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## LETTER DECISION

File OF-Surv-AMP-2022 01  
22 December 2022

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Dear Dawn Farrell, Brad Gilmour, and Keith Landra:

**Trans Mountain Pipeline ULC (Trans Mountain)  
Request for Review of AMP-001-2022  
Hearing Order MH-001-2022  
Letter Decision of the Commission of the Canada Energy Regulator**

**Before: K. Penney, Presiding Commissioner; S. Luciuk, Commissioner;  
M. Chartier, Commissioner**

### 1.0 Overview

On 24 February 2022, the Administrative Monetary Penalties Designated Officer (**AMP Officer**) of the Canada Energy Regulator (**CER**) issued Notice of Violation AMP-001-2022 (**NOV**) pursuant to section 125 of the *Canadian Energy Regulator Act* (**CER Act**). The NOV stated that Trans Mountain failed to establish, develop, implement, maintain, and document processes as required under paragraphs 6.5(1)(k) and 6.5(1)(q) of the *Canadian Energy Regulator Onshore Pipeline Regulations* (**OPR**). The administrative monetary penalty amount imposed in the NOV was \$88,000.00.

On 22 March 2022, Trans Mountain requested that the Commission of the CER (**Commission**) review both the penalty amount and the facts of the violation.

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The Panel issued a procedural letter on 12 April 2022 setting out the process steps through which the review would be considered. In accordance with this process, the Panel received the materials included in the AMP Officer's Disclosure Package dated 22 April 2022,<sup>1</sup> as well as his submission dated 30 June 2022. The Panel also received Trans Mountain's submissions, dated 24 May 2022 and 2 August 2022. On 5 October 2022, the Panel heard oral summary argument.<sup>2</sup>

For the reasons that follow, the majority of the Panel has determined that:

- Trans Mountain committed the violation; and
- The amount of the penalty for the violation was not properly determined in accordance with the *Administrative Monetary Penalties Regulations (National Energy Board)* (**AMP Regulations**). The amount must be corrected to reflect a gravity value of -5, resulting in a penalty of \$4,000.00.

## 2.0 The Violation

### 2.1 Views of the Parties

#### **AMP Officer**

In the NOV, the AMP Officer stated that Trans Mountain failed to adequately fulfill the requirements of paragraphs 6.5(1)(k) and (q) of the OPR in relation to two incidents and two near misses involving bird nests that occurred during the construction of the Trans Mountain Expansion Project (**Project**) in the spring of 2021. The occurrences which triggered examination of OPR processes are the:

- 12 April 2021 destruction of an Anna's Hummingbird nest and egg on Spread 7;
- 8 May 2021 destruction of an unmarked American Robin's nest and eggs on Spread 5B;
- 13 May 2021 removal and replacement of a partially constructed American Robin's nest at a boot room at the Burnaby Terminal; and
- 27 May 2021 commencement of clearing activities without following Trans Mountain's environment requirements and mitigations on Spread 7B resulting in clearing in close proximity to an American Robin's nest.

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<sup>1</sup> During oral summary argument, the AMP Officer made reference to two Inspection Officer Orders that were issued prior to the NOV, Order DRP-002-2021, and Order RRW-001-2020 (**Orders**). The AMP Officer stated that the two orders represent compliance history that was relevant to the AMP Officer at the time of issuing the NOV to Trans Mountain. This was taken into consideration by the AMP Officer prior to the issuance of the NOV. Trans Mountain objected to the introduction of those Orders during the oral summary argument phase of this proceeding, given that they were not included in the AMP Officer's Disclosure Package. The Panel ruled that it would not consider Orders DRP-002-2021 and RRW-001-2020, as they were not included in the Disclosure Package. The Panel confirms that it did not consider these Orders in this decision.

<sup>2</sup> Oral summary argument was transcribed by a court reporter. However, the Panel's questions for the AMP Officer after oral summary argument and the AMP Officer's responses were, by mistake, not transcribed. The Panel indicated that it took good notes during this portion of the proceeding and did not require the transcript. However, the Panel was prepared to re-ask the questions to the AMP Officer, and have the AMP Officer re-answer them, should the parties prefer this approach. Both the AMP Officer and Trans Mountain indicated that they were prepared to proceed with that portion of that transcript missing.

In the AMP Officer's view, the four occurrences and surrounding processes demonstrated that Trans Mountain did not adequately implement processes for the verification of competency and training, supervision of personnel, or adequate control and coordination of operational activities, which resulted in potential and real harm to the environment. The NOV was issued due to Trans Mountain's failure to adequately oversee its contractors.

The AMP Officer highlighted that:

- Neither the assessment of the National Energy Board (**NEB**) of the potential impacts and mitigation related to birds in the hearing for the Project, nor the subsequent issuance of a Certificate of Public Convenience and Necessity by the Governor in Council obviate the certificate holder from compliance with all applicable laws, including the OPR; and
- The Environmental Protection Tribunal of Canada (**EPTC**) hearing referenced by Trans Mountain did not address OPR violations. The purpose of that hearing was to determine whether the tribunal should confirm, cancel, or amend a compliance order issued to Trans Mountain related to an alleged contravention of the *Migratory Birds Regulations*. Although it made an amendment, the EPTC determined that the compliance order was properly issued. The AMP Officer also pointed to evidence from that proceeding, which in the AMP Officer's view, showed that Trans Mountain's processes did not exceed industry standards.

The AMP Officer carried out a purposive analysis of sections 6 of both the CER Act and the OPR, and urged the Commission to adopt interpretations which promote legislative purpose. The AMP Officer noted that section 6.5 of the OPR must be read as a whole, and in the context of the entire regulation and the CER Act. In the AMP Officer's view, this analysis suggests that the management system requirements in the OPR must be interpreted to include demonstrating that employees and contractors *can or have followed* implemented processes.<sup>3</sup> Parliament could not have meant for these processes to merely exist, but rather to be utilized and followed, otherwise they would be little more than paper-pushing exercises. The AMP Officer acknowledged that the OPR is a performance-based regulatory model. However, he noted that where companies have flexibility to determine their means of compliance, they must still achieve the outcome or goal set in the legislation, which, in this case, includes the protection of the environment.

The AMP Officer noted that he used the term "adequately" in the NOV when he described Trans Mountain's failure to implement its processes. The AMP Officer's rationale for use of the term "adequate" in the NOV included that there is a definition of "adequate" in the *CER Management System Requirements and CER Management System Audit Guide (Audit Guide)*, and the term is also used regularly in CER audits, including previous CER audits of Trans Mountain. The term "adequate" is used in Trans Mountain's own Incident Investigation Report (**Investigation Report**).<sup>4</sup> Trans Mountain has had ample opportunity to understand its legal obligation that simply establishing a paper process is not "adequate" to satisfy the requirements of the OPR.

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<sup>3</sup> The AMP Officer also stated that the words "established" and "implemented" have been defined since 2015 in NEB audit reports to companies.

<sup>4</sup> The Trans Mountain Investigation Report, dated 14 June 2021, was submitted in response to a CER Inspection Officer Order, which was issued by a CER Inspection Officer after the 27 May 2021 occurrence. The Inspection Officer Order ordered Trans Mountain to stop work until it satisfied the conditions of the Order. The Incident Investigation Report, submitted by Trans Mountain in response to one of the conditions of the Order, covers the 8 May 2021 and the 27 May 2021 occurrences.

The AMP Officer stated that Trans Mountain's argument that its programs met or exceeded industry standards is irrelevant. The AMP Officer's role is to ensure that companies meet the expectations and requirements of the OPR.

The AMP Officer submitted that he issued this NOV because he believed that there was potential risk of further harm from Trans Mountain's operations. This NOV was important to deter future non-compliances and to affirm the importance and necessity of contractor oversight by Trans Mountain. Environmental protection is one of the CER's expectations of performance-based management systems and is most certainly in the public interest.

### ***Trans Mountain***

Trans Mountain submitted that the AMP should be dismissed on the basis that violations of paragraphs 6.5(1)(k) and 6.5(1)(q) of the OPR did not occur.

Trans Mountain was of the view that it established and implemented processes in accordance with the OPR. Paragraphs 6.5(1)(k) and (q) contemplate a requirement for Trans Mountain to have established and implemented processes. To establish a violation, the AMP Officer had to have presented evidence that the efficacy of the processes is so low that they are deemed not to have been established or implemented, or to otherwise not comply with some reasonable or known standard.

The intent of sections 6 to 6.6 of the OPR is to ensure that companies have a consistent set of processes within their management systems, with aspirational goals and objectives to achieve protection of the environment. The OPR includes a clear expectation of annual self-evaluation, and it assumes that lessons will be learned once the management system progresses from the paper to being implemented in the field. Section 6.5 of the OPR sets out the basic elements that must be included in a project's overall management system. However, in light of section 6.1 of the OPR,<sup>5</sup> the AMP Officer must take into account the magnitude and complexity of the Project, the context of the specific incidents raised, as well as an evaluation of the efficacy of Trans Mountain's management system processes.<sup>6</sup> In Trans Mountain's view, the AMP Officer failed to consider implementation of processes Project-wide, or the success of the implementation.

Relevant Trans Mountain processes and activities that fulfilled OPR requirements included:

- Trans Mountain's Environmental Protection Plan, Environmental Compliance Management Plan, Environmental Compliance and Education Training Program, Environmental Field Guide (**EFG**)-Nesting Bird Risk Assessment, EFG-Flagging and Signage, Environmental Inspection, Monitoring, and Measurement programs were in place, and met or exceeded industry standards; and

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<sup>5</sup> In Trans Mountain's view, section 6.1 of the OPR requires that the AMP Officer evaluate Trans Mountain's management system in light of the scope, nature and complexity of the company's activities, and the hazards and risks associated with those activities.

<sup>6</sup> Paragraph 6.1(1)(c) of the OPR states that a company shall establish, implement and maintain a management system that applies to all the company's activities involving the design, construction, operation or abandonment of a pipeline and to the programs referred to in section 55, while paragraph 6.1(1)(e) requires the management system to correspond to the size of the company, to the scope, nature and complexity of its activities and to the hazards and risks associated with those activities.

- The Project successfully recording over 20,000 person days of technical fieldwork, including migratory bird nest sweeps and monitoring and 10,000 bird nest observations representing 1,368 unique nest sites, and protecting 99.85% of the bird nests encountered.

The actual impacts to migratory birds nests referenced by the AMP Officer are “minor”, particularly when compared to the impacts of other industrial activities. The impacts are within the range of those considered in the assessment of the Project by the NEB and the approval by the Governor in Council. The standard imposed by the AMP Officer was inconsistent with that assessment and approval.

More recently, Trans Mountain’s processes for the mitigation of potential impacts to migratory birds were reviewed by the EPTC. The EPTC considered a compliance order that had been issued in respect of the 12 April 2021 occurrence under the *Migratory Birds Convention Act*. In Trans Mountain’s view, this hearing process confirmed that Trans Mountain had established and implemented appropriate procedures for the protection of migratory birds.

Trans Mountain also took issue with the AMP Officer’s use of the term “adequate” in the NOV. Among other arguments, Trans Mountain indicated:

- While the word “adequate” is referred to in several CER documents, including the Audit Guide, these are not legal documents and have no force of law;
- Compliance in terms of “adequacy” is extremely unclear, and there are no easily measurable outcomes upon which to base enforcement; and
- The AMP Officer wrongly concluded that “a few minor events” involving migratory birds demonstrate a level of supervision of workers that is not “adequate”.

Trans Mountain characterized the occurrences as “limited and isolated deficiencies” in the implementation of a process, and not evidence of a systemic issue.<sup>7</sup> For example, with respect to the 12 April 2021 occurrence, Trans Mountain asserted that there is at least some uncertainty as to whether Trans Mountain’s activities were the cause of the disturbance to the Anna’s Hummingbird nest and egg. Trans Mountain speculated that there were suspicious circumstances in that area. In addition, the “near-miss” on 27 May 2021 was a one-time error on the part of the clearing subcontractor.

Trans Mountain concluded that the Project has been constructed under a regulatory microscope. The media has observed that inconsistent and uneven regulation has cost the Project hundreds of millions of dollars, while other industries (and cats) cause far greater impacts to birds with little or no regulatory or legal consequences. Trans Mountain summarized that the AMP Officer is imposing a level of efficacy in respect of the processes established and implemented by Trans Mountain that is arbitrary, not based on any known industry standard, and that is inconsistent with the review, recommendations and decision for the Project, the findings of the EPTC’s hearing process related to the *Migratory Birds Convention Act*, as well as standards applied to other industries and activities in Canada.

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<sup>7</sup> Trans Mountain noted that in its investigations of the occurrences (which are being relied on by the AMP Officer), the most important “cause” to be considered is the “immediate cause” or, in other words, root cause. In the case of the 8 May 2021 and the 27 May 2021 occurrences, the immediate causes were a failure of an individual to follow processes that had been implemented by Trans Mountain.

## 2.2 Commission Analysis and Findings

### 2.2.1 Commission Majority

#### ***Elements of the Offence, Intent of section 6.5 and the Meaning of the word “Implement”***

To prove the violation of paragraphs 6.5(1)(k) and (q) of the OPR, the AMP Officer must establish the elements of the violation set out below, in accordance with section 129 of the CER Act. When considering whether the AMP Officer met his burden, the Panel must ensure that there is clear, cogent and convincing evidence for each element. The burden of proof is on a balance of probabilities. These are the key issues before the Commission in this proceeding.

The elements of the violation are as follows:<sup>8</sup>

- Trans Mountain is a company as defined by the CER Act;
- The Project is subject to the management system requirements of the OPR; and
- Trans Mountain failed to establish and implement a process for:
  - Verifying that employees and other persons working with or on behalf of the company are trained and competent and for supervising them to ensure that they perform their duties in a manner that is safe, ensures the safety and security of the pipeline and protects the environment [paragraph 6.5(1)(k)];
  - Coordinating and controlling the operational activities of employees and other people working with or on behalf of the company so that each person is aware of the activities of others and has the information that will enable them to perform their duties in a manner that is safe, ensures the safety and security of the pipeline and protects the environment [paragraph 6.5(1)(q)].

The first two elements were not contested. Trans Mountain is a company, as defined by the CER Act, that is required to design, construct, operate, and abandon the Project in accordance with the OPR. The parties agree that Trans Mountain has established processes as part of its management system. However, the parties had differing views on whether the processes in paragraphs 6.5(1)(k) and (q) of the OPR have been implemented.

Having considered all the evidence and submissions on the record of this proceeding, the majority of the Panel finds that the AMP Officer has established that the violation occurred.

The AMP Officer provided ample and compelling submissions regarding the proper interpretation of the OPR and its purpose, which is to enable a company to design, construct, operate or abandon its pipeline in a manner that ensures the goals of safety and security of persons and the protection of the environment.<sup>9</sup> There was consensus in this proceeding that section 6.5 of the OPR gives companies the ability and flexibility to establish, implement and maintain the management system that works best for them. Flexibility to meet the

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<sup>8</sup> Throughout the course of the decision, the majority of the Panel adopts the wording “the violation” to refer to the elements of the violation referred to above.

<sup>9</sup> OPR, section 6.

requirements of the OPR through a range of potential systems, however, does not mean that the requirements of the OPR are relaxed. Companies' management systems must always meet – and the CER enforces compliance with – the provisions the OPR, including any of the goals set out in those provisions.<sup>10</sup>

In the context of high hazard industries such as the oil and gas sector regulated by the CER, management systems are fundamental to keeping people safe and protecting the environment. Management systems include the necessary organizational structures, resources, accountabilities, policies, processes, and procedures for a company to fulfill all tasks related to safety, security and environmental protection. Management systems ensure that individual employees and contractors have tools and routines to safely carry out their work, reducing the potential for human error and unpredictability. These systems effectively manage and reduce risk, are adaptable to changing conditions, and reflect companies' commitments to continual improvement in safety and environmental protection. A robust management system also supports a strong safety culture, which is an absolute necessity for pipeline companies regulated by the CER.

The requirements of the OPR that are at issue in this proceeding relate to the issue of contractor oversight. Effective contractor oversight means that a company ensures that its required policies, procedures, and practices are being carried out by those working on or behalf of it. This is particularly important on large projects involving a large and diverse workforce. Only in this way can a pipeline company ensure that its safety culture is consistently reflected in the field, that people are safe and that the environment is protected.

Once established, a management system and programs must be implemented and maintained. Consistent and rigorous implementation is essential to achieve the safety and environmental goals of management systems. The word "implement" is not defined in the regulation. However, the majority of the Panel considers it reasonable and appropriate to apply the ordinary and plain meaning of the word. To "implement" means to fulfill, perform, carry out, or put into effect according to or by means of a definite plan or procedure.<sup>11</sup>

The plain and ordinary definition is also consistent with the CER's Audit Guide definition:

A process or other thing prescribed by the OPR that has been approved and endorsed for use by the appropriate management authority. It has been communicated throughout the organization. All staff and persons working on behalf of the company or others that may require knowledge of the process or other thing required by the OPR are aware of it and its application.

Staff has been trained on how to use the process or other thing required by the OPR. Staff and others working on behalf of the company have demonstrated use of the process or other thing prescribed by the OPR. Records and interviews have provided evidence of full implementation of the requirement, as prescribed (i.e., the process or procedures are not partially utilized).

In the view of the majority of the Panel, the term "implement" requires that management system processes be carried out and put into effect on an ongoing and consistent basis. This is to avoid having company management systems that are technically "established", but hollow or performative in practice – in other words, rules that exist only on paper. This would not be in the public interest, as management systems that are not carried out and put into

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<sup>10</sup> See, for example, Part 2 of the CER Act and the AMP Regulations.

<sup>11</sup> *Merriam-Webster Online Dictionary*, "implement".

effect on an ongoing basis lead to serious environmental incidents and safety failures, such as workplace fatalities.

The definition of “implement” does not just apply to management systems in the context of this decision and AMPs. Attaching proper but robust meaning to the definition of “implement” has far-reaching implications for all compliance and enforcement action taken with respect to management systems under the CER Act. The expectations around implementation, and the AMP Officer’s role in ensuring compliance, must be interpreted with this context in mind.

Trans Mountain urged the Commission to apply a much narrower interpretation of “implement”. Specifically, Trans Mountain argued that to establish a violation of paragraphs 6.5(1)(k) and (q), the AMP Officer must show that the efficacy of the processes is so low that they are deemed not to have been established or implemented. The majority of the Panel considers Trans Mountain’s proposed interpretation to be a de minimus approach and would result in lax CER regulatory oversight of management systems.

Section 6.5 is thorough and detailed. The provision intentionally sets out a lengthy list of processes that a company is expected to include, and implement as part of, its management system. These provisions ensure companies create management systems that are rigorous and multi-faceted. The majority of the Panel further agrees with the AMP Officer that Parliament could not have meant for these processes to merely exist, and that it could not have intended for these processes to lack total efficacy before a violation can be found to occur. The definition of “implement” favoured by the majority of the Panel is consistent with a purposive approach to statutory interpretation. Moreover, only such an interpretation will ensure that the purposes and goals of the OPR, including the goal of environmental protection, and the compliance and enforcement scheme set out in the CER as a whole, can be consistently and reliably achieved.

***Paragraph 6.5(1)(k) of the OPR***

Paragraph 6.5(1)(k) requires establishment and implementation of a process to verify training and competency and to supervise workers. Implemented processes ensure that the activities of workers are critically watched and directed, and that a company verifies that training or competency requirements are met.

The following evidence demonstrates that Trans Mountain failed to verify training of workers as required by paragraph 6.5(1)(k):

- Trans Mountain’s Environmental Compliance Management Plan states that all Project personnel are to be educated and to understand Project environmental compliance requirements during construction. Trans Mountain’s Environmental Compliance and Education Training Program provides details of the training required.
- The Trans Mountain Investigation Report found “inadequate orientation”, or a lack of training, for the 27 May 2021 occurrence. Seventy-five percent of contractor clearing supervisors for Spread 7B, the location of this occurrence, had received training, instead of the 100 percent required by the above-referenced plan and program.



- During a meeting between Trans Mountain and the CER Inspection Officer on 18 June 2021, the CER Inspection Officer asked about the 75 percent training completion rate for contractor clearing supervisors for Spread 7B. Trans Mountain indicated that this problem was uncovered as a result of the Trans Mountain Investigation Report, and that it was working with its contractors and the Project Training and Compliance department to rectify the problem.

A 75 percent training rate of contractor clearing supervisors (rather than the required 100 percent) identified after the occurrence (rather than pro-actively) is clear evidence that Trans Mountain did not implement its processes to verify contractor clearing supervisor training.

The following evidence shows that Trans Mountain failed to implement its process for supervising persons working on behalf of it, in violation of paragraph 6.5(1)(k):

- The Investigation Report found that a common basic or underlying cause for both the 8 May 2021 and 27 May 2021 occurrences was that there was “inadequate supervision”.
  - Trans Mountain construction inspectors were not consistently present to oversee contractor clearing personnel.
  - In both cases, contractors proceeded to conduct clearing without implementing all required environmental mitigation measures.
- Trans Mountain responded to the Investigation Report finding by committing to having its inspectors provide direct on-site supervision of construction clearing crews during the migratory bird restricted activity period or until all corrective actions identified in the report had been implemented. Trans Mountain also responded by revising its Project Environmental Focus Inspection for clearing, to include checklist items for measures required for clearing during the restricted activity period. This revision would clarify how Trans Mountain oversees its contractors during clearing.

Trans Mountain argued that the most important “cause” to be considered in the Panel’s review of the Investigation Report is the “immediate cause” listed in that report.<sup>12</sup> Trans Mountain highlighted that the immediate cause for both the 8 May 2021 and 27 May 2021 occurrences was the failure of an individual or contractor to follow Project procedures. This argument appears to be accepted by the dissent, which states the view that the evidence regarding supervision and control and coordination of contractors appears to be a one-off issue.

The majority of the Panel finds Trans Mountain’s Investigation Report to be very thorough and commends Trans Mountain in this regard. However, the view of the majority of the Panel is that both immediate and basic causes must be considered. The basic causes for the 8 May 2021 and 27 May 2021 occurrences point to deeper problems with Trans Mountain’s processes, including, as noted above, inadequate supervision. The finding that the contractor did not implement the required processes is important. However, what is also equally or even more important is *why* the contractor did not implement such processes. Consideration of

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<sup>12</sup> Trans Mountain defines “immediate cause” as something that led to a particular result or event, directly producing such result. Trans Mountain defines “basic cause” as a contributing factor for either or both events, and a factor that potentially influences an outcome of an incident, elimination of which would not necessarily prevent or reduce the severity of an incident.

both basic and immediate causes will lead to continued improvement in the realm of contractor management and oversight, and is consistent with an approach to management systems which prevents harm to people and the environment.

The majority of the Panel would have expected an implemented process to result in Trans Mountain critically watching and directing *all* the activities of all its workers, including contractors. These stringent requirements make sense, given the definition of the term “implement”, and especially in the context of the high-hazard industry regulated by the CER. In this case, Trans Mountain could not ensure that its required mitigation was being implemented in two instances. Trans Mountain holds the authorization for the Project and is responsible for complying with the CER’s regulatory requirements.

In view of all of the above, the majority of the Panel finds that Trans Mountain’s management systems failed to verify training and competency, and to supervise workers.

Paragraph 6.5(1)(q)

Paragraph 6.5(1)(q) requires a company to have implemented a process for coordinating and controlling the activities of its workers to ensure that they have the necessary information to perform their duties in a manner that is safe, ensures the safety and security of the pipeline and protects the environment. The paragraph also requires that the process include procedures for ensuring that workers are aware of the activities of others.

Implementation of such processes requires effective two-way communication between company management and workers in the field. This is accomplished through the use of all communication tools at the company’s disposal (including controlled and documented processes that have been communicated to all company staff and those working on behalf of the company) and procedures for making sure that those processes are understood and are being followed. Without these processes and procedures, mistakes can be made, safety can be compromised, and the security of the pipeline and protection of the environment can be placed at risk.

The following evidence demonstrates that Trans Mountain violated paragraph 6.5(1)(q):

- On 8 May 2021, a sub-contractor conducted clearing that had not been authorized by Trans Mountain and that was within a protective buffer for a Robin’s nest. The protective buffer was not clearly marked, as flagging tape had been lowered to allow equipment passage and had not been replaced as required. Moreover, the most up-to-date nest sweep results and tracking information had not been reviewed by the foreman.
  - The sub-contractor was not aware of the activities of others, particularly the findings of the Project resource specialist who identified and marked the nest, nor the activities of the contractor who lowered the buffer and failed to replace it.
- On 27 May 2021, a contractor conducted unauthorized clearing of trees and shrubs. Baseline pre-clearing requirements (conducting an up-to-date bird nest survey, conducting a walk-through in new work areas prior to commencement of construction) were not conducted prior to the clearing. Enhanced mitigation measures, which had recently been approved (daily nest sweeps, and oversight of clearing activities by a resource specialist), were also not implemented. The clearing was not authorized by

Trans Mountain, and it occurred without Trans Mountain being aware it had occurred until the next day.

- The Investigation Report found that a basic cause of the 8 May 2021 and 27 May 2021 occurrences was “inadequate work standards”, that is, inconsistent interpretation of the daily work authorization process for work to be completed by contractors.
- The Investigation Report also found that a basic cause of the 8 May 2021 and 27 May 2021 occurrences was “inadequate communication”.
  - For the 8 May 2021 occurrence, this finding was due to the inadequate transfer of nest sweep and tracking information to workers who needed it.
  - For the 27 May 2021 occurrence, the finding was due to:
    - The date until which a bird nest survey could be relied upon was not clear and because the bird nest survey information (maps and tracker) itself, did not reflect enhanced mitigation measures approved as early as 19 May 2021.
    - The enhanced mitigation measures for clearing during the restricted activity period on Spread 7B had been approved as early as 19 May 2021, but, on 27 May 2021, those enhanced mitigation measures had been communicated to the general construction contractor, but had not been communicated to those who needed it, such as the clearing sub-contractor or applicable craft.

The evidence above shows that Trans Mountain’s contractor oversight processes failed to provide information between crews, failed to control the activities of workers, and failed to ensure that required environmental mitigation was being implemented. It also shows that Trans Mountain failed to transfer or communicate key information, including knowledge of enhanced procedures. In other words, Trans Mountain failed to implement processes for coordinating and controlling the operational activities of those working for the company.

The dissent cites statistics relating to, among other things, the amount of technical fieldwork (including migratory bird nest sweeps and monitoring) and environmental inspections carried out as evidence of successful implementation of Trans Mountain’s processes. The majority of the Panel acknowledges that aspects of Trans Mountain’s management system, such as the requirement to do environmental inspections, were being carried out on certain days. However, the Investigation Report clearly shows that on 8 May 2021 and 27 May 2021, Trans Mountain failed to implement management system requirements relating to contractor oversight, including the requirements to ensure that its contractors were conducting nest surveys and sweeps prior to clearing.

In view of all of the above, the majority of the Panel finds that Trans Mountain’s management systems failed to coordinate and control the activities of its workers, and to make workers aware of the activities of others.

Additional Comments Regarding Evidence in this Proceeding

The Panel heard about a number of additional matters over the course of the proceeding:

- Both parties presented arguments about the use of the term “adequate” in the NOV. The majority of the Panel does not find it necessary to address or define this word for the purposes of this decision. Under subsection 128(1) of the CER Act, the Panel must consider whether the person committed the violation contained in paragraphs 6.5(1)(k) and (q) of the OPR, which does not include the word “adequate”. The issue before the Panel is whether the evidence establishes the elements of the violation in accordance with the CER Act.
- Arguments were made during this proceeding about paragraph 6.5(1)(x) of the OPR, which requires, among other things, that a company establish and implement a process for ensuring continual improvement. The parties agreed that a management system should result in a continuous feedback loop, with lessons learned from the field resulting in improvements to management system processes and procedures. Trans Mountain also provided evidence about continual improvement steps it took after every occurrence.<sup>13</sup> The AMP Officer was of the view that Trans Mountain’s evidence on continual improvement amounted to a due diligence argument, a defence which is not permitted under the CER Act at this stage of the Panel’s analysis and findings.<sup>14</sup> The majority of the Panel is of the view that neither compliance with, nor a breach of, paragraph 6.5(1)(x), should affect its consideration of whether there was a violation of paragraphs 6.5(1)(k) and (q). In the AMP Regulations, each paragraph of section 6.5 contains a standalone violation that can be proceeded with by the AMP Officer. Nothing in the Act or AMP Regulations prohibits the AMP Officer or the Commission from finding a violation in situations where a management system is flawed but includes a continual improvement process. If one were to read in such a prohibition, no company could be issued an AMP in situations where it was undertaking corrective action – or conversely, corrective action or continuous improvement would always cure breaches of the OPR. The evidence cited in the analysis above demonstrates failures in the implementation of Trans Mountain’s management system processes required under paragraphs 6.5(1)(k) and (q), even in the face of continual improvement. None of the foregoing diminishes the importance of continual improvement, particularly in the context of management systems in a high-hazard industry such as the oil and gas sector. These systems help ensure that pipelines are reliable and safe, and that the environment is protected. The majority of the Panel notes that elements of due diligence, continuous improvement and company efforts were considered relevant when assessing the appropriate penalty to be applied – in other words, these were only relevant to the analysis of the gravity factors.
- Trans Mountain submitted that its processes had been successfully implemented Project-wide, as 99.85% of encountered bird nests were protected, a number also cited by the dissent. The AMP Officer submitted that he issued the NOV because he believed that there was potential risk of further harm, and to promote compliance during future migratory bird restricted periods, and noted that AMPs provide a flexible enforcement tool to complement other compliance and enforcement tools available to

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<sup>13</sup> For example, Trans Mountain argued that it carried out investigations after three of the occurrences, took corrective actions, carried out additional mitigation and made improvements to its processes.

<sup>14</sup> CER Act, subsection 121(1).

him.<sup>15</sup> The majority of the Panel notes that paragraphs 6.5(1)(k) and (q) ensure management systems prevent harm to the environment and promote safety across a wide range of operations. A single data point about nests protected cannot by itself prove or disprove that a management system is implemented, nor does such a data point actually measure process implementation. Moreover, in this case, the violation of paragraphs 6.5(1)(k) and (q) was confirmed to have occurred on two dates, 8 May 2021 and 27 May 2021. Statistics about the number of nests observed and protected overall do not address what happened on those specific dates or the risk of harm to the environment in the future. In the view of the majority of the Panel, reliance on a statistic suggests that there is a threshold percentage of protected birds nests which, once attained, proves implementation. This is inconsistent with a fact-based analysis of the elements of the violation.

- Trans Mountain suggested that compliance and enforcement surrounding the four occurrences and related management system violations was absurd, in part because of the prevalence of bird deaths due to other causes. The majority of the Panel found this argument to be unhelpful, as information about bird deaths generally does not inform whether Trans Mountain's management system was implemented.
- Trans Mountain commented during oral summary argument that paragraphs 6.5(1)(k) and (q) provide no easily measurable outcomes upon which to base enforcement. The majority of the Panel, however, considers the elements of the violation to be clear. The principles of statutory interpretation provide guidance for the interpretation of undefined words in the paragraphs. Enforcement via issuance of a NOV is permitted under the AMP Regulations and the CER Act. While, as noted above, the AMP Officer could always choose not to issue a NOV, and instead rely on CER Inspectors to work collaboratively with companies and to escalate matters in specific situations, that discretion is not relevant to the Panel's consideration. Nor does the Panel have the ability to substitute its view for whether it would have issued the NOV.<sup>16</sup>
- Regarding Trans Mountain's argument that the matter had already been addressed by the EPTC, and the Inspection Officer Order (IOO) issued by the CER on 3 June 2021, the majority of the Panel disagrees. The EPTC hearing addressed violations under the legal framework governed by the *Migratory Birds Convention Act*. The IOO stopped Trans Mountain from clearing until it could show the CER that work could be continued in a safe manner. The AMP Officer submitted that he issued the NOV to deter future non-compliance and promote future compliance. The EPTC hearing, the IOO and the NOV have fundamentally different purposes. And there is nothing under the CER Act which prohibits both an IOO and a NOV from being issued for the same matter, or in circumstances when another regulator has taken enforcement action under its legislation. The majority of the Panel finds both parties' evidence and argument respecting the NEB certificate hearing and Order in Council for the Project, and the hearing before the EPTC, to be irrelevant. It is the view of the majority of the Panel that neither relate to the elements of the violation.

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<sup>15</sup> [Administrative Monetary Penalties Process Guide](#).

<sup>16</sup> See subsection 128(1) of the CER Act. This subsection also requires the Panel to consider whether the penalty amount was determined in accordance with the AMP Regulations.

### Additional Comments on the Dissent

The Panel agreed on the applicable analysis to be used in this case, which is to focus on the elements of the violation and the balance of probabilities standard. The Panel was not unanimous as to the issue of whether the evidence established the violation on a balance of probabilities. The majority also notes:

- Regarding the Federal Court of Appeal decision in *Doyon v. Canada (Attorney General)* referenced in the dissent,<sup>17</sup> the Federal Court of Appeal expressed views about the *Agriculture and Agri-Food Administrative Monetary Penalties Act*, noting that aspects of the regime were “highly punitive”. The Federal Court of Appeal did not address the AMP scheme in the CER Act. There are differences between the AMP regime at issue in *Doyon* and the scheme in the CER Act and AMP Regulations, particularly the types of violations that can proceed. The facts in *Doyon* are highly distinguishable from the case before the Commission, in respect of the number of incidents at issue, the relative quantum of the penalty at issue and the breadth of evidence tendered to support the violation. The Federal Court of Appeal in *Doyon* focused the analysis of the facts in the context of the elements of the offence. The majority of the Panel concurs with the dissent that application of the decision in *Doyon* means that we must uphold a notice of violation only when there is clear, cogent, and convincing evidence that a violation has occurred.
- The dissent also takes issue with aspects of the form of the NOV – noting, for example, that if the AMP Officer was of the view that the violation was, in fact, a multi-day violation that occurred between 12 April 2021 and 27 May 2021, he should have said so clearly in the NOV, and the penalty should have reflected this. The majority of the Panel notes that no party focused on the form of the NOV or on the correctness of the dates in the NOV. The Panel is required, under subsection 128(1) of the CER Act, to determine whether the violation occurred. This requires analyzing all the relevant evidence submitted in the course of this proceeding. The dissent, indeed, relies on evidence related to the period between the four occurrences. In this case, the NOV was sufficiently clear to detail the violation and express the basis for the AMP Officer’s actions.

#### **2.2.2 Dissent of Commissioner Chartier**

I do not agree with the majority of the Panel that the AMP Officer has established on a balance of probabilities that Trans Mountain has violated paragraphs 6.5(1)(k) and (q) of the OPR, and I would dismiss the NOV.

#### ***CER AMP Regime Legal Framework***

Sections 115-135 of the CER Act and the AMP Regulations establish a regime of administrative violations and penalties. Violations under this regime are absolute liability offences. If a person is found to have committed a violation, there are very few permissible defences.<sup>18</sup>

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<sup>17</sup> *Doyon*, at paras. 21-25.

<sup>18</sup> CER Act, section 121.

The purpose of this regime is to promote compliance with the CER Act and not to punish.<sup>19</sup> The [Administrative Monetary Penalties Process Guide](#) states:

AMPs are financial penalties imposed by a regulatory body in response to contravention of legislative requirements. AMPs provide regulatory agencies with a flexible enforcement tool to complement other types of regulatory sanctions such as notices of non-compliance, orders, warning letters and directions.

The Federal Court of Appeal described this system of administrative violations and penalties as highly punitive because:

- of the possibility of multi-day violations which gives rise to increased penalties;
- the person who committed the violation has no defence of due diligence or of mistake of fact;
- the prosecutor has a considerably reduced burden of proof in comparison to the one he would have if proceeding by offence; and
- the person who has committed the violation risks higher penalties in the event of a subsequent violation.<sup>20</sup>

Therefore, as decision-makers, we must be circumspect in analysing the evidence and in analysing the essential elements of the violation and the causal link.<sup>21</sup> We should uphold a NOV when there is clear, cogent, and convincing evidence that a violation has occurred. It is with these principles in mind that I have reviewed the NOV and have determined that the AMP Officer did not provide sufficient evidence to establish that the alleged violations have occurred.

#### ***The required Management System Processes have been established***

I will limit my analysis and reasons to the question of *implementation* of the management system processes.

The description of the violation in the Short Form Description of the NOV states that “there was a failure to establish, develop, implement, maintain, and document processes as prescribed”. However, the AMP Officer’s subsequent disclosure and arguments focus on the lack of implementation. In addition, during oral summary argument, the AMP Officer acknowledged that the management system processes had been established and confirmed that he is only alleging the lack of implementation of those processes.

#### ***The elements of the violations and the alleged date of the violations***

I agree with the majority of the Panel about what constitutes the elements of the violations in this case. I also agree with the majority of the Panel that the AMP Officer has to establish each of these elements on a balance of probabilities in order for the Panel to conclude that Trans Mountain violated paragraphs 6.5(1)(k) and (q) of the OPR. I note however that it is unclear whether the AMP Officer is alleging one violation for either paragraphs, or

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<sup>19</sup> CER Act, subsection 117(2).

<sup>20</sup> *Doyon v. Canada (Attorney General)*, 2009, F.C.J. No. 605, at paras. 21-25 (*Doyon*). See, also, CER Act subsection 115(2) and sections 121, 122, 123 and 129, and *Administrative Monetary Penalties Regulations (Canadian Energy Regulator)*, section 4, Table, Item 1.

<sup>21</sup> *Doyon*, paragraph 28.

two violations, i.e. that both paragraphs were violated. For the purpose of my reasons, I will assume that there were two alleged violations, and will use the plural.

The date of the alleged violations is also unclear. The AMP Officer stated in the NOV that the alleged violations were one-day violations, (as opposed to multi-day violations) and that they occurred on 27 May 2021. However, the AMP Officer relies on four incidents that occurred over a five-week period to argue that the violations occurred.

In any event, given that the AMP Officer checked the one-day violation box, I will assume that the question before me is whether the AMP Officer has established on a balance of probabilities that Trans Mountain has violated, on 27 May 2021, paragraphs 6.5(1)(k) and (q) of the OPR.

***The AMP Officer did not establish the alleged violations***

Based on the record before me, and contrary to the majority of the Panel, I find that the AMP Officer did not provide clear, cogent, and convincing evidence to establish on a balance of probabilities that Trans Mountain violated paragraphs 6.5(1)(k) and (q) of the OPR on 27 May 2021.

In support of the alleged violations, the AMP Officer relied on four occurrences that occurred between 12 April 2021 and 27 May 2021. More details about these four occurrences are provided in the majority of the Panel's reasons, so I will not repeat them here.

The AMP Officer argues that these four incidents, taken in aggregate, showed that the processes had not been implemented. He says in his Review Submission dated 30 June 2022:

This AMP is in relation to several related events, not just one event to a single nest and a single egg. ***Taken in aggregate, the multiple events, over an approximate 5-week window*** of its construction activities, demonstrate that Trans Mountain ***has a systematic issue with aspects of the implementation*** of its management system. Namely a lack of oversight, supervision and coordination and control of its contractors.<sup>22</sup> (My emphasis)

He also says that:

The AMP alleges that ***based on four separate events*** that took place on 12 April, 8 May, 13 May, and 27 May 2021, Trans Mountain failed to demonstrate adequate supervision of personnel, or adequate control and coordination of operational activities which resulted in real and potential harm to the environment.<sup>23</sup> (My emphasis)

I find the AMP Officer's arguments problematic for a few reasons.

First, I do not agree with the AMP Officer and the majority of the Panel that these incidents, even if they occurred as alleged, lead to a conclusion that the management system in place had not been implemented. The AMP Officer's argument that the aggregate of these four occurrences clearly show a lack of implementation of the management system processes demands that I take a leap in logic to find that evidence of these four occurrences

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<sup>22</sup> Administrative Monetary Penalty AMP Officer Review Submission, dated 30 June 2022 (**Review Submission**), page 2 of 62.

<sup>23</sup> Review Submission, page 4 of 62.



necessarily mean that the processes were not implemented. This is incorrect in my view. To me, the fact that there were four occurrences over a five-week period does not necessarily mean that the management system processes as a whole had not been implemented, especially given the size of the Project.

The evidence shows that Trans Mountain had established and implemented, that is, put in place and into practice, the following processes:

- Trans Mountain Environmental Protection Plan;
- The Environmental Compliance Management Plan;
- The Environmental Compliance and Education Training Program;
- The Environmental Field Guide – Nesting Bird Risk Assessment;
- The Environmental Field Guide – Flagging and Signage; and
- Environmental inspection, monitoring, and measurement programs.<sup>24</sup>

Second, when examined more closely, at least one of these four occurrences actually demonstrates, in my view, that the management systems were in place, that they were implemented, and that they prevented damage to the environment.

On 13 May 2021, an American Robin nest was removed from a boot room at Westridge Terminal. The active nest was soon after recognized, and the nest material was replaced inside the boot room. A buffer zone was created around the boot room, and the American Robin returned and continued nesting. If anything, this near-miss shows that Trans Mountain's management system was implemented properly, given that timely action was taken to carry out the mitigation outlined in the EFG and other processes, and that the nest was ultimately protected.

Third, in my view, the NOV lacks clarity which makes it difficult to determine the proper issues before us. It is unclear whether the AMP Officer is alleging that one violation for both paragraphs occurred or that two violations have occurred. When asked at the hearing, the AMP officer said we could find that either or both paragraphs at issue could have been violated. I note that the evidence he presented does not clearly distinguish between these two paragraphs.

It is also unclear whether the AMP Officer alleges that the management system processes had not been implemented for the entire Project, or only for Spread 5B, Spread 7, or Spread 7B. In the Violation Details section of the NOV, the AMP Officer stated that the location of the violation is: "Trans Mountain Expansion Project – Spread 7B, Construction Work Package 95". However, he relies on incidents that occurred on Spread 7, Spread 5B, Burnaby Terminal and Spread 7B.

It is also unclear what the AMP Officer means by systematic issue with "aspects of the implementation of its management systems". As mentioned above, Trans Mountain has a variety of different processes in place and it is unclear which aspects of these processes the AMP Officer argues had not been implemented on 27 May 2021.

Finally, although the AMP Officer argues that the evidence shows that there was a systematic issue with implementation during a five-week window, he only issued a one-day violation. In my view, one near-miss on 27 May 2021 does not equal to a systematic issue with the implementation of Trans Mountain's management system.

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<sup>24</sup> Trans Mountain's written submission 24 May 2022 page 16 of 52, and footnotes, and Attachment 2, Statement of [REDACTED] 23 May 2021 (Statement of [REDACTED]).

Fourth, in coming to my decision, I am required to take into consideration all of the evidence before me. In particular, I need to consider the evidence that supports the implementation of the management system processes and balance it against the evidence relied on by the AMP Officer. I disagree with the majority of the Panel that the evidence of the successful implementation of the processes, and the protection of the vast majority of the nests found, is only relevant to the determination of the gravity factors.

The Statement of ██████ describes in detail how the various management system processes had been implemented Project-wide, including that, in 2021, there were over 20,000 person days of technical fieldwork (including migratory bird nest sweeps and monitoring) and 15,000 person days of environmental inspections.<sup>25</sup> ██████ also states that over 10,000 bird nests were observed in 2021. This represents 1368 unique bird nest sites, with multiple observations of the same nest over multiple days.<sup>26</sup> I note that his evidence is uncontested.

Of those 1,368 nests observed, the vast majority were protected, except for two nests in a five-week period. I do not excuse Trans Mountain for the destruction of these nests and the other two near misses. However, in the context of my review of the NOV, I find that the destruction of two nests in comparison to 1,368 nests that were observed and protected, as well as a couple of near misses, is not sufficient evidence to establish on a balance of probabilities that the management system processes required by the OPR had not been implemented.

Although lack of supervision or lack of control and coordination of contractors may have contributed to the destruction of those two nests as well as the two near-misses, I do not find the four occurrences relied on by the AMP Officer and the majority of the Panel to be sufficient to conclude that there was a systemic issue with the implementation of Trans Mountain management systems, especially when compared to the rest of the evidence. Based on the evidence on the record, these appear to be a one-off issue, rather than an outright failure to implement the required management system processes.

Fifth, since these are one-day violations, I am of the view that any improvement to the management system processes between 12 April 2021 to 27 May 2021 should be taken into consideration in our review of the NOV.

Management systems, by their very design, have processes to conduct quality assurance activities to identify deficiencies, conduct investigations, and where necessary, take corrective actions and communicate results. The OPR recognizes this need for continual improvement.<sup>27</sup>

In this case, the uncontested evidence shows that Trans Mountain carried out investigations, as required by the OPR, after the 12 April, 8 May, and 27 May 2021 occurrences relied on by the AMP Officer. Trans Mountain identified and took corrective actions, shared any relevant information with employees and contractors via bulletins and communications to fields teams, and made improvement to its management system processes.

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<sup>25</sup> Statement of ██████ paragraph 35.

<sup>26</sup> Statement of ██████ paragraph 30.

<sup>27</sup> OPR, paragraph 6.5(1)(x).

In particular:

- After the 12 April 2021 occurrence:
  - Trans Mountain temporarily and voluntarily paused clearing activity in Spread 7 pending the results on an internal review;
  - Trans Mountain retained an independent expert to provide a review of its EFG programs and mitigation measures; and,
  - As early as 19 May 2021, Trans Mountain approved enhanced requirements for vegetation clearing activities conducted in Spread 7B during the migratory bird RAP following the voluntary suspension of clearing and the issuance of an order by Environment and Climate Change Canada for CWP-98.
- After the 8 May 2021 occurrence:
  - Trans Mountain immediately stopped work and the crew was stood down from further work;
  - The incident was voluntarily reported to the CER; and
  - The day after, on 9 May 2021, Trans Mountain sent a bulletin to all contractors, further outlining and reinforcing requirements pertaining to review and awareness of nest sweeps prior to initiating daily work and including the requirement for a pre-construction walk through.
- On 18 May 2021:
  - Trans Mountain had a Project-wide environmental stand-down, the purpose being to reinforce the requirements that were in place on the Project for working during migratory bird window;
  - The stand-down also emphasized that all individuals must be aware of their responsibilities to ensure that all work is done in compliance with Trans Mountain's environmental requirements;
  - The information was delivered to both Trans Mountain's employees and contractor management personnel; and
  - TMEP communicated to field teams that the only personnel authorized to remove or adjust a bird nest buffer flagging and staking are Resource Specialists, Environmental Inspectors of Contract Environmental Coordinators.
- On 21 May 2021, a standard Project wide SharePoint site was created for distribution of Nesting Bird Maps. Trans Mountain Expansion Project would work with Resource Specialists to ensure file size of nest sweep maps is reduced to minimize download issues in the field.
- As of 25 May 2021, Trans Mountain worked to develop a new Environmental Protection Rule to reinforce commitments regarding nesting bird mitigation, and installation of signage at all nest buffers that includes mitigation measures.

These corrective actions, additional mitigation measures, and Trans Mountain's overall improvement to its management system processes are relevant to my determination of whether the AMP Officer has established that the required management system processes had not been implemented, i.e., put in place and in practice, on 27 May 2021. In my view, these improvements actually demonstrate that the processes were working as they should. Trans Mountain reviewed the occurrences and made improvements to its processes and management systems as a result, as required by the OPR.

For all of these reasons, I find that the four occurrences relied on by the AMP Officer are not clear, cogent, and convincing evidence that Trans Mountain's management system processes were not implemented as required by paragraphs 6.5(1)(k) and (q) of the OPR on 27 May 2021, even when taken "in aggregate" as the AMP Officer would have me do. I also find that the evidence of a near-miss on 27 May 2021 is not sufficient to find that Trans Mountain had not implemented its management system processes as required by paragraphs 6.5(1)(k) and (q) of the OPR on that day.

I note that there may have been additional reasons for the AMP Officer to issue the NOV. Unfortunately, any other reasons or justifications have not been disclosed and I am therefore unable to take them into consideration.

Based on the record before me, I find that Trans Mountain did not commit the violations. In light of this finding, it is not necessary for me to consider the penalty calculation.

### **3.0 Penalty Amount**

Having considered whether the violation was established and the majority of the Panel having concluded that it was established, the majority of the Panel has also reviewed the penalty.

#### **3.1 Gravity Levels in Notice of Violation**

In the NOV, the AMP Officer applied different gravity levels to the criteria set out in the table in section 4 of the AMP Regulations. The total gravity factor of "+4" resulted in a penalty amount of \$88,000.00.

Trans Mountain disputed the gravity values ascribed to criteria numbers 2, 3, 4, 5, 6, 7 and 9. Trans Mountain submitted that should the Panel find that it committed the violations, the facts presented by the AMP Officer are incomplete or mischaracterized, and do not support the total gravity level of mitigating and aggravating factors alleged. The AMP amount should be reduced to \$4,000.00 based on a total gravity level of between -5 and -7.

#### **3.2 Any competitive or economic benefit from violation**

##### ***Views of the Parties***

In the NOV, the AMP Officer applied a +2 to criterion 2. In the AMP Officer's view, the competitive advantage gained by Trans Mountain was in relation to cost savings that resulted from construction during the nesting season. Trans Mountain's management system should have corresponded to the scope, nature, and complexity of its activities and to the hazards and risks associated with those activities.

Trans Mountain submitted that the gravity level should be 0. Trans Mountain stood down its BC lower mainland operations, ceased clearing activities, and commissioned the study of its EFG programs. All these activities resulted in a significant direct cost, and additional costs in delaying construction.

### ***Analysis and findings of the majority of the Panel***

The majority of the Panel is of the view that this criterion requires consideration of competitive or economic *benefit* from the *violation*. The violation, in this case, is the failure to implement the management system processes required by paragraphs 6.5(1)(k) and (q) of the OPR.

The violation is not Trans Mountain's decision to carry out construction activities during the nesting season. Construction, with the implementation of required mitigation, was permitted during nesting season. The majority of the Panel does not consider the fact that Trans Mountain carried on construction during this season to be a relevant competitive or economic benefit in this case.

The criterion does not reference economic detriments suffered. Trans Mountain's submission, that it stood down its BC lower mainland operations, and that it ceased clearing activities and commissioned the study of its EFG programs, is therefore not relevant to this criterion.

There is no evidence on the record that showed that Trans Mountain gained an economic benefit or competitive advantage from failing to implement the processes in paragraphs 6.5(1)(k) and (q) during nesting season. Nor was any evidence presented that quantified the economic benefit or competitive advantage of carrying out construction activities without implemented processes (versus carrying out those activities with implemented processes).

The majority of the Panel has decided to apply a gravity factor of 0.

### **3.3 Reasonable efforts to mitigate/reverse the violation's effects**

#### ***Views of the Parties***

The AMP Officer stated that he assigned a +1 to criterion 3 because destruction of a bird's nest and egg cannot be reversed and because Trans Mountain did not update its processes to apply throughout the Project fast enough.

Trans Mountain disagreed that destruction of a bird's nest cannot be reversed, citing the successful replacement of the nest removed from the boot room at the Burnaby Terminal. Trans Mountain argued that it mitigated adverse effects by taking the measures noted under criterion 2. By 18 June 2021, the CER had determined that the corrective actions it took were satisfactory. An appropriate level for this criterion would be -1 or -2.

### ***Analysis and findings of the majority of the Panel***

The majority of the Panel finds that Trans Mountain undertook many reasonable efforts to mitigate the effects of the violation:

- After the 12 April 2021 occurrence, Trans Mountain temporarily and voluntarily paused clearing activity in Spread 7 pending the results of an internal review.
- After the 12 April 2021 occurrence, an independent expert was retained to provide a review of Trans Mountain's EFG programs and mitigation measures.

- After the 8 May 2021 occurrence, work was immediately stopped, and the crew was stood down from further work. The incident was voluntarily reported to the CER. The day after, Trans Mountain sent a bulletin to all Project construction staff further outlining and reinforcing requirements pertaining to review and awareness of nest sweeps prior to initiating daily work.
- On 18 May 2021, Trans Mountain had a Project-wide environmental stand-down. The purpose of the stand-down was to reinforce the requirements that were in place on the Project for working within the migratory bird window. It emphasized that all individuals must be aware of their responsibilities to ensure that their work is done in compliance with environmental requirements, and was delivered to both Trans Mountain employees and contractor management personnel.

Trans Mountain also carried out an investigation after each occurrence, and identified and took corrective actions, such as bulletins and communications to field teams. The Investigation Report following the 8 and 27 May 2021 occurrences was thorough, and identified corrective actions, including actions to address contractor oversight and control.

The actions of the CER Inspection Officer who issued the IOO to Trans Mountain after the 27 May 2021 occurrence provide further justification that the effects of the violation were mitigated. The CER Inspection Officer found that the corrective actions identified, taken and planned in the Investigation Report were satisfactory enough for the IOO to be lifted, and for clearing during the nesting period to be resumed.

The majority of the Panel is not persuaded by the AMP Officer's argument that the enhanced mitigation identified by Trans Mountain on Spread 7 ought to have been applied throughout the Project. In the view of the majority of the Panel, enhanced mitigation is required when hazard assessments determine additional mitigation is required. The AMP Officer failed to provide clear evidence showing that this is the case here.

The majority of the Panel is also not persuaded that Trans Mountain failed to make updates to its processes in a timely manner. Analyzing and amending processes and procedures, including implementing change management, takes time. The AMP Officer indicated that the EFG programs were not updated until after prompting by the CER. However, the AMP Officer never explained what sort of timing would have been reasonable, taking into account the size and scope of the company and the changes. The only clear evidence is that the IOO, which had been issued to Trans Mountain after the 27 May 2021 occurrence, was lifted on 18 June 2021. If the CER was concerned about the timing of the process changes, the CER would have used enforcement tools to ensure that the changes were made.

Given the above, the majority of the Panel has decided to adjust criterion 3 to a factor of -2.

### **3.4 Negligence on the part of person who committed violation**

#### ***Views of the Parties***

In the NOV, the AMP Officer applied a +1 to criterion 4. In the AMP Officer's view, Trans Mountain did not demonstrate adequate due diligence in the supervision, control, and coordination of its contractors. On 23 March 2021, Trans Mountain was advised that the clearing activities were high-risk and should be halted to avoid harm. Trans Mountain's management system and processes failed to respond to the hazards and risks associated

with those clearing activities. The clearing activities continued until an IOO was issued on 3 June 2021.

Trans Mountain argued that the gravity level for criterion 4 should be 0. None of the facts relied upon by the AMP Officer support a finding of negligence. The details of each occurrence illustrate that Trans Mountain was duly diligent. Further, the five-week delay is a misleading characterization.

### ***Analysis and findings of the majority of the Panel***

Criterion 4 requires consideration of whether there was negligence on the part of Trans Mountain leading up to its failure to implement paragraphs 6.5(1)(k) and (q) of the OPR. The Panel may consider due diligence as an available defence to negligence.

The majority of the Panel has been persuaded to reduce this criterion to a factor of 0. While the majority of the Panel has found that Trans Mountain failed to implement paragraphs 6.5(1)(k) and (q) of the OPR, it was not negligent in doing so. Trans Mountain's construction activities were legally permitted. Comparing the evidence on the record showing the number of nests identified and protected with the number of nests impacted, the majority of the Panel finds that in the majority of cases, Trans Mountain was able to implement required mitigation.

After every occurrence listed in the NOV, Trans Mountain followed legal requirements, including carrying out investigations into what happened. Trans Mountain also took additional measures, as set out under criterion 3. After Trans Mountain was issued an IOO, it immediately ceased clearing activities and carried out the root cause analysis required by the IOO. The Investigation Report conducted by Trans Mountain was thorough and also set out reasonable corrective actions.

## **3.5 Reasonable assistance to the CER with respect to the violation**

### ***Views of the Parties***

In the NOV, the AMP Officer applied a -1 to criterion 5. The AMP Officer stated that Trans Mountain met with the CER's Inspectors as requested, answered Information Requests and came into compliance after an IOO was issued. Trans Mountain argued that because it took these actions, and voluntarily reported the incident to the CER, the gravity level should be -2. In response to Trans Mountain, the AMP Officer noted that a factor of -2 is utilized when a company has taken extraordinary measures. The AMP Officer characterized Trans Mountain's efforts as reasonable, meeting the CER's expectations, but not extraordinary.

### ***Analysis and findings of the majority of the Panel***

The majority of the Panel has decided to adjust the factor in this criterion to -2.

Trans Mountain was cooperative leading up to and upon discovery of the violation. For example, it met with CER Inspection Officers and provided full assistance when answering CER Information Requests and complying with the CER IOO. Trans Mountain was proactive in voluntarily reporting the 27 May 2021 occurrence to the CER, even though this was not required by the CER Event Reporting Guidelines. All in all, the view of the majority of the Panel is that Trans Mountain's behaviour is of a sufficient standard to warrant adjustment of this criterion.

### **3.6 Promptly reported the violation to the CER**

#### ***Views of the Parties***

The AMP Officer noted that the 27 May 2021 event was discovered by Trans Mountain on 28 May 2021 and reported to the CER Inspection Officer on 2 June 2021. The AMP Officer did not consider this to be prompt. As a result, the AMP Officer applied a 0 to criterion 6.

Trans Mountain argued that its efforts regarding reporting were not fully acknowledged by the AMP Officer. All reporting was carried out within a reasonable amount of time, and as a result, the factor for this criterion should be -1 or -2.

#### ***Analysis and findings of the majority of the Panel***

Criterion 6 requires consideration of whether Trans Mountain promptly reported the violation after becoming aware of it. The violation is Trans Mountain's failure to implement processes required by the OPR. The reporting of the individual occurrences listed in the NOV is not relevant to this criterion.

The majority of the Panel finds that the Investigation Report was the means by which the CER confirmed the problems regarding implementation of Trans Mountain's management system. The Investigation Report was required to be provided to a CER Inspection Officer as a result of an IOO. The majority of the Panel does not consider Trans Mountain's compliance with legal requirements (in this case, the IOO) to be deserving of the application of a -1 or -2 for this criterion.

The majority Panel is of the view that the AMP Officer appropriately applied a 0 to this criterion.

### **3.7 Steps taken to prevent reoccurrence of violation**

#### ***Views of the Parties***

The AMP Officer applied a -1 to criterion 7, and indicated that Trans Mountain took some steps to prevent the reoccurrence of the violation, such as adding some new mitigations to specific spreads of the Project. However, the mitigation was not applied to all spreads Project-wide, and the EFG programs were not updated until after prompting by the CER.

Trans Mountain submitted that criteria 7 should be assigned a mitigating gravity level of -2. In response to the AMP Officer's views that additional mitigation was not applied on all spreads Project-wide, Trans Mountain asserted that there was no requirement to, nor is there any evidence supporting a necessity to. In response to the AMP Officer's views that the EFG programs were not updated until prompted by the CER, Trans Mountain argued that the consultant retained to review the EFG programs and prepare findings required time. Trans Mountain also required time to consider the findings, and determine how to implement them through its management of change process. That Trans Mountain took five weeks to update its EFG was not a delay.

#### ***Analysis and findings of the majority of the Panel***

The majority of the Panel is of the view that Trans Mountain took many steps to prevent the reoccurrence of the violation. As noted in the analysis and findings above, the Trans Mountain Investigation Report was the means by which the CER became aware of the



problems regarding implementation of Trans Mountain's management system. The corrective actions in the Investigation Report show the steps that Trans Mountain took or committed to take in order to prevent reoccurrence of the violation. The Investigation Report was thorough. It identified factors underlying the events and actions, and made recommendations and corrective actions to improve processes, including those required by paragraphs 6.5(1)(k) and (q).

For the reasons provided under criterion 3, the majority of the Panel is of the view that the time Trans Mountain took to update its EFG programs was not unreasonable.

Given the above, the majority of the Panel concludes that this criterion should be adjusted to -2.

### **3.8 Any aggravating factors in relation to risk of harm to people or environment**

#### ***Views of the Parties***

The AMP Officer applied a +2 to factor 9, noting that Trans Mountain's clearing activities had a high probability to negatively impact nesting migratory birds. Despite being advised of this, Trans Mountain continued clearing across the Project, with no Project-wide changes, until a CER Inspection Officer issued an IOO halting clearing activities. The AMP Officer also noted that it took five weeks for Trans Mountain to make updates to EFG programs during the migratory bird nesting window.

Trans Mountain stressed its view that the AMP Officer "double dipped" by applying an additional +2 gravity level based on items already relied upon to increase the gravity level in other criteria. While Trans Mountain was of the view that these items were not aggravating in any event, they were considered elsewhere and should therefore be assigned no additional weight. Trans Mountain submitted the gravity level for this factor should be reduced from +2 to 0.

#### ***Analysis and findings of the majority of the Panel***

The majority of the Panel is of the view that the circumstances of the violation and the resulting harm warrant the application of a "+1" to criterion 9.

While Trans Mountain argued that the AMP Officer should not "double dip" by considering facts relevant to other gravity factors, it provided no authority for this argument. The majority of the Panel is of the view that what is relevant in this case is the risk of harm to the environment.

Trans Mountain's failure to implement the processes required by paragraphs 6.5(1)(k) and (q) of the OPR resulted in an increased risk of harm to the environment. Without implemented processes, Trans Mountain's clearing activities could have negatively impacted nesting migratory birds. This violation resulted in some bird nest and egg destruction, an environmental impact that is unacceptable in light of the CER's requirements respecting environmental protection.

However, the majority of the Panel would characterize the level of actual harm as low, given that the species impacted are common species, and the number of individuals impacted is relatively low compared to the estimated populations. The Investigation Report also includes corrective actions which, when fully implemented, would mitigate the risk of this harm.

**Consequently, the total gravity value is adjusted to -5 and the amount of the penalty is hereby set to \$4,000.00.**

Yours sincerely,

*Signed by*

Ramona Sladic  
Secretary of the Commission