

ITEM 11
MANAGER'S REPORT NO. 5
COUNCIL MEETING 89/01/16

RE: REVIEW OF THE BURNABY CITIZENS FOR ENVIRONMENTAL PROTECTION BRIEF AND
THE FEASIBILITY OF ENACTING A MUNICIPAL BYLAW TO REGULATE AIR EMISSIONS
FROM TRANS MOUNTAIN PIPE LINE COMPANY LTD.'S BURNABY OPERATIONS

MUNICIPAL MANAGER'S RECOMMENDATION:

1. THAT the recommendation of the Chief Public Health Inspector be adopted.

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TO: MUNICIPAL MANAGER 1989 JANUARY 11

FROM: CHIEF PUBLIC HEALTH INSPECTOR

SUBJECT: REVIEW OF THE BURNABY CITIZENS FOR ENVIRONMENTAL PROTECTION BRIEF AND THE FEASIBILITY OF ENACTING A MUNICIPAL BYLAW TO REGULATE AIR EMISSIONS FROM TRANS MOUNTAIN PIPE LINE COMPANY LTD.'S BURNABY OPERATIONS

PURPOSE: TO PROVIDE COUNCIL WITH A REPORT RESPONDING TO THE BURNABY CITIZENS FOR ENVIRONMENTAL PROTECTION BRIEF AND A LEGAL OPINION ON THE FEASIBILITY OF DEVELOPING A MUNICIPAL BYLAW TO CONTROL AIR EMISSIONS FROM TRANS MOUNTAIN'S OPERATIONS

RECOMMENDATIONS:

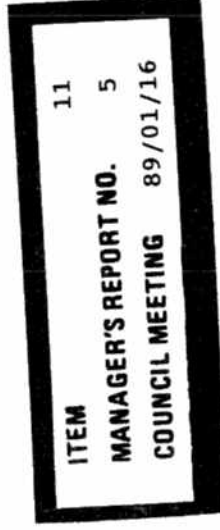
1. THAT the Burnaby Citizens for Environmental Protection's request of Council to provide the legal services for a Federal Court of Appeal application be denied.
2. THAT staff proceed with the development of a Municipal Health Bylaw which would regulate air emissions from Trans Mountain Pipe Line Company Ltd.'s facilities.
3. THAT a copy of this report be forwarded to the Burnaby Citizens for Environmental Protection, c/o Mrs. C. Boothroyd, 5751 Highfield Drive, Burnaby, B.C., V5B 1E4.

REPORT

SUMMARY:

After reviewing the Brief by the Burnaby Citizens for Environmental Protection, consulting legal counsel is of the opinion that the likelihood of obtaining leave to appeal is low and if leave were granted it is unlikely that the B.C.E.P. would succeed on an appeal. Consulting legal counsel is also of the opinion that in the absence of Federal, Provincial or Regional Regulatory control of air emissions from Trans Mountain Pipe Line Company Ltd.'s Burnaby facilities, the Municipality does have legal grounds to develop a Municipal Health Bylaw.

This report recommends against the Municipality of Burnaby providing legal services to the B.C.E.P. for a Federal Court of Appeal application. This report does recommend that Municipal Council give direction to staff to develop a Municipal Health Bylaw which would regulate air emissions from Trans Mountain's Burnaby facilities subject to conditions as noted in the attachment to this report.



1.0 INTRODUCTION:

During the 1988 November 28 meeting of Municipal Council, the Burnaby Citizens for Environmental Protection presented a Brief which requested that this Municipality provide legal counsel for a Federal Court of Appeal application regarding the National Energy Board's approval of Trans Mountain Pipe Line Company Ltd.'s facilities expansion and that Municipal Bylaws be established for controlling future expansion of petroleum facilities and emissions of air contaminants at vessel loading docks.

This report is in response to Council's direction that staff review and report on the requests of the Burnaby Citizens for Environmental Protection and the feasibility of enacting a Municipal Bylaw to regulate air emissions from Trans Mountain's Burnaby facilities.

2.0 REQUEST FOR PROVIDING LEGAL COUNSEL TO THE B.C.E.P.
IN A FEDERAL COURT OF APPEAL APPLICATION:

The B.C.E.P. Brief was forwarded to Dr. A.R. Thompson, Associate Counsel with Ferguson Gifford for review and recommendation. Dr. Thompson represented the Municipality of Burnaby on the recent Application for Leave to the Federal Appeal Court concerning the National Energy Board's approval of the Trans Mountain Pipe Line Company Ltd.'s facilities expansion.

Dr. Thompson's written analysis of the B.C.E.P.'s grounds for Federal Court of Appeal application are attached for Council's information (Attachment 1).

Dr. Thompson is of the opinion that although the B.C.E.P. may have stronger grounds for their Federal Court of Appeal application than the Municipality of Burnaby had, their likelihood of obtaining leave to appeal is low, as many of the items for argument were previously rejected during the Municipality of Burnaby's application.

Further, if the B.C.E.P. were granted leave to appeal, it is Dr. Thompson's opinion that they would be unlikely to succeed on an appeal.

Taking into consideration Dr. Thompson's opinion, staff are recommending against providing legal services to the B.C.E.P. should they proceed with an Application for Leave to the Federal Appeal Court concerning the National Energy Board's approval of the expansion to Trans Mountain's Burnaby facilities.

3.0 RESTRICTING FUTURE EXPANSION OF PETROLEUM OR OTHER HAZARDOUS GOODS INDUSTRIES AND THE FEASIBILITY OF ENACTING A MUNICIPAL BYLAW TO CONTROL AIR EMISSIONS FROM TRANS MOUNTAIN'S BURNABY FACILITIES:

Dr. Thompson's comments on this portion of the B.C.E.P. Brief are as follows:

"In our view, the time and money spent on an attempt to gain leave to appeal would be more effectively channelled into drafting a public health bylaw which would regulate Trans Mountain and other polluters. It is likely that a land use zoning bylaw similar in form to the North Vancouver one would not be effective for regulating an environmental/public industry. However, if a bylaw were designed from an environmental/public health/nuisance perspective and applied to Burnaby as a whole it might be able to meet the constitutional constraints arising out of a municipality regulating a federally regulated industry. It would be essential that the bylaws be authorized under the British Columbia Municipal Act and that it not be in direct conflict in an operational sense with any other provincial or federal laws or regulations. In addition, it must not go far as to prohibit any activity which is permitted by either the Provincial or Federal Government. The issue of the enforcement of the bylaw would have to be carefully considered.

Should you enact such a bylaw which would have the effect of regulating the emissions produced by the Trans Mountain facilities, you will likely face a court challenge from Trans Mountain on matters of jurisdiction. If the bylaw has been properly drafted from a constitutional and jurisdictional standpoint, it would likely be upheld and be effective until preempted by valid federal laws or regulations. Thus, the main effect of a Burnaby bylaw in the long run may be to force the federal authorities (Ministry of Environment and NEB) to legislate an effective pollution control regime for Trans Mountain."

4.0 MUNICIPAL HEALTH BYLAW DEVELOPMENT:

Taking into consideration the comments and recommendation by Dr. Thompson, the Environmental Health Division is recommending that Municipal Council direct staff to develop a Municipal Health Bylaw which would regulate air emissions from Trans Mountain Pipe Line Company Ltd.'s Burnaby operations.

5.0 CONCLUSIONS:

Consulting legal counsel is of the opinion that further legal appeals against the National Energy Board's approval of Trans Mountain Pipe Line Company Ltd.'s facilities expansion are unlikely to succeed.

In the absence of Federal, Provincial or Regional regulatory control, the consulting legal counsel is recommending the development of a Municipal Health Bylaw to regulate air emissions from Trans Mountain Pipe Line Company Ltd.'s Burnaby facilities subject to conditions as noted in the attachment.

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Attachment

cc: Medical Health Officer
Director Administrative &
Community Services
Municipal Solicitor
Director Planning &
Building Inspection

George V. Harvie

G.V. Harvie, C.P.H.I.(C)
CHIEF PUBLIC HEALTH INSPECTOR

Ferguson
Barristers & Solicitors

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Rosa D. Ellis
Martin L. Pallason
Brian L. Child
Grant Ritchey

Suite 500 - Park Place
666 Burrard Street
Vancouver, B.C.
Canada V6C 3H3

Telephone (604) 687-3216
FAX (604) 683-2780
Telex 04-55183

Associate Counsel: Dr. Andrew R. Thompson

Please Reply To: **A.R. Thompson**
File No.: **18776/001**

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January 4, 1989

Mr. George V. Harvie
The Corporation of the District of Burnaby
4949 Canada Way
Burnaby, B.C.
V5G 1M2

Dear Mr. Harvie:

Re: Burnaby Citizens for Environmental Protection
Application for leave to appeal to the Federal
Court of Appeal the National Energy Board's
decision dated December 19, 1988.

Further to your letter of December 28, 1988, we have reviewed the Burnaby Citizens for Environmental Protection ("BCEP")'s presentation to the Burnaby Council. We agree with the BCEP that the December 19, 1988 decision of the National Energy Board on the BCEP's application for revision, review, rehearing and stay of the Trans Mountain decision (OH-1-87) is appealable to the Federal Court. The time for applying for leave to appeal is limited by S. 22(1) of the National Energy Board Act to one month period from the date of the Board's decision or order. This time period will run out on January 18, 1989. Therefore any application by BCEP must be filed on or before January 18, 1989. We note that the Board's decision refers to a telex of December 1, 1988 advising BCEP that their application was denied. Trans Mountain might therefore argue that one month ran from that date but it is our opinion that this argument would not prevail and that the effective date would be December 19, 1988.

Although BCEP may have stronger grounds for their Federal Court of Appeal application than the Municipality of Burnaby had, their likelihood of obtaining leave to appeal is low.

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Arguments previously presented by Burnaby

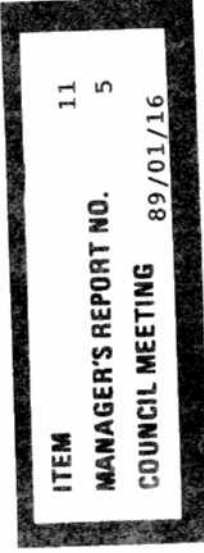
A number of the arguments put forward by the BCEP in their review application are essentially the same as those put forward by the Municipality of Burnaby in its October 17, 1988 application for leave to appeal to the Federal Court of Appeal. The appropriateness of proceeding under Section 49 of the National Energy Board Act, the regulation of hydrocarbon vapour emissions at Westridge and the Burnaby Tank Farm and the production of contingency plans were all issues before the Federal Court of Appeal at that time. It therefore seems unlikely that the BCEP will be granted leave to appeal on these particular issues.

Requirement for a comprehensive environmental impact assessment

In order to succeed on their appeal, BCEP must convince the Court that the NEB erred on a question of law or question of jurisdiction. For example, if the NEB has misinterpreted their own rules or gone beyond their jurisdiction in coming to their decision, an appeal will likely succeed. On the other hand, if the BCEP's argument merely goes to the sufficiency or adequacy of evidence presented or to a matter of policy, the Federal Court of Appeal will defer to the NEB as it is an expert tribunal appointed to deal with such matters. The issue of sufficiency of evidence is particularly important in the context of the BCEP's request for a comprehensive environmental impact assessment. The NEB has made it clear that it was satisfied with the environmental impact assessment presented to the Board by Trans Mountain in their application. Our opinion is that the Court will not grant leave to appeal this issue. This issue was raised in the previous Burnaby application for leave to appeal but was dropped at the hearing on the ground that there was no legal argument other than one of sufficiency of evidence.

Lack of fairness argument

The request for rehearing on the basis of unfairness of the hearing is the strongest of BCEP's arguments. However, it is important to note that they attempted to present this particular argument at the October 17, 1988 hearing and were not well received. The fact that the NEB did schedule a separate Burnaby sitting will likely lead the Court to conclude that the Burnaby citizens had a fair opportunity to be heard. Although the BCEP can argue that they were not given sufficient time or an adequate opportunity to be heard, the fact remains that they were given an opportunity to be heard, an opportunity to cross examine witnesses and to present a final argument. Again it is our opinion that the Court will refuse leave to appeal on the question of fairness.



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Other arguments

The enactment of the Canadian Environmental Protection Act does not at this point in time have any particular effect on the Board's decision given that any new regulations which might apply to Trans Mountain's application are not yet in effect.

It is also unlikely that the court will accept BCEP's application on the basis of the decline in world oil prices. On the issue of the shipment and storage of methanol, the fact that Trans Mountain made it clear that they do not intend to ship or store methanol without additional facilities makes it difficult to find fault with the NEB's finding on this point. However, should it be discovered that methanol is being shipped and stored prior to additional facilities being built, the Municipality of Burnaby or the BCEP would be better placed to apply to the NEB for a review or rehearing of this particular matter. For the moment, absent a municipal by-law or NEB regulations in this regard, there is little that can be done to force Trans Mountain to self-regulate.

Municipal by-law

As the foregoing has undoubtedly made clear, it is our opinion that the BCEP is unlikely to succeed on an application for leave to appeal or on an appeal if they were granted leave to appeal. In our view, the time and money spent on an attempt to gain leave to appeal would be more effectively channelled into drafting a public health by-law which would regulate Trans Mountain and other polluters. It is likely that a land use zoning by-law similar in form to the North Vancouver one would not be effective for regulating a federally regulated industry. However, if a by-law were designed from an environmental/public health/nuisance perspective and applied to Burnaby as a whole it might be able to meet the constitutional constraints arising out of a municipality regulating a federally regulated industry. It would be essential that the by-law be authorized under the British Columbia Municipal Act and that it not be in direct conflict in an operational sense with any other provincial or federal laws or regulations. In addition, it must not go so far as to prohibit any activity which is permitted by either the Provincial or Federal Government. The issue of the enforcement of the by-law would have to be carefully considered.

Should you enact such a by-law which would have the effect of regulating the emissions produced by the Trans Mountain facilities, you will likely face a court challenge from Trans Mountain on matters of jurisdiction. If the by-law has been properly drafted from a constitutional and jurisdictional

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standpoint, it would likely be upheld and be effective until preempted by valid federal laws or regulations. Thus, the main effect of a Burnaby by-law in the long run may be to force the federal authorities (Ministry of Environment and NEB) to legislate an effective pollution control regime for Trans Mountain.

We trust you will find the above useful and please feel free to contact us in order to discuss the above matter or any other issues.

Yours truly,

FERGUSON GIFFORD



Per: Andrew R. Thompson

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