEB notified by letter 70 Indigenous⁴ communities, whose rights and interests could be potentially affected by the TMEP detailed route approval process in Segments 6 and 7, of the detailed route approval process ([C01164](#), [C01167](#)). All notices advised that interested Indigenous communities could file a SOO in relation to the proposed detailed route, the methods of construction, and/or the timing of construction; indicated the timeline for doing so; and described how to obtain further information or assistance.

⁴ The use of the term "Indigenous" has the meaning assigned by the definition of "aboriginal peoples of Canada" in subsection 35(2) of the *Constitution Act, 1982* which states:

In this Act, "aboriginal Peoples of Canada" includes the Indian, Inuit, and Métis Peoples of Canada.

On 23 September 2019, the Canada Energy Regulator (CER) received a SOO from the S'ólh Téméxw Stewardship Alliance (STSA) [[C01778](#)] opposing the proposed detailed route and the methods and timing of construction throughout Segment 6 and 7 lands. No other notified Indigenous community filed a SOO regarding the proposed detailed route for these segments. On 29 November 2019, the Commission issued SOO Decision No. 4 related to Segments 5, 6, and 7 ([C03323](#)), which granted a three-phased detailed route hearing process to STSA.

On 1 May 2020, the Commission received a letter from the STSA ([C06175](#)) in which it requested leave to substitute Semá:th First Nation (Semá:th) in the place of the STSA for the purposes of representing their own interests in the SOO filed by the STSA for Segments 5, 6, and 7. With the exception of Semá:th, all signatory STSA member communities had withdrawn their signatures from the SOO.

On 29 May 2020, the Commission issued a decision that revised the three phases of Semá:th's hearing ([C06552](#)). The decision indicated that Semá:th was no longer a party in Detailed Route Hearing MH-018-2020. The Commission provided its reasons for this decision on 12 June 2020 ([C06814](#)).

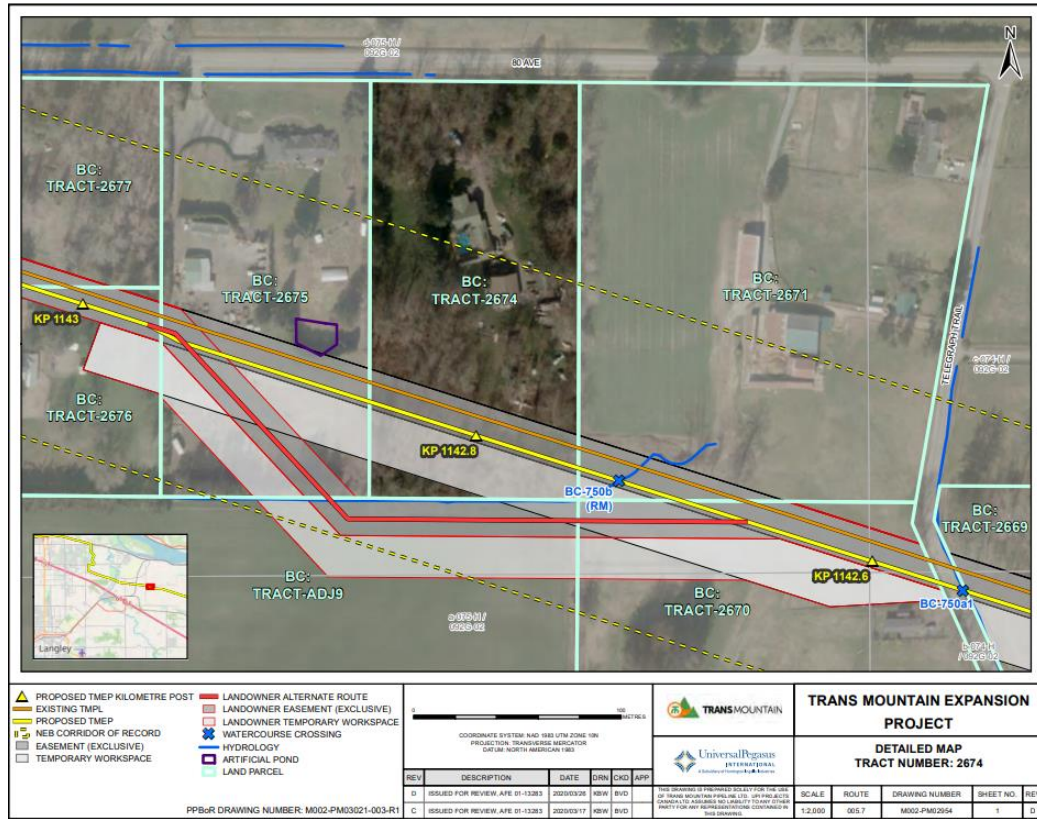
The Commission is of the view that there has been appropriate notification provided to Indigenous communities regarding the TMEP detailed route approval process and that they have been provided the opportunity to participate in the detailed route approval process for Segments 6 and 7.

4 Overview of the proposed TMEP pipeline on the subject lands

The scope of Detailed Route Hearing MH-018-2020 is limited to Tract 2674 as described in Section 3, and is referred to in this Decision as the "Lands."

Figure 1 below shows Trans Mountain's proposed route and the Grays' proposed alternate route.

Figure 1 – Trans Mountain’s proposed route and the Grays’ proposed alternate route across the Lands (C07123-1)



5 Is Trans Mountain’s proposed detailed route the best possible detailed route?

Trans Mountain proposes to install the TMEP pipeline within the existing TMPL right-of-way (RoW) for the entirety of the route through the Lands. To determine whether it is the best possible detailed route, the Commission first assessed whether Trans Mountain applied its routing criteria appropriately in selecting the route, and then considered the Grays’ proposed alternate route. The Commission found that Trans Mountain’s proposed route is, on a balance of probabilities, the best possible detailed route.

5.1 Did Trans Mountain apply its routing criteria appropriately?

Trans Mountain’s submissions

- The TMEP pipeline corridor was approved as part of the Certificate hearing. During Trans Mountain’s route selection process for the corridor, it established a hierarchy of routing options. In descending order of preference, these were:
 - where practicable, co-locate the TMEP on or adjacent to the existing Trans Mountain Pipeline (TMPL) easement to:
 - reduce land use fragmentation;
 - reduce the use of unencumbered lands by using the existing TMPL RoW for the location of the TMEP pipeline and construction workspace; and

- leverage the existing pipeline protection program and landowner knowledge of the location and nature of the existing TMPL to optimize pipeline integrity and safety;
- where co-location with the TMPL is not practicable, minimize the creation of new linear corridors by installing the TMEP segments adjacent to existing easements or RoWs of other linear facilities, including other pipelines, power lines, highways, roads, railways, fibre-optic cables, and other utilities;
- if co-location with an existing linear facility is not feasible, install the TMEP segments in a new easement selected to balance safety, engineering, construction, environmental, cultural, and socio-economic factors; and
- in the event a new easement is necessary, minimize the length of the new easement before returning to the TMPL easement or other RoWs.
- Selection of the approved TMEP corridor also included:
 - acquiring and reviewing data from assessments related to engineering, constructability, geotechnical and seismicity, land and RoW, environmental, archaeological, socio-economic (including land use), operations, maintenance, and cost, in support of the preferred corridor; and
 - engagement with landowners, stakeholders, appropriate government authorities, and Indigenous groups, to gather and incorporate additional criteria or commentary on the proposed corridor from all parties impacted or involved.
- Route and corridor selection also followed these guidelines to enable and maintain consistent decision-making:
 - minimize the length of the TMEP pipeline;
 - avoid areas that have significant environmental or cultural value or restrictions;
 - minimize routing through areas of extensive urban development;
 - be consistent with established land use planning;
 - avoid areas of potential geotechnical or geological hazards;
 - avoid areas of extremely rough terrain or areas that have limited access;
 - minimize the number of watercourse, highway, road, railway, and utility crossings; and
 - establish the crossing of watercourses at as close as practical to right angles.
- To determine the location of the pipeline alignment, the easement, and temporary workspace on a specific land parcel, Trans Mountain employed the same process and criteria as was used in determining the location of the proposed pipeline corridor. Where possible, the TMEP easement was fixed within the overlapping easement.
- The proposed route on the Lands is consistent with these routing principles.
- Trans Mountain's desktop review of the Lands did not identify any wetlands on the Lands. If a wetland or wet area is encountered during construction, Trans Mountain will implement and adhere to the mitigation measures described in its Pipeline Environmental Protection Plan and its Wetland Survey and Mitigation Plan.

Mr. Gray's submissions

- Trans Mountain considered none of the options outlined in its hierarchy of routing options.
- The proposed route is not appropriate for the community. When the TMPL was installed in the early 1950s, the area was sparsely populated and relatively underdeveloped. Today, the area is mainly characterized as semi-urban developed equestrian properties.

- The proposed workspace will destroy the wooded area between the current TMPL RoW and the property line.
- The proposed route goes through an area that is saturated with water for half the year, making it somewhat unstable.

The Commission: Trans Mountain applied its routing criteria appropriately

The GIC approved, following the Certificate hearings, the criteria recommended by the Commission's predecessor, the NEB, to determine the pipeline's route. The Commission, like the NEB, has consistently considered in an objective manner Trans Mountain's application of these criteria to assess a proposed detailed route, while also considering how the proposed route incorporates reasonable mitigation measures to address a landowner's concerns. The Commission is of the view that this practice continues to be appropriate for detailed route hearings and sees no justification to depart from it.

The Commission acknowledges that Trans Mountain's routing criteria and guidelines are reasonable and appropriate. They prioritize safety and consider a number of competing factors, including physical constraints, while attempting to minimize environmental and socio-economic impacts on land and landowners. They are also flexible enough to incorporate reasonable mitigation measures to respond to concerns raised by landowners. Accordingly, the Commission assessed whether Trans Mountain's proposed route reflects an appropriate application of its routing criteria, while considering its proposed mitigation measures to address the Grays' concerns, and concludes that Trans Mountain applied its routing criteria appropriately.

Mr. Gray argued that the use of the Lands has changed since the TMPL was originally constructed and the proposed route is not appropriate for the community, but offered no specific reasons in support of this opinion. The Commission notes Trans Mountain's submission that it acquired and reviewed socio-economic data, including land use data, when determining the location of the pipeline corridor. Trans Mountain further submitted that it followed the same process to determine the location of the detailed route of the pipeline, such that it again considered land use, and also considered consistency with established land use planning. Accordingly, in the Commission's view, and in the absence of any evidence to the contrary, the proposed route is consistent with the current use of the Lands.

The Commission accepts Mr. Gray's assertion that the routing criteria allow for changes and minor pipeline adjustments, as required. However, the Commission also accepts Trans Mountain's submission that the approved criteria are a *hierarchy* that follow a descending order of preference, and not just a *list*. Since the TMPL is located on the Lands, the first criterion applies in this case unless it would not be practicable to co-locate the TMEP pipeline on the TMPL easement. Mr. Gray's concerns are that the proposed route (i) is not appropriate for the current community, (ii) will go through a wet area, and (iii) its associated workspace will result in the removal of trees on the Lands.

In the Commission's view, the first and third concerns are not about whether the proposed route is practicable (i.e., whether it is possible to install the pipeline in the proposed location). The concern about the wet area is about practicability; however, Trans Mountain's evidence shows that it has plans in place to mitigate potential impacts to wetlands if any are discovered during construction. Mr. Gray has raised no concerns about Trans Mountain's practical ability to install the pipeline along the proposed route that Trans Mountain has not adequately addressed. As a result, the first routing criterion applies.

In the Commission's view, Trans Mountain applied its routing criteria appropriately in selecting the proposed route.

5.2 Considering the Grays' proposed alternate route, is Trans Mountain's proposed route the best possible detailed route?

Mr. Gray's submissions

- Mr. Gray proposes an alternate route about 60 metres south of the Lands, across a turf farm.
- This proposed alternate route through adjacent lands would still be within the approved corridor.
- A re-route off of the Lands would still adhere to Trans Mountain's routing criteria, just not the top of the hierarchy (co-location).
- One of the things within the frame of reference was to avoid trees, vegetation, and buildings. The alternative route avoids trees and vegetation and goes through unhindered land, with the exception of a little fringe of trees on the south property line of the land to the east of the Lands.
- Mr. Gray's southern neighbours, who own Western Turf Farms, are very experienced with Trans Mountain (they own extensive property near Sumas).
- The alternate route would also affect two other properties.
- Trans Mountain's proposed route goes through an area that is saturated with water for half of the year and an alternate route would avoid this area.

Trans Mountain's submissions

- The alternate route is outside of the TMPL easement where Trans Mountain has multi-line rights; would require several additional bends, which add complications to the pipeline alignment from a design, stress, and maintenance perspective; would affect lands on the properties of neighbours who have not been engaged in the TMEP detailed route approval process; and would result in land fragmentation.
- The alternate route is contrary to Trans Mountain's routing criteria because it (i) unnecessarily departs from the TMPL RoW, (ii) does not parallel other linear infrastructure, and (iii) requires affecting previously unencumbered lands in Tract ADJ 9.
- The watercourse that was identified along the alternate route runs on the southern boundary of the Lands and is a vegetated swale with potential for overland flow that is classified as a seasonal Non Classified Drainage. Trans Mountain proposes to cross the watercourse on other lands (Tract 2671). The alternate route does not avoid the watercourse, but crosses it at the boundary dividing other lands (Tract ADJ 9 and Tract 2675).
- Compared to Mr. Gray's alternate route, Trans Mountain's proposed route:
 - is 24 metres shorter;
 - has one less bend;
 - has no bends over the limit for cold bends,⁵ as opposed to two in the alternate route;

⁵ Mr. Gray's proposed alternate route includes 30- and 47-degree bends, which are over the limit for a "cold bend" (i.e., bends that can be connected in the field), so they would have to be manufactured off the Lands, delivered, and installed at an increased cost.

- requires more tree clearing; and
- is approximately \$1 million less costly.
- Of the three adjacent landowners affected by the alternate route, one would not consent to a re-route or temporary workspace on their lands, one is neutral, and one prefers the current proposed route.
- The landowners of Tract ADJ 9 (Western Turf Farms), which is to the south of the Lands, have indicated that it would need more information in order to make an informed decision regarding the alternate route. The alternate route would encumber these previously unencumbered lands, which are in high-production use, and may also affect the turf farm's irrigation, since there would be construction through the northern part of the property.

The Commission: Considering the Grays' proposed alternate route, Trans Mountain's proposed route is the best possible detailed route

When considering an alternate route, the Commission is mindful that Trans Mountain retains the onus to establish, on the balance of probabilities, that its proposed route is the best possible route. One way for a landowner to cast a doubt as to whether the proposed route is the best possible route is to propose an alternate route that may be better. In this case, Mr. Gray has proposed an alternate route. However, in considering the proposed alternate route, the Commission is not persuaded that Trans Mountain's proposed route is not the best route, on a balance of probabilities.

Mr. Gray submits that the alternate route adheres to the routing criteria because it avoids trees, vegetation, and buildings, and goes through unhindered land. He further submits that it avoids an area on the Lands that is saturated with water for half the year. He concedes that it does not follow the hierarchy of the routing criteria since it is not co-located with the TMPL.

As discussed previously, the routing criteria are hierarchical and follow a descending order of preference. Accordingly, as the starting point, the TMEP pipeline should be co-located on or adjacent to the existing TMPL easement where practicable. Where co-location with the TMPL is not practicable, then the TMEP pipeline should be located adjacent to existing easements or RoWs of other linear facilities. Finally, if co-location with an existing linear facility is not feasible, the TMEP pipeline should be installed in a new easement.

Mr. Gray's alternate route does not follow the TMPL easement or another existing easement or RoW. It requires a new easement, which would be located on his neighbours' adjacent properties to the west and south, as well as on the property to the southeast of the Lands. His argument that it avoids the wet area on the Lands may be related to the feasibility of co-location with the TMPL. However, the Commission considered this issue earlier in this Decision and concluded that Trans Mountain's proposed mitigation actions are adequate, such that the proposed route is feasible. In addition, Trans Mountain submitted that the TMEP pipeline will cross the watercourse either on the Lands or on the property adjacent to the Lands. The evidence shows no difference in environmental impacts or impacts to Trans Mountain's ability to construct the pipeline according to the specific crossing location. Accordingly, in the Commission's view, the evidence about the watercourse does not demonstrate that Trans Mountain's proposed route is not the best possible route.

The Commission is not persuaded by Mr. Gray's argument that the alternate route avoids trees and vegetation and goes through unhindered land. First, the evidence demonstrates that Trans Mountain's proposed route also avoids trees and vegetation, since it follows the TMPL easement, which Mr. Gray stated that he keeps clear of vegetation. The Commission will consider the proposed temporary workspace and the forested area in Section 6 of this

Decision related to methods of construction. Second, the Commission does not agree that the turf farm is “unhindered land.” According to the evidence, it is cultivated, possibly irrigated, and likely has commercial value. In contrast, the proposed route follows the TMPL easement, which is already encumbered with another pipeline. In the Commission’s view, it is preferable to avoid encumbering additional land with new pipeline easements wherever possible.

Trans Mountain’s evidence states that one adjacent landowner opposes Mr. Gray’s proposed alternate route, one is neutral, and one prefers Trans Mountain’s proposed route. The Commission finds this more persuasive than Mr. Gray’s submissions in which he argues a preferable alternative route could be sited on his neighbours’ lands simply because some of them may have prior experience dealing with Trans Mountain.

The Commission finds, on a balance of probabilities, that Trans Mountain’s proposed route is the best possible detailed route, since it reflects an appropriate application of Trans Mountain’s routing criteria and Trans Mountain has appropriate plans in place to mitigate any potential impacts to wetlands in the event any are discovered during construction. In contrast, the Grays’ alternate route does not reflect an appropriate application of Trans Mountain’s routing criteria, and would result in additional impacts that are not sufficiently justified in the circumstances. Specifically, the alternate route would result in a new pipeline easement on adjacent and nearby lands, greater land fragmentation, longer pipeline length, a more complicated pipeline alignment, and additional costs. Although such impacts may be justified in some situations, the Commission is not convinced that they are justifiable or appropriate in this case.

6 Are Trans Mountain’s proposed methods of construction the most appropriate?

Trans Mountain proposes to use only one method of construction on the Lands, which is conventional footprint, or open-cut pipeline construction.

Trans Mountain’s submissions

- Trans Mountain assessed several construction methodologies for each portion of the route.
 - In descending order of preference of the different construction methodologies, conventional open-cut is Trans Mountain’s first preference. It is a standard method because it provides the least risk, greatest control, and quickest construction duration of all available construction methods.
 - If environmentally sensitive features or infrastructure require no surface disturbance, using auger boring for short lengths or directional boring for longer lengths of up to 300 metres can be accomplished with suitable soil conditions. Horizontal directional drilling is the most complicated and risky method of the different construction methodologies, and is only used where no other method is practicable, features in between the entry and exit locations require no surface disturbance, and sufficient workspace is available for drill entry, exit, and the pipe pull-section.
 - Each change in method increases the complexity of construction, the risk of construction failure (which brings with it a need for an alternate installation method), and an increase in construction duration at the site of installation. Alternative construction methods also change the location and nature of impacts.
- Trans Mountain’s determination of whether trenchless methods are appropriate through specific lands hinges on a range of factors, including technical challenges

and risks, the period of time in which the subject lands will be affected, impacts to adjacent landowners, and costs, among others.

- A trenchless method on the Lands would require more time, would still require tree and vegetation clearing, would create additional impacts to adjacent landowners for extra temporary workspace and 20 by 60 metre pits, and would significantly increase overall costs. Trans Mountain would also have to complete geotechnical studies to determine the technical feasibility of a trenchless method.
- A trenchless method is unnecessary in this case, and any impacts created through open-trench construction can be adequately mitigated.
- On the Lands, Trans Mountain determined that the best approach was to use the method proposed, given the implications of each construction method, the nature of the ground conditions, and the ability to remediate construction impacts.
- Required temporary workspace was located as much as possible on open and undeveloped lands to avoid proximity to residences, treed areas, and areas of environmental or cultural sensitivity.
- Temporary workspace will be required during pipeline construction activities to safely install the pipeline. It is required for sufficient space to accommodate excavated material, construction equipment, and pipe and supplies; for the safe operation and travel of heavy construction equipment; and to properly store salvaged topsoil or root zone material.
- Woody vegetation will only be cleared to the extent required to safely construct the pipeline in order to reduce the loss of forest values and limit the potential for terrain instability and erosion. Trees that are removed for temporary workspace during construction can be replaced with trees of similar species or the Grays may accept monetary compensation in lieu of tree replacement.
- Reclamation will be conducted in accordance with the Reclamation Management Plan. The primary objective is to promote the re-establishment of natural ecosystems that are compositionally and functionally similar to the early seral species of the native plant community that occurred pre-disturbance, or a vegetative cover compatible with surrounding vegetation and land uses.
- Trans Mountain, accompanied by horticultural experts, met with the Grays in July 2018 to discuss reduced temporary workspace in order to minimize tree removal, but the proposal was unacceptable to them, so Trans Mountain did not adopt it.
- Trans Mountain noted that, while it could conceptually narrow down the construction footprint area on the Lands, further studies and engagements would be required to determine the extent of any such reduction and the corresponding relocation and probable increase of temporary workspace on adjacent or nearby lands.
- Trans Mountain commits to make best efforts to protect two Western red cedar trees located along the edge of the temporary workspace, maintain the vegetative buffer on the southwest corner of the Lands, conduct a detailed tree assessment, and provide an arborist report that will document the number, species, age, size, health, and value of all trees proposed to be removed from the treed area and walking path.
- Trans Mountain will establish, in relation to the walking path, understory (native shrubs) vegetation of the same species that are presently found on the Lands, and provide a vegetative buffer along the south side of the walking path to ensure visual screening to the neighboring lands to the south.
- Trans Mountain commits to developing a site-specific reclamation (replanting) plan aimed at providing a functionally equivalent forest area to that which is currently present on the Lands, in consultation with the Grays. In the event that the parties cannot agree on the site-specific reclamation plan details, Trans Mountain's

Environmental Protection Plan has measures to follow to ensure that reclamation is conducted in accordance with a manner approved by the Commission.

Mr. Gray's submissions

- Trans Mountain's proposed temporary workspace will destroy the wooded area and the walking path on the south part of the Lands, between the RoW and the property line. This forested area also provides shade and a natural privacy barrier to the back of the property.
- The Grays value the woods and the walking area, and have offered to pay Trans Mountain \$100,000 to move the pipeline and right of way to the adjacent turf farm. The woods are not just a bunch of trees; it is a forest walk experience. The Grays' goal is to protect the forest walk.
- Trans Mountain cannot replace or remediate the wooded area in the Grays' lifetimes, since they are elderly and may have ten years left to enjoy their walks in the woods.
- None of Trans Mountain's mitigation strategies apply to the Lands. In fact, there are trees to the north side of the RoW that are to be knocked down because they are a "safety hazard."
- The technology exists to either tunnel or directionally drill under the Lands. Trans Mountain uses it under roads, creeks, rivers, sensitive sites, and the freeway. It has the ability to directionally drill or tunnel under the Lands, which would be the least undesirable solution.
- Trenchless construction methods are all accepted and possible technologies that are available when circumstances require it. The Lands have circumstances that require this approach. Space is available on the adjacent properties to either side of the Lands for excavation work, and there are no barriers for this kind of work.

If Trans Mountain were to use a trenchless method, the work would be within the existing encumbered areas on either side of the Lands, so it would not change the impact to either of the adjacent neighbours.

The Commission: Trans Mountain's proposed methods of construction are the most appropriate

As noted previously in this Decision, the Commission and its predecessor have consistently considered in an objective manner Trans Mountain's application of appropriate criteria to assess the proposed detailed route. The Commission finds that this approach is also appropriate to assess the proposed methods of construction.

In the Commission's view, Trans Mountain's criteria to determine its proposed methods of construction on particular lands are reasonable and appropriate. They minimize the risk of failure, prioritize safety, and consider physical constraints both on the surface of the land and subsurface. In addition, temporary workspaces are located as much as possible on open and undeveloped lands to avoid proximity to residences, treed areas, and areas of environmental or cultural sensitivity. Where a landowner raises concerns, the Commission is of the view that the criteria are flexible enough to allow Trans Mountain to incorporate mitigation strategies in response. The Commission assessed Trans Mountain's proposed open-cut method of construction on the Lands against these criteria, while also considering Mr. Gray's proposed trenchless method of construction, and concludes that Trans Mountain's proposed method is, on a balance of probabilities, the most appropriate.

In selecting the proposed construction method for the Lands, Trans Mountain submitted that it considered the implications of each construction method, the ground conditions, and its

ability to remediate construction impacts. Trans Mountain proposes to locate a temporary workspace along the south side of the pipeline easement, from the east to the west boundaries of the Lands. The temporary workspace will extend to the south boundary of the Lands on the eastern part of the Lands only, while the southwest corner will not be impacted. According to the evidence, the temporary workspace area is currently forested and contains a walking path that the Grays use regularly.

Mr. Gray argued that Trans Mountain has the ability to use a trenchless method of construction, the Lands have circumstances that require a trenchless method, and the adjacent properties have space within the existing encumbered areas for excavation work, such that there are no barriers. In the Commission's view, although a particular method of construction may be technically feasible, the practical ability to use that method does not necessarily mean that it is appropriate to the circumstances on the particular lands.

The Commission observes that Mr. Gray did not argue that there are any environmentally sensitive features or infrastructure along the pipeline route that would require the avoidance of surface disturbance, such that an open-cut method is inappropriate. Rather, Mr. Gray's concern is that the temporary workspace associated with the open-cut method will destroy the wooded area and the walking path on the south part of the Lands. Mr. Gray emphasized that the experience of walking through the forested area is very important to him and his wife and stated that their goal is to protect the experience. He stated that they had offered to pay Trans Mountain \$100,000 to move the proposed pipeline off of their land to protect the forested area. The Commission considers this submission to be of no relevance with respect to an objective determination of routing or methodology and therefore assigns it no weight. It reflects the personal preference of the Grays to avoid the removal of the forested area, but does not relate to the criteria Trans Mountain applies to determine the most appropriate route or method of construction.

The Commission recognizes that the removal of the forested area to accommodate the temporary workspace does not align with Trans Mountain's stated aim to avoid treed areas. However, the Commission is of the view that the proposed temporary workspace is appropriate for a number of reasons.

First, it avoids proximity to residences and will not affect areas of environmental or cultural sensitivity, which is both appropriate and consistent with Trans Mountain's stated aims. The Grays' residence is to the north side of the pipeline easement, such that it is more appropriate to locate the temporary workspace on the south side. The record contains no evidence suggesting that the forested area is sensitive from an environmental or a cultural perspective, or that it contains any environmentally or culturally sensitive features that should be avoided. The Grays' concern is about their personal experience walking in the forest, rather than about any particular features of the forest itself.

Second, the Commission accepts that Trans Mountain requires temporary workspace to install the pipeline safely. The Commission observes that the pipeline easement is forested on both the north and south sides from the east to the west boundaries of the Lands. Accordingly, the Commission is persuaded that some tree removal will be required to accommodate a temporary workspace.

Third, the Commission accepts that Trans Mountain will only clear woody vegetation to the extent required to safely construct the pipeline, such that Trans Mountain will minimize the removal of trees from the Lands. The Commission observes that the Lands will retain intact forested areas outside of the temporary workspace. In particular, the forested area to the north side of the pipeline easement will only be minimally impacted by the select removal of

trees that present a safety risk, while the forested area in the southwest corner of the Lands will not be impacted.

Fourth, in the Commission's view, Trans Mountain's proposed mitigation measures for the forested area and the walking path are responsive to the Grays' concerns and are acceptable and appropriate for the Lands. Mitigation measures are meant to eliminate, reduce, control, or offset the adverse effects of the pipeline through replacement, restoration, or any other means, including compensation. The Commission agrees that mitigation measures cannot completely address the Grays' concerns in the short term because the only full solutions are to leave the forested area untouched or to reproduce a forest of the same state of maturity. However, the Commission disagrees with the Grays' contention that Trans Mountain's proposed mitigation measures do not address their concerns at all. While the Commission accepts that, following reclamation, the forested area may require years to develop to its current state of maturity, the Commission disagrees that the gradual re-establishment of the forested area amounts to a complete lack of mitigation. The Grays' "forest walk experience" is enabled by the presence of the forest, such that the way to re-create the experience is to re-create the forest. Trans Mountain's proposed mitigation measures aim to accomplish this goal. The Grays' experience walking through a younger forest may differ somewhat from walking through the current, more mature forest, but as the forest matures, their experience is likely to come closer and closer to their current experience.

In the MH-052-2018 Reconsideration Report, the NEB recognized that many of the benefits of the TMEP would be national or regional in scope, while the majority of the burdens would be shouldered by local and regional communities. When infrastructure requiring the taking of certain land rights, such as a CER-regulated pipeline, is found to be in the public interest, affected landowners along the route will consequently experience direct impacts. The Commission understands that, in this case, Trans Mountain's proposed method of construction will result in the Grays bearing the burdens of the removal of the wooded area south of the pipeline easement, and the associated impacts to the walking path. While the Grays would prefer a trenchless method of construction to minimize the impacts on the Lands, the Commission accepts Trans Mountain's submission that this would increase the impacts on adjacent lands (and landowners). The evidence shows that this would include digging pits 20 metres by 60 metres in size, and that construction would take a longer period of time to complete. As a result, a trenchless method of construction would not eliminate the burdens. Instead, it would shift the burdens to the Grays' neighbours. The Commission also accepts Trans Mountain's submissions that a trenchless method would increase project costs and increase the risk of construction failure, such that it may become necessary to use another construction method that would not necessarily achieve the Grays' goals of protecting the forest and the walking path.

The Commission is cognizant that the Grays may be entitled to compensation in the event the mitigation measures do not fully address damage to the Lands. As noted earlier in this Decision, the law requires the Grays to be compensated for their losses, whether through agreed-to mitigation measures, by agreement with the company as to monetary compensation, or through a CER process that determines monetary compensation.

The Commission acknowledges Trans Mountain's and the Grays' previous efforts to address the Grays' concerns by exploring the possibility of a narrower temporary workspace. In the Commission's view, it was appropriate to explore this option, and it is unfortunate that the parties were unable to agree to a revised temporary workspace. The Commission encourages Trans Mountain to undertake further studies and engagement to determine if the construction footprint area can be reduced.

The Commission views commitments made by companies to be significant, and not trivial, matters, as they can further reduce potential impacts to landowners. Therefore, the Commission also expects Trans Mountain to fulfill the commitments it has made in this detailed route hearing. The Commission is of the view that several of Trans Mountain's proposed mitigation measures are particularly responsive to the Grays' concerns, including Trans Mountain's commitment to consult with them to develop a site-specific reclamation plan and its proposal to establish understory vegetation of the same species along the walking path, which will also provide a visual buffer between the walking path and the lands to the south. The Commission expects Trans Mountain to provide the Grays with a full list of the commitments it made to them throughout the course of this hearing and to follow through with each one. Notably, these commitments include conducting an assessment of the existing trees, and providing to the Grays an arborist report that sets out the number, species, age, size, health, and value of all the trees proposed to be removed from the wooded area and the walking path. The Commission expects Trans Mountain to develop the site-specific reclamation plan in consultation with the Grays, and to consider construction activities and replanting, how these activities can be coordinated, and how reclamation of the impacted forested area can be expedited.

The Commission further notes that Condition 151 of Certificate OC-065 ([C00061](#)) applies to the Lands. Condition 151 sets out the requirement for Trans Mountain to file, in the first, third and fifth years after completing final clean-up, post-construction monitoring reports, which would include, among other things, an assessment of the effectiveness of its mitigation and corrective actions and an evaluation of the need for any further corrective actions in relation to various enumerated items, which would include issues in relation to the Lands.

Accordingly, the Commission finds that Trans Mountain's proposed conventional open-cut method of construction is the most appropriate method of construction for the Lands.

7 Is Trans Mountain's proposed timing of construction the most appropriate?

Trans Mountain proposes a schedule of construction as follows:

- begin tree clearing in Q4 2020 to accommodate bird nesting window restrictions;
- prepare the RoW and install the pipe between Q1 and Q2 of 2021; and
- complete clean-up and restoration in Q3 2021.

Trans Mountain's submissions

Trans Mountain proposes to follow its proposed construction schedule, subject to regulatory approval.

Mr. Gray's submissions

Mr. Gray submits that now is not the time for the TMEP.

The Commission: Trans Mountain's proposed timing of construction is the most appropriate

While Mr. Gray generally opposes constructing the TMEP at this time, he has raised no specific concerns with respect to Trans Mountain's proposed timing of construction. In the absence of any evidence of specific concerns, the Commission finds that Trans Mountain's proposed timing of constructing the TMEP pipeline across the Lands is the most appropriate.

8 Conclusion

The Commission appreciates the time and effort of Hugh David and Barbara Ann Gray, and of Trans Mountain, in providing their presentations of evidence and argument in this detailed route hearing.

Given that the Commission has decided that Trans Mountain's proposed detailed route is the best possible detailed route on the Lands, that its proposed timing of construction is the most appropriate, and that its proposed method of construction is the most appropriate, the Commission may issue an order approving the PPBoR for the Lands.

Any future order approving the PPBoR for the Lands will include conditions requiring Trans Mountain to file updated environmental and construction alignment sheets and to maintain a copy of the order and condition filings at its construction office(s). In this Decision, the Commission has articulated a number of expectations that it expects Trans Mountain to undertake in a prompt and efficient manner. The Grays can seek a [remedy](#) from the Commission if Trans Mountain does not follow through on its commitments.

The Commission also reminds Trans Mountain that the relevant conditions of approval in Certificate OC-065 apply to the construction and operation of the TMEP pipeline on the Lands.

Finally, as the Commission has communicated in previous correspondence in this hearing, under Part 6 of the CER Act, parties may apply to the Commission to determine compensation disputes in relation to land matters. The CER's [Guidance on Land Related Compensation Disputes](#) provides further information about when compensation may be available.

If parties are unable to resolve a compensation dispute through their own negotiation efforts, the CER can support the resolution of the dispute in two ways: through [Alternative Dispute Resolution](#) (ADR) or adjudication (hearing and decision). Interested parties may contact ADR-MRD@cer-rec.gc.ca to request ADR services or file an [application](#) with the CER to commence either or both of these compensation dispute proceedings.

Yours sincerely,

Signed by

Jean-Denis Charlebois
Secretary of the Commission

c.c. Trans Mountain Canada Inc., General Inbox, Email info@transmountain.com