



File OF-Surv-AMP-2015-0901  
2 March 2016

## LETTER DECISION

Mr. Mark Fiedorek  
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Mr. Robert Steedman  
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Dear Messrs. Fiedorek and Steedman and Ms. Fisk and Ms. Kolber:

**Westcoast Energy Inc., carrying on business as Spectra Energy Transmission  
(Westcoast)  
Administrative Monetary Penalty Request for Review (AMP-009-2015)  
Transmission North Expansion Project  
National Energy Board Letter Decision**

### BACKGROUND

On 21 April 2011, the National Energy Board (Board or NEB) issued Order XG-W102-005-2011 (Order), granting Westcoast approval to construct and operate the Transmission North Expansion Project (Project) pursuant to section 58 of the *National Energy Board Act* (NEB Act).

Pursuant to Part IX of the NEB Act and section 2(3) of the *Administrative Monetary Penalties Regulations (National Energy Board)* (AMP Regulations), the Administrative Monetary Penalty (AMP) Officer issued Notice of Violation (NOV) AMP-009-2015 to Westcoast on 5 May 2015.

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The NOV was issued to Westcoast for a failure to provide information specific to the effectiveness of mitigation applied to minimize effects on the Western Toad and its breeding habitat in the first year post-construction monitoring report, as required by Condition 7 of the Order. The penalty was set in the amount of \$28,000.00.

On 29 May 2015, Westcoast submitted a Request for Review of both the penalty amount of \$28,000 and the facts of the violation.

The Board issued a procedural letter on 16 June 2015, setting out the process through which the Request for Review would be considered. In accordance with this process, the Board received the AMP Officer's disclosure package on 23 June 2015 and Westcoast's submission on 29 July 2015. The AMP Officer filed his response submission on 28 August 2015 and Westcoast filed its reply on 28 September 2015.

## **DISPOSITION**

For the reasons that follow, the Board has determined that:

- **Westcoast committed the violation; and**
- **The total gravity value, which had previously been assessed at “-1” is adjusted to “-3” and the amount of the penalty is hereby reduced accordingly to \$4,000.00.**

## **ANALYSIS**

### **The Facts of the Violation**

#### *Views of the Parties*

The AMP Officer states in the NOV that the Board clearly stated in Condition 7 of the Order that it expected Westcoast to provide information specific to the effectiveness of mitigation applied to minimize effects on the Western Toad and its breeding habitat in its first year post-construction monitoring report.

In its response submission, the AMP Officer states that Westcoast's obligation under Condition 7 was to include information on the effectiveness of the mitigation relating to the Western Toad and its breeding habitat, and not just to report that mitigation actions were planned or had been completed. Westcoast submits that Condition 7 is not clear because it does not set out what was expected and when in terms of assessing the effectiveness of the applied mitigation. Westcoast also argues that it did effectively mitigate the breeding habitat of the Western Toad by constructing dugouts.

### ***Views of the Board***

The Board, after reviewing all of the evidence on the record and submissions by the parties, finds that Westcoast contravened Condition 7 of the Order because Westcoast failed to provide information specific to the effectiveness of mitigation applied to minimize effects on the Western Toad and its breeding habitat in the first year post-construction monitoring report. Therefore, the Board finds that Westcoast committed the violation.

### **Penalty Amount**

In the NOV, the AMP Officer applied different gravity levels to the criteria as set out in the table in section 4 of the AMP Regulations:

1. Other violations in the previous seven years: “+1”;
2. Any competitive or economic benefit from violation: “0”;
3. Reasonable efforts to mitigate/reverse the violation’s effects: “0”;
4. Negligence on the part of person who committed violation: “0”;
5. Reasonable assistance to Board with respect to the violation: “-1”;
6. Promptly reported violation to Board after becoming aware of the violation: “+1”;
7. Steps taken to prevent reoccurrence of violation: “-2”;
8. Violation was primarily reporting/record-keeping failure: “0”; and
9. Any aggravating factors in relation to risk of harm to people or environment: “0”.

The total gravity factor of “-1” resulted in a penalty amount of \$28,000.00.

Westcoast is disputing the gravity values ascribed to criteria number 6 (promptly reporting after becoming aware) and criteria number 8 (primary a reporting failure) in the NOV. The Board will deal with the disputed gravity factors below.

### **Whether the person, after becoming aware of the violation, promptly reported the violation to the Board**

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

In the NOV, the AMP Officer applied a gravity value of “+1” and stated the following:

The Board discovered the final term of Condition 7 had not been addressed during its PCMR evaluation. Westcoast did not report the violation to the Board and only identified steps to address the non-compliance after NEB raised concerns with the lack of appropriate reporting as required.

The AMP Officer further submits that the Board's information request, dated 28 January 2015, clearly states in the preamble and the request that the component of Condition 7 relating to monitoring of Western Toad and its breeding habitat is missing from the first year post-construction monitoring report.

Westcoast asserts that criteria number 6 should not have been applied in the NOV because the information requests issued by the Board referenced the third year post-construction monitoring report and not the first year post-construction monitoring report and therefore, Westcoast was not aware of any violation in respect of the first year post-construction monitoring report.

### ***Views of the Board***

The Board notes that criteria number 6 is in relation to a person or company promptly reporting a violation to the Board *after becoming aware of the violation*. The Board finds that the AMP Officer did not provide the requisite evidence to support the view that Westcoast was aware it had committed a violation in respect of its first year post-construction monitoring report before the NOV was issued. Accordingly, the Board has decided to change the gravity level assigned to this factor to "0".

### **For type B violations, whether the violation was primarily a reporting or record-keeping requirement failure**

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

The AMP Officer asserts that criteria number 8 should not be applied because the intent of Condition 7, in relation to the Western Toad, was to provide information on the effectiveness of the mitigation and not to simply report that mitigation had been undertaken.

Westcoast states that criteria number 8 should be applied because the NOV was issued for a failure to report information and the AMP Officer did not provide any evidence that Westcoast failed to mitigate effectively.

#### ***Views of the Board***

Criteria number 8 speaks to the legislative, condition or commitment requirements to report or keep records, and the person or company's adherence to those requirements. The NOV was issued to Westcoast for the contravention of Condition 7 of the Order. The relevant facts of the NOV and the AMP Officer's submissions spoke to Westcoast's failure to report information, specifically, information on the effectiveness of mitigation

applied to minimize effects on Western Toad and its breeding habitat in its first year post-construction monitoring report, as required by the last component of Condition 7 of the Order. The NOV was not issued for a failure to assess the effectiveness of the mitigation measures applied. Accordingly, the Board has concluded that criteria number 8 should be applied with a gravity value of “-1”.

**Consequently, the total gravity value is adjusted to “-3” and the amount of the penalty is hereby set to \$4,000.00.**

[REDACTED]

C.P. Watson  
Presiding Member

[REDACTED]

R.R. Wallace  
Member

[REDACTED]

D. Hamilton  
Member