



Issue Date: July 27, 2021

Citation: *Trans Mountain Pipeline ULC et al v. Canada (Environment and Climate Change)*, 2021 EPTC 7

EPTC Case Nos.: 0017-2021, 0018-2021, 0019-2021 and 0020-2021

Case Name: *Trans Mountain Pipeline ULC et al v. Canada (Environment and Climate Change)*

Applicant: Trans Mountain Pipeline ULC (0017-2021); Clifford Wendell Jones (0018-2021); Alan Martin Dallas (0019-2021); Neil Pelletier (0020-2021)

Respondent: Minister of Environment and Climate Change Canada

Subject of proceeding: Review commenced under s. 256 of the *Canadian Environmental Protection Act, 1999*, S.C. 1999, c. 33 of a Compliance Order issued under subsection 11.21 of the *Migratory Birds Convention Act, 1994*, S.C. 1994, c. 22, for an alleged contravention of paragraph 6(a) of the *Migratory Birds Regulations*, C.R.C., c. 1035.

Heard: July 13, 2021 (by videoconference)

Appearances:

Parties

Trans Mountain Pipeline ULC
Clifford Wendell Jones
Alan Martin Dallas
Neil Pelletier

Minister of Environment and
Climate Change Canada

Counsel

Brad Gilmour
Sean Assie
David McKinnon

Sarah Bird
Alicia Blimkie

DECISION DELIVERED BY:

**HEATHER GIBBS
LESLIE BELLOC-PINDER
PAUL MULDOON**

Overview

[1] This decision deals with whether or not it is reasonable in the circumstances for certain measures outlined in an environmental compliance order to remain in effect until August 20, 2021, with respect to certain construction work on the Trans Mountain pipeline expansion project in Burnaby, British Columbia, to avoid harm to migratory birds. In effect, the measures required all active work be stopped.

[2] On April 12, 2021, Environment and Climate Change Canada (“ECCC”) issued a verbal environmental compliance order under s. 11.21(1) of the *Migratory Birds Convention Act, 1994*¹ (“MBCA”) to Trans Mountain Pipeline ULC (“Trans Mountain”) and three individuals: Clifford Wendell “Biff” Jones, Alan Martin Dallas and Neil Pelletier. The compliance order related to an alleged contravention of s. 6(a) of the *Migratory Birds Regulations*² (“MBR” or “the Regulations”) in relation to the destruction of an Anna’s Hummingbird nest and egg witnessed during an inspection of an approximately 900-meter stretch of approved Trans Mountain Expansion Project (“the Project”) right-of-way in Burnaby, British Columbia referred to as Construction Work Package-98 (“CWP-98” or “the Site”).

[3] Section 6(a) of the Regulations prohibits the disturbance, destruction, or take of a migratory bird or egg of a migratory bird without a permit. An unintended violation of this prohibition is referred to as “incidental take”. There is no regulatory system currently in place to manage or permit incidental take.³ Trans Mountain and ECCC both agree that, with few exceptions, every incidental take is a breach of the MBCA and Regulations.⁴

[4] The verbal compliance order was followed by written Environmental Compliance Order No. 9530-2021-03-25-6490 (“Compliance Order”), issued on April 16, 2021, which included three compliance measures: prohibiting Trans Mountain from harming migratory birds, directing Trans Mountain to cease all significant activities at the Site, and requiring that Trans Mountain post signage at the Site. The duration of the order is until August 20, 2021 at 00:01 hours.

[5] Section 11.2 of the MBCA empowers a Game Officer to issue an environmental compliance order and sections 257 to 271 of *Canadian Environmental Protection Act*⁵ (“CEPA”) give the Environmental Protection Tribunal of Canada (“EPTC” or “the Tribunal”) the jurisdiction to review the order and (a) confirm or cancel the order; (b) amend or suspend a term or condition of the order, or add a term or condition to, or delete a term or condition from, the order; or (c) extend the duration of the order for a certain period.

¹ *Migratory Birds Convention Act, 1994*, S.C. 1994, c.22.

² *Migratory Birds Regulation*, C.R.C., 1035.

³ Report of Michael Preston, “Breeding Bird Mitigation Technical Review” at p. 1, being Exhibit A to Affidavit of Michael Preston, sworn 2021 06 14 (Preston Affidavit).

⁴ Trans Mountain Submissions, para 33.

⁵ *Canadian Environmental Protection Act, 1999*, S.C. 1999, c.33.

[6] Trans Mountain requested a review of the Compliance Order and requests that the Tribunal cancel the Compliance Order or, in the alternative, amend it to remove measures #2 and #3, and remove the named individuals. ECCC requests that the Compliance Order be upheld in its entirety.

[7] The Tribunal finds that there is no “reasonableness” standard implied in s. 6(b) of the Regulations, which prohibits harm to migratory birds. However, enforcement of the “no harm” provision is to be undertaken in a manner that is “reasonable in the circumstances” under s. 11.21 of the MBCA. The Tribunal finds that it is reasonable in the circumstances to modify the measures in the Compliance Order by reducing its duration to reflect the reduced risk of harm in this case to migratory birds, due to the imminent end of the nesting window and the mitigation measures required for this Project. The Tribunal also cancels the Compliance Order as it applies to the three named individuals.

Background

The Project

[8] Trans Mountain, in its submissions, describes the Project as follows:

The Project involves a twinning of the existing 1,150 km Trans Mountain Pipeline between Strathcona County, Alberta and Burnaby, British Columbia and the expansion of four terminals and thirteen pump stations. It is a massive and complex undertaking determined to be in the national public interest, with nearly 1000 km of new pipeline under construction. The environmental and socio-economic assessment ("ESA") for the Project identified that the Project would result in impacts to, among other things, migratory birds and their habitat.

...

To address these concerns, the Applicant developed mitigation measures for avoiding or reducing Project impacts on wildlife including birds, which were determined by the regulator to be reasonable.

Appreciating the impacts and the benefits of the Project, the National Energy Board ("NEB") (now the Canada Energy Regulator ("CER")) recommended approval of the Project.

The Governor in Council ("GIC") found that the Project would result in "significant adverse environmental effects that are justified in the circumstances" and approved the Project as being in the national public interest.⁶

⁶ Trans Mountain Submissions, starting at para 11

Trans Mountain's Mitigation Measures

[9] In its request for review to the EPTC, Trans Mountain summarizes the mitigation measures it is obliged to follow in order to protect migratory birds:

In British Columbia, and specifically with respect to migratory birds, the Applicant's first priority for mitigation was to schedule clearing and construction activities outside the migratory bird nesting season of March 15 to August 15. However, it was also recognized that some clearing activities would need to occur within the bird nesting season. In such cases, the Applicant committed to follow a series of additional mitigation measures, including conducting migratory bird nest sweeps using nonintrusive methods to search for evidence of nesting in order to minimize impacts. In the event an active nest is found, it is then subject to site-specific mitigation measures (i.e., clearly marked protective buffer around the nest and/or non-intrusive monitoring).

After the rigorous and exhaustive review, the CER ultimately concluded that the Applicant's proposed mitigation measures were reasonable. On June 18, 2019, the Government of Canada approved the Project, confirming the Project was in the Canadian public interest. A Certificate of Public Convenience and Necessity was issued by the CER on June 21, 2019 (CPCN No. OC-065). The Project is subject to 156 conditions enforced by the CER.

Importantly, the Project's approval requires compliance with those conditions and the Applicant's mitigation measures to avoid or minimize Project effects. Of course, the Applicant is not held to a standard of zero impacts, nor is such a standard of perfection realistic, appropriate, or demanded in the context of major infrastructure projects.

[10] Both ECCC and Trans Mountain agree that the first priority mitigation measure to protect migratory birds is to avoid construction during the nesting season.⁷

[11] At the time of the inspections and issuance of the Compliance Order, Trans Mountain was conducting tree clearing activity during the nesting window. According to the affidavit of Lauren Darr, Project Manager for the portion of the Project which includes the Site, this was a result of necessary construction schedule adjustments and other factors including minimizing environmental impacts on watercourse crossings, dealing with trespassers, and delays in obtaining permits from the City of Burnaby.⁸ Trans Mountain was implementing its Environmental Protection Plan, which included mitigation

⁷ Trans Mountain Submissions para 16; Affidavit of Sean Britt, sworn 2021 06 17 (Britt Affidavit) at Exhibit A p.2; Affidavit of Kevin Fort, sworn 2021 06 25 (Fort Affidavit) para 29.

⁸ Affidavit of Lauren Darr, sworn 2021 06 18 (Darr Affidavit), para. 14

measures such as migratory bird nest sweeps commencing on March 1, 2021, before the bird nesting window, and creating buffers around identified trees with nests.⁹

[12] Current ECCC advice for industry to minimize the risk of harm to migratory birds is in the form of Avoidance Guidelines published on its website.¹⁰ The Guidelines advise proponents to avoid intrusive techniques such as nest sweeps or nest surveys in complex habitats for various reasons but most fundamentally because “the ability to detect nests with this technique is very low and the risk of nest destruction of undetected nests during subsequent clearing activities is very high.”¹¹ Previous ECCC advice endorsing such techniques has now been withdrawn. Michael Preston, the Stantec biologist retained by Trans Mountain to conduct a review of the migratory bird mitigation measures, commented that “The methods cited in the *Nest Sweep Protocol* (i.e., CWS 2008) are outdated and have not been endorsed by CWS since about 2010 (CMIAE 1017)”¹² Kevin Fort, senior biologist with ECCC, confirmed that ECCC does not have the authority to prescribe or recognize specific avoidance measures for specific circumstances or activities. He acknowledged in cross-examination that industry practice is to conduct nest sweeps and surveys and create buffer zones around nests as a mitigation measure. Mr. Fort testified however that, “in the event a proponent chooses to engage in high risk activity then they also face the risk that they will, as a result, be in contravention of the MBCA and MBR despite any mitigation measures they have in place.”¹³

The Inspections and Issuance of the Compliance Order

[13] ECCC submitted evidence that complaints were received from the public regarding harm to Anna’s Hummingbird at CWP-98 between February and early April 2021.¹⁴ Anna’s Hummingbird is a migratory species protected under the MBCA. Its nests are small and hard to find. It is one of the earliest nesting species and is not considered a species at risk.

[14] On March 23, 2021, ECCC received a complaint through its public reporting portal regarding an imminent disturbance and destruction of active Anna’s Hummingbird nests at CWP-98. The same day, Game Officer Justus Mirembe attended CWP-98 with Chloe Boynton, a Canadian Wildlife Service (“CWS”) biologist, and conducted an inspection under the authority of section 7 of the MBCA.¹⁵ At that time Ms. Boynton observed two Anna’s Hummingbird nests as well as other migratory bird species.

⁹ Britt Affidavit, Exhibit A at pp. 8-9.

¹⁰ Fort Affidavit para 11.

¹¹ Fort Affidavit para. 21.

¹² Preston Review, p. 4 of 17, Exhibit A to Affidavit of Michael Preston, sworn 2021 06 14 (Preston Affidavit).

¹³ Fort Affidavit para. 23

¹⁴ Affidavit of Justus Mirembe, sworn 2021 06 25 (Mirembe Affidavit) at paras. 6, 10 and 16.

¹⁵ Mirembe Affidavit paras. 10-11.

[15] On April 12, 2021, in response to further complaints, Game Officers Mirembe and Ross Dolan conducted an inspection of the Site to verify compliance with the MBCA. They were accompanied by a member of the public. The Game Officers were met by Trans Mountain employees including Wildlife Biologist Tom Heakes. They observed 5 Anna's Hummingbird nests in standing trees that had been previously identified, with a 5 meter buffer zone around each tree marked out with tape. Game Officer Mirembe subsequently observed a freshly felled tree, with a hummingbird nest and broken egg on the ground. A Trans Mountain subcontractor later confirmed he had felled the tree approximately 3 hours earlier.

[16] Game Officer Mirembe issued a verbal Compliance Order to individuals he identified as Trans Mountain representatives, Mr. Dallas, Mr. Pelletier and Mr. Jones, to immediately cease activity on the Site. Trans Mountain stopped its activities at the Site following the issuance of Compliance Order.

[17] On April 16, 2021, after consulting with Ms. Boynton, Game Officer Mirembe issued the written Compliance Order that is the subject of this review.

[18] As mentioned above, subsequent to the issuance of the Compliance Order, Trans Mountain retained Michael Preston, Senior Wildlife Biologist with Stantec Consulting, to review the Project-specific mitigation measures that were developed to avoid or reduce the risk of incidental take of migratory birds and their nests and eggs.

[19] Mr. Preston concluded the mitigation measures were consistent with industry standards but suggested that they could be improved in a number of ways. Trans Mountain has proposed to implement most of Mr. Preston's recommendations through its Revised Field Guide dated June 21, 2021.¹⁶

Review process by the Tribunal

[20] In order to expedite this review in light of the short timelines provided in the legislation, the Tribunal attended the cross-examinations of the parties' witnesses which took place by Zoom videoconference on July 5, 2021. The expedited hearing was then conducted by Zoom videoconference on July 13, 2021, based on written materials filed by the parties in advance. The reasons which follow address only the most salient evidence and submissions due to the 15 day time period to render a decision on a compliance order review as prescribed by s. 266 of CEPA, however the panel has fully considered all evidence and submissions in arriving at its findings.

¹⁶ Exhibit D to Britt Affidavit.

Relevant Legislation (See Appendix A for full provisions)

Migratory Birds Convention Act, 1994, (S.C. 1994, c. 22)

11.21 (1) Whenever, during the course of an inspection or a search, a game officer has reasonable grounds to believe that any provision of this Act or the regulations has been contravened by a person that is continuing the commission of the offence, or that any of those provisions are likely to be contravened, the game officer may issue a compliance order directing any person described in subsection (2) to take any of the measures referred to in subsection (3) that are reasonable in the circumstances and consistent with the protection and conservation of migratory birds and their nests and with public safety in order to cease or refrain from committing the alleged contravention.

Migratory Birds Regulations (C.R.C., c.1035)

6 Subject to subsection 5(9), no person shall

(a) disturb, destroy or take a nest, egg, nest shelter, eider duck shelter or duck box of a migratory bird, or

(b) have in his possession a live migratory bird, or a carcass, skin, nest or egg of a migratory bird

except under authority of a permit therefor.

Canadian Environmental Protection Act, 1999 (S.C. 1999, c.33)

263 The review officer, after reviewing the order and after giving all persons who are subject to the order, and the Minister, reasonable notice orally or in writing of a hearing and allowing a reasonable opportunity in the circumstances for those persons and the Minister to make oral representations, may

(a) confirm or cancel the order;

(b) amend or suspend a term or condition of the order, or add a term or condition to, or delete a term or condition from, the order; or

(c) extend the duration of the order for a period of not more than 180 days less the number of days that have passed since the day on which the order was received by the person who is subject to the order, not counting the days during which the order was suspended under subsection 258(3).

265 A review officer shall not exercise any of the powers referred to in section 263 if doing so would result in

- (a) impairment or serious risk of impairment of the quality of the environment for any use that can be made of it;
- (b) injury or damage or serious risk of injury or damage to any property or to any plant or animal life; or
- (c) danger to the health or safety of any person.

Issues

[21] The overarching question for the EPTC under s. 263 of CEPA is whether it should confirm, cancel or amend the Compliance Order.

[22] The sub-issues stemming from this issue arise from the language in the MBCA, particularly section 11.21(1):

- i) whether there are reasonable grounds to believe that Trans Mountain contravened the MBCA or its regulations and was continuing the commission of the offence,
- ii) whether there are reasonable grounds to believe that Trans Mountain was likely to contravene the MBCA or its regulations;
- iii) whether the measures in the Compliance Order are reasonable in the circumstances; and
- iv) whether the Compliance Order should be cancelled as it pertains to the named individuals.

Discussion, Analysis and Findings

Preliminary Questions of Statutory Interpretation

- i) “Reasonable grounds to believe” test in MBCA s. 11.21 (1)

[23] In *Kost v. Canada (Environment and Climate Change)*, 2019 EPTC 3 (“*Kost*”) at para. 13, the Tribunal found that the phrase “reasonable grounds to believe” requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities.

[24] In that case the Tribunal was considering s. 235(1) of CEPA, which includes an identical standard of proof to that found in section 11.21(1) of the MBCA applicable in this case; i.e., “reasonable grounds to believe”. ECCC submits that the same standard of proof was interpreted by the Supreme Court of Canada in *Mugesera v. Canada (M.C.I.)*, 2005 SCC 40 at para. 114:

The first issue raised by s. 19(1)(j) of the *Immigration Act* is the meaning of the evidentiary standard that there be “reasonable grounds to believe” that a person has committed a crime against humanity. The FCA has found, and we agree, that the “reasonable grounds to believe” standard requires something more than mere suspicion, but less than the standard applicable in civil matters of proof on the balance of probabilities... In essence, reasonable grounds will exist where there is an objective basis for the belief which is based on compelling and credible information... [citations omitted]

[25] The parties in this case did not disagree on this point. The Tribunal finds that the above reasoning from the Supreme Court, which was found in *Kost* to be applicable to s. 235(1) of CEPA, is equally applicable to s. 11.21(1) of MBCA. As noted in *Mugesera* at para. 116, this standard applies to questions of fact and is lower than the civil standard of proof.

ii) The Tribunal’s powers under s. 263 of CEPA

[26] The Tribunal in *Kost* also analyzed the question of the Tribunal’s powers under s. 263 of CEPA, and whether it is conducting a *de novo* review of reasonableness at the time of the hearing. The Tribunal in *Kost* found at para. 16 that it was not “frozen in time”, but that it could consider circumstances in addition to those considered by the compliance officer at the time the environmental compliance order was issued. This panel agrees. Section 263 is a clear statement of the Tribunal’s powers to order a remedy in a review of a compliance order, limited only by CEPA s. 265 (described further below).

Issue No. 1: whether there were reasonable grounds to believe that Trans Mountain contravened the MBCA or regulations and was continuing the commission of the offence

[27] Section 11.21(1) of the MBCA provides that a game officer may issue a compliance order when, “during the course of an inspection or a search, a game officer has reasonable grounds to believe that any provision of this Act or the regulations has been contravened by a person that is continuing the commission of the offence...”

Trans Mountain’s Submissions

[28] Trans Mountain argues that the first portion of s. 11.21(1), which it refers to as Ground 1, requires both a contravention of the MBCA or MBR, and a continuing contravention. Trans Mountain submits that the only evidence on the record of an actual contravention of the MBCA and regulations relates to the destruction of a single nest and egg of an Anna's Hummingbird on the Site no later than April 12, 2021. There is no convincing evidence of a continuing offence and therefore that Ground 1 has not been made out.

[29] Trans Mountain submits that offences can be either passive or requiring affirmative action. A passive offence is where there is a continuing duty, such as when someone deposits a substance harmful to migratory birds. In that instance, the offence would be continuing until the substance was removed. However, Trans Mountain submits that:

In contrast, the disturbance or destruction of a nest or egg of a migratory bird requires affirmative action (whether intentional or not). For a contravention that requires affirmative action to satisfy the element of "continuing the commission of the offence" in Ground 1, the action must be repeated. If an officer found evidence of a contravention, such as the destruction of a nest, where the affirmative act had been done, but there was no evidence that additional nests were being disturbed or destroyed at the time of the inspection, that would not satisfy the second element of Ground 1.

[30] In the facts of this case, Trans Mountain agrees that s. 6(a) of the MBR was violated in that a nest and egg of a migratory species was destroyed. However, Trans Mountain submits that there is no convincing evidence that the commission of the offence *was continuing* because the destruction of the Anna's Hummingbird's egg and nest was done by April 12, 2021 and there is no evidence that the offence was continuing. Trans Mountain states that evidence was inconsistent and conflated Grounds 1 and 2, that is, whether the offence was continuing or whether the provisions of the MBCA or regulations under the MBCA are likely to be contravened.

[31] Trans Mountain states that there is no compelling or credible evidence that additional migratory bird nests or eggs were disturbed or destroyed at the Site during the April 12, 2021 inspection, nor is there any evidence that Trans Mountain has destroyed a migratory bird nest or egg past this date at the Site. More particularly,

- while Game Officer Mirembe deposed in his affidavit to observing trees being cut at the Site on April 12, 2021, he confirmed when cross-examined that he did not, actually, see trees being cut that day; he only heard them being cut, and later observed that the trees had been felled.
- Game Officer Mirembe stated that he did not see the birds leave the nests and there is no evidence that those birds were displaying agitated behaviour or that Trans Mountain 's activities were otherwise disturbing or destroying the nests; and
- neither of the Game Officers Mirembe nor Dolan have the requisite expertise to identify whether activities resulted in disturbance of the nests (e.g., abandonment of a nest).

ECCC's Submissions

[32] ECCC submits that under subsection 11.21(1) of the MBCA, a compliance order may be issued where there are "reasonable grounds to believe" that the MBCA or the

MBR has been contravened by a person that is continuing the commission of the offence or that the MBCA or the MBR is likely to be contravened. Therefore, a compliance order that is made under subsection 11.21(1) should be upheld where the evidence points to the requisite “reasonable grounds to believe”.

[33] ECCC submits that there were reasonable grounds to believe that the legislation or regulations had been contravened by persons who were continuing the commission of the offence:

- During the inspection of CWP-98 on April 12, 2021, Game Officer Mirembe observed that a nest and egg were destroyed in a freshly fallen tree approximately two meters from a tree he had only moments earlier seen felled. Trans Mountain’s wildlife biologist confirmed at the time that these were of an Anna’s Hummingbird. In addition, the downed nest and egg were located less than two meters away from a recently cleared area.
- There does not appear to be a dispute between the parties that a destroyed nest and egg of an Anna’s Hummingbird was found during the April 12, 2021 inspection on CWP-98.

[34] ECCC does not address the question of whether a contravention that requires affirmative action, such the felling of a tree or the destruction of a nest, can be a “continuing” contravention.

Analysis and Findings on Issue No. 1

[35] Section 11.21(1) of the MBCA outlines two grounds where a compliance order may be issued, namely, where there are reasonable grounds to believe that any provisions of the MBCA or the regulations “has been contravened by a person that is continuing the commission of the offence” or provisions are likely to be contravened. The two grounds are disjunctive, the Game Officer needs reasonable grounds for one or the other ground, not both.

[36] As noted above, Trans Mountain makes extensive submissions with respect to both the “continuing” ground and the “likely” ground. The Tribunal notes that, for the most part, ECCC relies only on the “likely” ground.

[37] In its review of the evidentiary record, the Tribunal finds that Game Officer Mirembe had reasonable grounds to believe that Trans Mountain contravened the MBCA or its regulations.

[38] Game Officer Mirembe’s affidavit lays out the basis for his conclusion that there were reasonable grounds to issue the Compliance Order. The Tribunal finds that Game Officer Mirembe’s evidence is credible and trustworthy. The Tribunal found that, overall, Game Officer Mirembe’s testimony (some of which is outlined below), backed by his written notes, photographs, and other material, was consistent, detailed and coherent.

His memory was supported by notes taken at the time and email records. There is no evidence to support Trans Mountain's allegation that the public complaints or the fact that he was accompanied by a member of the public during the April 12, 2021 inspection tainted his motivations. The Tribunal finds that Game Officer Mirembe demonstrated independent and professional exercise of his discretion.

[39] The Site has been subject to a number of complaints. Game Officer Mirembe states that on April 9, 2021, WED received a public complaint that Anna Hummingbird's nests were being harmed at the CWP-98 site. The complaint prompted both Game Officer Mirembe and Game Officer Ross Dolan to attend the site on April 12, 2021.

[40] Game Officer Mirembe then outlines the basis as to why he believes there are reasonable grounds to believe that a contravention of the MBCA or its regulations occurred:

18. During the April 12, 2021 inspection of CWP-98, I observed various activities that included tree-cutting, shrub clearing, use of heavy machinery and bulldozing. The area was partially cleared and littered with fresh cut logs and half-pruned trees. Heavy machine tracks were visible in the area as well.

19. In the first ten minutes of the inspection, I observed five nests between five to ten meters in proximity to each other. I further observed that three of the nests were occupied by hummingbirds. Trans Mountain's wildlife biologist, who had accompanied Game Office Dolan and me on the inspection, confirmed verbally at that time that the birds were Anna Hummingbirds.

20. During the inspection, Game Officer Dolan and I noticed freshly fallen trees that, on closer inspection contained a nest and a cracked egg that was still stuck to the tree with sticky embryo residue. The egg and nest were within approximately two meters from a tree that I had witnessed being felled moments earlier. The egg and nest were both identified by Trans Mountain's wildlife biologist as a Anna's Hummingbird nest. A contractor cutting trees in the immediate vicinity had confirmed that he had cut down the tree approximately three hours earlier.

[41] Game Officer Mirembe then went on to state that he took samples of the egg and nest, logged and placed it in evidence bags and then took photographs and video of the area. He then stated that based on the information and evidence collected in the course of the inspection¹⁷ and consistent with ECCC's enforcement and compliance policy for the protection of wildlife, he came to the conclusion that he had reasonable grounds to believe that a contravention has occurred and that Trans Mountain was continuing to contravene and likely to contravene the MBR. He then issued a verbal Compliance Order.

¹⁷ Mirembe Affidavit, para 24.

[42] In reviewing the evidence, the Tribunal finds that there were reasonable grounds to conclude that there was a contravention of the MBCA or its regulations. Officer Mirembe entered the Site, witnessed an egg and nest disturbed or damaged, confirmed that the tree where the nest was found was recently cut down, and then drew a conclusion that s. 6 of the regulations under the MBCA were contravened. Trans Mountain did not disagree that one nest and egg had been destroyed. Although Trans Mountain suggested there was no proof that the tree was felled by Trans Mountain employees, the Tribunal finds Officer Mirembe's conclusion was reasonable based on what he witnessed and heard.

[43] It should be noted that Ms. Boynton, who is a wildlife biologist, during her inspection on March 23, 2021, recognized a number of migratory species at the Site. She states that her passive bird observations include Song Sparrows, Pine Siskin, American Robin and the Black-capped chickadee. Kevin Fort notes in his affidavit¹⁸ that other migratory birds were also on Site including Pacific Wren and the Spotted Towhee, and further stated that he suspected other species would be found if proper search techniques were used.

[44] Nevertheless, the Tribunal agrees with Trans Mountain's interpretation of 11.21(1) in that the first ground requires that the contravention be continuing. In this case, the felling of a tree with a migratory bird nest and egg was a contravention requiring affirmative action, and not a passive one that was continuing. It ended when the tree fell and the nest and egg were destroyed. Trans Mountain immediately stopped work when ordered to do so. The number of migratory species on Site is relevant to risk of future contraventions of the MBCA or regulations. As noted above, section 11.21(1) provides that ground 1 or ground 2 will be sufficient to issue a compliance order.

Summary of Findings on Issue No. 1

[45] The Tribunal finds that Game Officer Mirembe had reasonable grounds to believe that Trans Mountain contravened the MBCA or the regulations under that Act, in that it destroyed a migratory bird nest and egg. However, ECCC has not established that there were reasonable grounds to believe that the contravention was continuing. The Tribunal will now turn to the second Ground contained in s.11.21(1) of the MBCA.

Issue No. 2: Whether, during the course of the inspection, there were reasonable grounds to believe that Trans Mountain was likely to contravene the MBCA or the regulations

Trans Mountain's Submissions

¹⁸ Fort Affidavit, paras. 14-15.

[46] Trans Mountain refers to this as “Ground 2” in s. 11.21(2) of MBCA. Trans Mountain states that, with respect to the whether any provisions of the MBCA are “likely to be contravened,” the term “likely” refers to having a high probability of occurring to be true, very probable.

[47] Trans Mountain submits that the Compliance Order does not cite any “reasonable ground to believe” the MCBA or the regulations under that law are “likely” to be contravened as a result of Trans Mountain’s activities.

[48] Trans Mountain submits that Mr. Fort and Game Officer Mirembe explained their views as: "one nest is one nest too many" which Trans Mountain submits amounts to a “standard of perfection.” Trans Mountain submits that the standard of care under the MBCA is not perfection; it is reasonableness.

[49] Trans Mountain submits that if Parliament wished to prohibit all "likely" and "possible" effects from development activities during the bird nesting window, it would do so. Trans Mountain submits that Parliament could not include this probative language because it would effectively stop many important activities across the country during the bird nesting window such as forestry and agriculture activities.

[50] Trans Mountain submits that the mitigation measures it employed reduced the risks to migratory birds associated with Trans Mountain 's activities such that, in Trans Mountain's submission, they were not "likely" to result in a contravention, especially in light of the fact that numerous experts reviewed and approved the mitigation plans in the context of the review by the Canadian Energy Regulator (“CER”), and it has qualified professionals to develop and implement measures to protect migratory birds and their nests during the bird nesting window.

[51] Trans Mountain submits that Game Officer Mirembe, who expressed concern about nest search techniques, is not qualified to opine on the suitability of such techniques. Trans Mountain relies on the expert opinions of Matthew McTavish and Michael Preston in submitting that its nest search techniques meet or exceed industry standards, and submits it is not required to meet a “perfection” standard.

[52] Trans Mountain submits that there is no compelling or credible evidence that Trans Mountain was likely to contravene the MBCA or the regulations at the Site in the future. At most, the evidence in this proceeding suggests a "potential" for a contravention, which does not meet the threshold under Ground 2.

[53] Trans Mountain submits that the fact that Game Officer Mirembe thought that there would be future mortalities does not take into account the Project’s mitigation measures. As such, there is no "objective basis" for the belief that Trans Mountain was likely to contravene the MBCA and regulations by way of the disturbance or destruction of the two Anna's Hummingbird nests identified by Ms. Boynton in her inspection on March 23, 2021.

[54] Trans Mountain submits that Ms. Boynton's suggestion that Trans Mountain's activities could "potentially" result in disturbance or destruction of nests of other species, does not rise to the required "likely" contravention for Ground 2.

ECCC's Submissions

[55] ECCC submits that there were reasonable grounds to believe that a contravention was likely to occur:

- Game Officer Mirembe had reasonable grounds to believe that paragraph 6(a) of the MBR was likely to be contravened by a future disturbance or destruction of a migratory bird nest or egg if a compliance order was not issued with the measures as set out.
- In addition to the evidence provided through his Affidavit, Game Officer Mirembe also confirmed during his cross examination his reasonable grounds to believe that there would be a disturbance or destruction of nests and eggs of migratory birds if he took no steps on April 12, 2021. He based this belief on the nature of the location, activities that were taking place at CWP-98 (felling trees, shrubs, use of heavy equipment and machinery such as chainsaws and bulldozers) and that various species within the vicinity were identified, in addition to multiple Anna's Hummingbirds and their nests. Further, he was concerned with the techniques being used by the Applicants to locate migratory bird nests. Game Officer Mirembe relayed a conversation he had with Trans Mountain's wildlife biologist during the April 12, 2021 inspection where Game Officer Mirembe questioned whether they were conducting a scan of the trees from top to bottom (similar to WED practice). Game Officer Mirembe was told by the wildlife biologist that "no" they were not and that they were "doing the best we can."

[56] ECCC submits that there is no evidence of influence over WED inspections. Trans Mountain's suggestion that Game Officer Mirembe was influenced as early as February 2021 by the emotional tone of the public complaint(s) or internal discussion between other government employees in an email conversation (that did not include him) are bald allegations based on conjecture.

Analysis and Findings on Issue No. 2

Trans Mountain's submission that there is no "Standard of Perfection" is misplaced

[57] Trans Mountain submits that measures employed by Trans Mountain reduced the risks to migratory birds associated with Trans Mountain's activities to such an extent that they were not "likely" to result in a contravention and the MBCA does not call for a standard of perfection, but reasonableness. Trans Mountain also states that if Parliament wanted such a strict standard, it would have drafted the legislation in such a manner.

[58] The Tribunal disagrees with this submission. Upon reading the relevant provision, Parliament did in fact draft the relevant provision in such a manner. There is no reasonableness language in section 6(a) of the MBR, which reads:

Section 6. Subject to subsection 5(9), no person shall

(a) disturb, destroy or take a nest, egg, nest shelter, eider duck shelter or duck box of a migratory bird, or

(b) have in his possession a live migratory bird, or a carcass, skin, nest or egg of a migratory bird

except under authority of a permit therefor.

[59] Both parties agree that there was no permit for incidental take with respect to section 6 of the MBR. Hence, whether Trans Mountain was acting reasonably, or took reasonable measures to avoid a contravention of the MBCA or regulations, is not the focus of a Game Officer at the stage of determining whether there are grounds to issue a compliance order. The role of the Game Officer under the MBCA is to assess whether there are reasonable grounds to believe that the provisions of the MBCA or its regulations, and in this matter, section 6, are likely to be contravened.

[60] In interpreting the provisions of the MBCA, it is important to be guided by the purpose of the MBCA – the protection and conservation of migratory birds as populations and individual birds – and their nests,¹⁹ and hence any interpretation of the statute must be consistent with the purpose of the legislation.

[61] The Tribunal finds that there is an objective basis for the belief that Trans Mountain was likely to contravene the MBCA or its regulations.

[62] Trans Mountain states that during her March 23, 2021 inspection, Ms. Boynton identified two active Anna's Hummingbird nests, however, she did not account for Trans Mountain's mitigation measures which were being undertaken. Hence, Trans Mountain argues that there is no objective basis for the belief that Trans Mountain was likely to contravene the MCBA or its regulations by way of the disturbance or destruction of two Anna's Hummingbird nests. Trans Mountain goes on to state that although Trans Mountain's activities could "potentially" result in disturbance or destruction of nest of other species, this does not rise to the required "likely" contravention as required under MBCA.

[63] The Tribunal disagrees with Trans Mountain's submissions. Ms. Boynton's evidence states as follows:

Migratory birds breeding activity was confirmed from observations of two Anna's Hummingbirds sitting on nest. It is my expert opinion, based on ECCC's General

¹⁹ s. 1, MBCA.

nesting periods of migratory birds, knowledge of the area, and bird activity in the area, breeding activity by migratory birds will only increase in the upcoming weeks and months, with the arrival of new migrants. There is therefore an increasingly high likelihood that cutting vegetation, including shrubs and trees, or other disruptive activities during the nesting window, will likely result in disturbance or destruction of the identified Anna's Hummingbird nests and potentially nests of other species.²⁰

[64] The Tribunal finds that there was expert opinion identifying the presence of Anna's Hummingbird nests during the March 23, 2021 inspection and at that time, Ms. Boynton's expert opinion was that there is an increasingly high likelihood that the continued clearing of the area would "likely result in the disturbance or destruction of" the nests. Game Officer Mirembe was present during the March 23, 2021 inspection and therefore was aware of Ms. Boynton's opinion when he observed the Anna's Hummingbird nest in the tree that was cut during his inspection on April 12, 2021.

[65] The Tribunal disagrees with Trans Mountain's submission that Ms. Boynton did not recognize the mitigation measures required by Trans Mountain. In fact, she does recognize the mitigation measures, such as nest search techniques. She states as follows:

Due to the complexity of the habitat at this site, nest search techniques are not recommended because the ability to detect nests remain very low, while the risk of disturbing the active risks high.

[66] Hence, in reviewing a variety of factors, Ms. Boynton did recognize the Trans Mountain mitigation measures, but still acknowledged the risk of harm should clearing activities continue.

[67] Under cross-examination, Trans Mountain asked a number of questions in order to support its submission that a contravention of the MBCA or its regulations was not "likely" to occur. Game Officer Mirembe responded in the following way on re-examination:

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15 Q MS. BIRD: Mr. Mirembe, what did you
16 believe would likely occur if you did not issue the
17 compliance order and if you had not included the
18 measure to stop the activity?
19 A MR. MIREMBE: I believed with reasonable
20 grounds that there was going to be more birds and nests
21 and eggs destroyed if I did not do anything. So that
22 was my belief.
23 Q And why did you believe that?

²⁰ Appendix A of the Fort Affidavit.

24 A Because of the nature of the location, the activities
25 that were taking place at this site, and also, as I
26 mentioned, there were various species within the

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1 vicinity, not just Anna's Hummingbirds, that had been
2 identified.
3 One of the major, major concerns that I heard with
4 Mr. Heakes, even before I saw the destroyed nest, I
5 asked him a basic question regarding the techniques of
6 how they're finding nests. I asked him, Do you scan a
7 tree from top, bottom to make sure that there is no
8 nest before you authorize someone to cut it? And he
9 said, No. We only do the best we can.

...

25 And moments later we saw a destroyed nest, and I
26 pointed it out to him. I'm, like, I guess you see why

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1 this is a concern. These techniques are not working.
2 They're going to -- we're just going to have a
3 mortality. These birds are going to keep dying or
4 destroyed, right? So that was my concern, and it was
5 not addressed by the biologist at the time of my
6 inspection.
7 And I knew if I walked away, we were going to have
8 mortalities -- likely to have mortalities.²¹

[68] For all these reasons, the Tribunal finds that there were reasonable grounds to conclude that a contravention of the MBCA or its regulations was likely, based on Officer Mireembe's observations made and evidence collected on April 12, 2021.

[69] In this review the Tribunal has the additional benefit of the evidence and submissions filed. The evidence is clear that the most effective way to avoid a contravention of the MBCA and the MBR in a construction project is to avoid tree clearing during the nesting window.²² Sean Britt, Director of Environment for the Project, confirmed in his affidavit that Trans Mountain's Project permit incorporates the requirement to implement migratory bird protections including timing windows. He states:

16. In its Reconsideration Report, the NEB noted the views of ECCC concerning migratory birds and Trans Mountain's commitment to implement ECCC recommendations (page 252):

²¹ Transcript of cross-examination of Justus Mireembe, July 5, 2021.

²² Fort testimony, Preston Affidavit, supra, note 9.

ECCC said that the Project would adversely affect migratory birds through the removal and fragmentation of existing habitat, through sensory disturbance, and through increased human and predator access. It recommended that Trans Mountain apply timing windows and buffers to reduce effects on migratory birds and that Trans Mountain take additional measures to avoid and minimize impacts on habitats for all migratory birds where biodiversity hotspots are identified from survey work.

[...]

Trans Mountain committed to implementing ECCC's recommendations related to **avoidance of habitat and/or sensitive periods of use by migratory birds** through micro-routing, **timing windows**, and protective buffers.²³ (emphasis added)

[70] Although Trans Mountain's self-described "first priority" is to avoid construction in the nesting season, Mr. Preston noted "there is little indication of specific efforts to avoid the nesting period."²⁴ In his review of Trans Mountain's mitigation measures to reduce risk to migratory birds, Mr. Preston identified as gaps that a "Demonstration of avoidance is not apparent", and there was "No consideration of nest density as a risk factor."²⁵

[71] Both of these weaknesses contribute to the Tribunal's agreement with Game Officer Mirembe, that future contraventions of the MBR were likely when the inspection took place on April 12, 2021, when tree clearing was taking place during the height of the migratory bird nesting season, numerous migratory bird species were identified on the Site²⁶, and Anna's Hummingbird nests had been found,²⁷ as well as a destroyed nest and egg.

Officer Mirembe properly exercised his discretion

[72] In its submissions and during the cross-examinations, it appears that Trans Mountain suggests that the Game Officer may have been influenced by external factors in the exercise of his discretion.

[73] The Tribunal finds that there is no evidence of this expressed or implied allegation. First, Game Officer Mirembe made it clear that inspections that may lead to prosecutions, compliance orders or other actions are often complaints-based. Hence, public complaints are not unusual. Second, the Game Officer made it clear in cross-examination that he

²³ Britt Affidavit, p. 4-5.

²⁴ Report at p.3, being Exhibit A to Affidavit of Michael Preston, sworn 2021 06 14 (Preston Affidavit).

²⁵ Preston Review at Table 3, Exhibit A to Preston Affidavit

²⁶ Fort Affidavit, Exhibit A (Site Visit Report by Chloe Boynton).

²⁷ Mirembe Affidavit and Fort Affidavit.

was not influenced by any factor and operated independently in the exercise of his discretion. His evidence is as follows:

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22 MR. GILMOUR: And so, Mr. Mirembe, it
23 says -- in the second sentence, it says: (as read)
24 This could be relevant to stop work.
25 Do you see that?
26 A MR. MIREMBE: I do.

4 A You know, that's a good question, Mr. Gilmour.
5 However, a lot of people have their preconceived -- I
6 don't know what the motivation is behind. It could be
7 legitimate or not. Ultimately --

8 Q Okay.

9 A -- the decision I make is not influenced by anybody but
10 myself, presented with a set of facts that are
11 presented to me.

12 If you look at the history of these emails, I
13 followed up with my own phone calls. I did my own
14 interviews prior to me going out to do an inspection.
15 It took me awhile to make a decision on whether or not
16 an inspection was warranted.

17 Again, coming back to these emails and what the
18 preconceived notion is or what other people had in
19 mind, it really does not -- to me, it did not influence
20 my decision. In fact, I didn't even know about this
21 email, but at the end of the day, it really -- it comes
22 down to the set of facts presented to me, my initial
23 follow-up inspection -- phone calls, which is a
24 pre-inspection check -- I do my pre-inspection
25 checklist with the complainant. We don't just jump and
26 go at every call that comes our way. Otherwise

1 we'll -- it's a never-ending game. None of this
2 influenced my decision. Anything that came my way I
3 made sure I did my own fact-finding, and I based my
4 reasonable grounds for an inspection based on the
5 information I gathered at the time.

6 Q Fair enough, Mr. Mirembe. But you also take advice
7 from the Canadian Wildlife Service in terms of what --
8 whether or not there are migratory birds, and you
9 specifically asked Ms. Boynton for her recommendations.

10 So you do take advice from the Canadian Wildlife
11 Service because they're experts, correct?

12 A Absolutely. Now --

13 Q Okay.

14 A -- but CWS is part of my inspection record. It's not
15 the total decision-maker. We've got a layer of
16 internal decision-making process that we follow. CWS
17 is part of that internal decision-making process. They
18 are not the only ones that make a decision, including
19 our legal services unit, including our regional
20 management team.

21 So once a decision has been made, it goes through

22 a layer of internal decision before an action is
23 actually taken. So, yes, CWS does advise us.
24 Sometimes we take their advice. Sometimes we don't.
25 Ultimately, the decision is ours as wildlife
26 enforcement.²⁸

Summary of Findings on Issues No. 2

[74] The Tribunal finds that, during the course of the inspection, there were reasonable grounds to believe that Trans Mountain was likely to contravene the MBCA or the regulations. The Tribunal therefore finds that the Compliance Order was properly issued.

Issue No. 3: whether Measures 1, 2 and 3 of the Compliance Order were reasonable at the time of issue, and whether they are still reasonable.

[75] There are three measures set out in the Compliance Order at issue in this case. ECCC submits that all three should be maintained until the Compliance Order's expiration on August 20, 2021. Trans Mountain submits the measures were unreasonable at the time they were imposed and, alternatively, even if they were reasonable in April 2021, they are no longer reasonable under current circumstances. Below, we will review each measure separately, analyzing the evidence to determine whether the measure is reasonable.

Measure #1: "As of April 12, 2021, immediately refrain from disturbing, destroying, or taking a nest or an egg of a migratory bird in contravention of paragraph 6(a) of the *Migratory Birds Regulations* at the Trans Mountain Pipeline ULC's site known as Construction Work Package 98 or CWP-98..."

[76] Given the Game Officer's mandate to enforce federal wildlife legislation that protects migratory birds and because s. 6(a) of the MBR prohibits any disturbance or destruction of a migratory bird's nest and/or egg, an order to refrain from violating the MBCA and MBR is, *prima facie*, reasonable. This, however, does not end our analysis.

[77] Trans Mountain is subject not only to environmental protections such as those found in the MBCA, but must also abide by conditions set out in its Pipeline Environmental Protection Plan ("Pipeline EPP") which addresses requirements applicable to pipeline construction activities under the Certificate of Public Convenience and Necessity OC-065, issued by the CER. Trans Mountain received approval to proceed with its pipeline construction project after extensive consultation with Indigenous groups, members of the public, and federal, provincial, and municipal authorities. Relating specifically to migratory birds, the Pipeline EPP sets expectations for pre-construction (section 6) and general pipeline construction mitigation measures (section 7), which includes the direction that "where feasible, (Trans Mountain shall) initiate or complete clearing activities outside of

²⁸ Transcript of cross-examination of Justus Mirembe, July 5, 2021.

the migratory bird nesting period to reduce the risk of encountering migratory birds nesting”.²⁹

[78] Other items listed under the Pipeline EPP section 7 relate to clearing vegetation, conducting non-intrusive area searches for evidence of nesting, and employing site-specific mitigation measures if a nest is found. A Reconsideration Report resulted in amendment of some Order In Council (OIC) conditions, which included implementing ECCC’s recommendation that Trans Mountain apply timing windows and buffers to reduce adverse effects on migratory birds.³⁰ According to Trans Mountain, its environmental commitments and conditions for the Project include 60 environmental conditions within the inspection order issued by the CER, 37 conditions from the British Columbia Environmental Assessment Office, 57 conditions from the Vancouver Fraser Port Authority, over 10,000 pages of environmental specifications, and 30,000+ person days of resource specialist mitigation.³¹ The Trans Mountain Environmental Field Guide – Nesting Bird Risk Assessment, April 1, 2021 and McTavish Nest Sweep Protocol also detail specific mitigation measures associated with migratory birds potentially impacted by the Project.

[79] Regarding the Site, evidence provided by Trans Mountain demonstrates it completed a risk assessment relating to migratory birds in the area, including consideration of nesting time periods and nest density, and utilized individuals trained to recognize breeding bird behaviour and habitat. Nest sweeps were adopted as a primary tool to minimize disturbance of nesting birds. According to two consultants retained to review Trans Mountain’s mitigation plans and survey protocols, Trans Mountain’s mitigation practices exceed industry standards because it uses relatively long nesting periods as a trigger for nest sweeps and undertakes nest sweeps regardless of species or habitat type.³² The Affidavit of Matthew McTavish appends an opinion which, at para. 3.5, states that “Trans Mountain’s policies and procedures as they relate to works within the migratory bird nesting window meet or exceed industry best management practice and guidance provided to industry.”³³ During cross-examination on his own Affidavit, ECCC biologist Kevin Fort agreed that Trans Mountain’s survey protocols specific to the CWP-98 site were consistent with industry standards.

[80] Expert witnesses for both Trans Mountain and ECCC agreed that ceasing clearing and construction work altogether at the Site during the migratory bird nesting window would be the only way to eliminate the risk of incidental take. Trans Mountain submitted that this would result in “perfect compliance” with the MBCA, which is not required by the MBCA or the OIC. Instead, they submitted that the standard of reasonableness applies,

²⁹ Britt Affidavit, Exhibit A at pp. 8-9

³⁰ Britt Affidavit, para 26.

³¹ Britt Affidavit, para. 25.

³² Preston Affidavit, Exhibit A.

³³ Affidavit of Matthew McTavish, sworn June 15, 2021, (McTavish Affidavit) 3.5.

which involves undertaking a case-specific, factual analysis leading to consideration of best practices and harm reduction. The exercise of discretion involves considering and balancing these factors.

[81] Discretion is a necessary tool and approach utilized by enforcement officers and implicitly manifest in the Pipeline EPP mitigation protocol. Compliance orders and EPTC reviews are tied to the facts of each case, with discretion being exercised at both the issuance and review stages, however the information available at each stage is not identical or equivalent. In this case, the information available upon EPTC review is more comprehensive, contextual, and multi-faceted than that considered by Game Officer Mirembe. This is the natural result of the way the complaint-investigation-compliance order-review process unfolds.

[82] As noted in ECCC's written submissions, Compliance Order Measure #1 constitutes immediate enforcement of s. 6(a) of the MBR, and Trans Mountain agrees it is required to abide by the statutory provisions. Considering the exigent circumstances, and application of s. 6(a), Measure #1 was reasonable at the time it was made. It is also a pre-requisite for Measure #2.

[83] Counsel for ECCC emphasized during her submissions that a compliance order is a preventative measure under s. 11.21 of the MBCA and is not a prosecution under s.13 of that Act. For this reason, the legal defence of due diligence does not apply. That said, evidence of Trans Mountain's compliance with OIC and Pipeline EPP conditions, and its reliance on expert advice, demonstrates it was acting in compliance with industry standards and mitigating damage to migratory birds and their habitat where feasible. Moving to the EPTC's review, it is important to recognize it is not an exercise in fault-finding. It is not necessary to find Trans Mountain intentionally contravened the law, and there is no evidence that Trans Mountain failed to follow its permit conditions. The evidence establishes that Game Officer Mirembe exercised his discretion to issue a compliance order during his investigation, based on his knowledge of the facts as described above and fortified by scientific advice. As a result, Measure #1 imposed by the Compliance Order was reasonable on April 12, 2021 regardless of how diligently Trans Mountain tried to avoid the circumstance giving rise to the order.

[84] Further, continuation of Measure 1 is also reasonable because, as submitted by ECCC, the measure is effectively a statement that Trans Mountain remains subject to the MBCA and its regulations. In its submission, Trans Mountain concedes that leaving Measure #1 in place would have little to no practical effect on its operations on the site because it remains obligated to comply with the statutory regime in any event.

[85] The Tribunal finds there is public interest and legal value in retaining this aspect of the Compliance Order. As a result, the Tribunal confirms Measure #1 of the Compliance Order.

Measure #2: “As of April 12, 2021, immediately stop or shut down any activity, including tree trimming and tree felling that may require the use of heavy machinery, bulldozers, chainsaws, machetes, etc that are likely to result in nest disturbance and destruction of a Migratory Bird during nesting window described by the CWS biologist as Mid March to Mid August.”

[86] Having found that Measure #1 is reasonable, our focus shifts to examining the reasonableness of this “stop-work” order. While Measure #2 does not specifically state that all activity must cease on the Site, the order had that practical effect because it was implemented during the clearing phase of the Project, which meant that no other trees could be trimmed or felled. ECCC acknowledged that Trans Mountain could not have undertaken alternative work on the site during the term of the order. Therefore, examination of the reasonableness of Measure #2 revolves around the duration of a complete stop work order.

[87] In this regard, the Tribunal finds the affidavit and oral evidence of ECCC biologist Kevin Fort helpful. Mr. Fort deposed that Anna’s Hummingbirds breed earlier than other hummingbird species in British Columbia and generally raise two broods each nesting season. Fort provided nesting period charts and data which indicates that peak nesting for all migratory birds in British Columbia’s lower mainland occurs between early March and the end of June, depending on the species, but also that nesting can continue through July and into early August. According to a nesting calendar for the Zone A 1 region including site CWP-98³⁴, peak nesting activity is over by the end of the third week of July, with lower-intensity periods thereafter. From May 20 to July 20, 60-100% of the species are expected to be breeding within the zone at that time. By the end of July, nesting activity is estimated to be between 80-89% less than during the peak intensity period. Between August 5 and 10, nesting activity is reduced between 95-100%, effectively ending the breeding season. Therefore, the passage of time since the inception of the Compliance Order has resulted in the most significant mitigation of risk to the migratory birds in CWP-98.

[88] ECCC’s submission is that the stop work order should continue until the end of the nesting season (mid-August) because resuming activity would likely result in a disturbance or destruction of a migratory bird nest or egg. The difficulty with this approach is that it appears to take no account of mitigation measures or that nesting activity is dynamic and bell-curved from the beginning of the predicted season to the end.

[89] That most of the nesting activity on the Site will be complete by the date of this decision means risk of harm to migratory bird nests and eggs will be significantly reduced.

[90] In addition to the mitigation measures that Trans Mountain is obligated to implement through its Project permit (outlined in para 26 of the Britt Affidavit), Trans Mountain has proposed additional mitigation measures since the Compliance Order was

³⁴ Fort Affidavit, Exhibit I, Zone A1-Forest, Government of Canada Nesting Periods and Calendar.

issued, to reduce the risk to migratory birds. These additional measures are enumerated at para. 26 of Mr. Britt's affidavit, including:

- (a) daily nest sweeps at Site during the migratory bird nesting window, with a work plan set on a daily basis based upon information provided by a wildlife Resource Specialist;
- (b) nest sweeps will be completed by a wildlife Resource Specialist the morning of any vegetation removal to mitigate the risk of incidental take;
- (c) results of nest sweeps will be documented and communicated to clearing and site supervision crews before commencement of clearing each day;
- (d) if warranted by the results of a nest sweep, a wildlife Resource Specialist will remain onsite during clearing to ensure vegetation removal occurs without impacts to nests;
- (e) during clearing, if work is permitted to proceed within a restricted buffer as per the guidance from a wildlife Resource Specialist, the wildlife Resource Specialist will monitor activity within the buffer to ensure birds do not exhibit disturbance behaviour. If disturbance behaviour is identified, work will not proceed in the relevant zone;
- (f) increased security measures to address interference by third parties with Trans Mountain's operations and mitigation measures;
- (g) an Environmental Protection Rule and associated updates will be added to training and the employee environment handbook;
- (h) enhanced training and communication to contractors and subcontractors about working around nesting birds will be completed prior to work recommencing at Site; and
- (i) to mitigate impacts to the environment from disturbance by members of the public, Trans Mountain will:
 - i. complete a baseline assessment of site conditions at the Site to inventory areas that have been disturbed as a result of public interference at Site to mitigate environmental impacts and ensure safety of Project personnel;
 - ii. complete daily validation within the migratory bird window that mitigation measures (e.g., buffers) have not been tampered with or moved.

[91] The Tribunal therefore finds that at the time this decision is issued the risk, while it remains, to hummingbirds and other migratory bird species in the area, falls short of serious or a "high likelihood" as ECCC defines the term. Instead, we find the risk is lower, mitigated by the passage of time in combination with the mitigation measures Trans

Mountain is required to implement and the additional measures it has undertaken to implement.

[92] Further, as risk to migratory birds diminishes, countervailing considerations warrant greater weight in the consideration of what measures are “reasonable in the circumstances”. In addition to analyzing the risk to migratory bird species, the Tribunal has considered additional circumstances in coming to the conclusion that the duration of the Compliance Order should be shortened in the current circumstances, and the balance now tips in favour of allowing Trans Mountain to carry on with its construction activity in the area as of the date of this decision.

[93] First, the scale of the extensive consultation and CER regulatory process which resulted in approval of the Project, along with its environmental impact mitigation measures, is an important consideration. That it resulted in approval deemed to be in the public interest³⁵ warrants respect.

[94] Second, consistency and predictability have a role in environmental regulatory compliance. While an environmental compliance order is a preventative tool, rather than an enforcement measure, some guidance can be taken from ECCC’s “Compliance and Enforcement Policy for Wildlife Legislation” (Compliance Policy),³⁶ which provides guidance to Game Officers in the exercise of their discretion when they are involved in compliance and enforcement activities. The basic principle embodied in that policy is that “Compliance and enforcement activities must be securely founded in law and must be fair, predictable, and consistent across Canada.”³⁷ .

[95] By referring to the general principles in the Compliance Policy, it is of note that the Anna’s Hummingbird is not a species at risk, and the degree of harm to Canadian ecosystems at this highly disturbed Site would not have population level impacts, given that Anna’s Hummingbird populations regionally, including the US and their range, is in the millions.³⁸

[96] Similarly, Trans Mountain tendered evidence indicating that numerous activities in the Canadian economy have much larger “incidental take” of migratory birds than pipeline construction, including forestry and agriculture, many of which undertake no migratory bird impact mitigation measures. It is uncontested that the stop work order against Trans Mountain due to incidental take has an extremely significant impact³⁹. Hence, it is necessary for ECCC to consider the principle of consistency of application of the law in the exercise of its discretion.

³⁵ Britt Affidavit, para. 12.

³⁶ Government of Canada, “Compliance and Enforcement Policy for Wildlife Legislation” (Compliance Policy), available online, Trans Mountain Book of Authorities Tab 2.

³⁷ Compliance Policy, Chapter 2.

³⁸ Cross-examination of Kevin Fort, July 5, 2021, p. 289.

³⁹ Darr Affidavit, para. 29.

[97] Third, after the Compliance Order was issued, Trans Mountain retained Stantec consulting to conduct a review and subsequently proposed additional mitigation measures.⁴⁰ Trans Mountain's willingness to enhance its mitigation protocols after issuance of the order demonstrates corporate accountability and has increased the protections for migratory birds.

Summary of Tribunal's Findings on Measure # 2

[98] Based on the above considerations, which are case-specific and not to be construed as general principles, the Tribunal concludes that the duration of Measure #2 is no longer reasonable in the circumstances, especially in light of the mitigation measures to be continued by Trans Mountain. As a result, the Tribunal amends the Compliance Order by modifying the duration of Measure #2, to end as of the date of this decision.

Measure #3: "As of April 23, 2021, erect and maintain clearly visible signage demonstrating to the public, employees or contractors accessing the Construction Work Package 98 or CWP-98 site that there is no activity permitted on this site during the nesting window that would disturb or destroy a nest of a Migratory Bird."

[99] Coincident with the stop-work measure, erection and maintenance of signage was a reasonable measure. The evidence demonstrates that there was significant activity from other individuals on the Site during the nesting window that could have disturbed or destroyed migratory birds or their habitat. In addition to Trans Mountain personnel and equipment throughout the Site, individuals opposed to the Project have demonstrated their views by entering the Site on foot, building and inhabiting treehouses, marking trees, leaving debris, and erecting their own signs, among other things. These activities, while different from those undertaken by Trans Mountain, also have the potential to disturb or destroy a nest of a migratory bird. Measure #3 was therefore reasonable at the time the Compliance Order was issued. However, with the stop work order now lifted pursuant to this decision, Measure #3 regarding signage that "no activity is permitted" is no longer required, and we amend the Compliance Order by modifying the duration of Measure #3, to end as of the date of this decision.

Whether amending the compliance measures will cause serious harm under s. 265 of CEPA

[100] While Section 263 of CEPA provides the EPTC with jurisdiction to confirm, cancel, modify, or extend a compliance order, s. 265 restricts the panel from exercising its powers if doing so would result in "injury or damage or serious risk of injury or damage to any property or to any plant or animal life" (265(b)), among other things. The phrase "serious risk" is not defined in the statute, nor has it been judicially considered by a court or by

⁴⁰ Britt Affidavit, para. 28.

EPTC to date, however within the circumstances of this case, it is apparent that “serious risk of injury to any animal life” could include destruction of a migratory bird nest and egg. Therefore, the panel is required to assess the risk or likelihood that damage could occur because of any order it makes pursuant s. 263.

[101] Section 11.21(1) of MBCA informs the panel’s review of such risk and requires the EPTC to apply a standard of reasonableness in the exercise of its discretion in the same way as it governs a game officer’s decision to issue measures in a compliance order.

[102] In this case, the Tribunal notes that shortening the length of Measures #2 and #3 to July 27, 2021 from August 20, 2021 does not relieve Trans Mountain of its obligation to comply with all Pipeline EPP, OIC conditions and environmental protections such as the MBCA. Trans Mountain, as it recognizes, must continue to comply with mitigation protocols still effective on the Site, which includes continual monitoring and risk assessment. In addition, the Tribunal requires Trans Mountain to implement the additional mitigation measures outlined in its June 2021 Revised Environmental Field Guide, Exhibit D to Mr. Britt’s affidavit. The actual conditions of Site CWP-98, such as its proximity to an urban environment, busy highway, and rail line, do not reduce Trans Mountain’s obligation to comply with the environmental protocols or statutes which govern its activities thereon. Further, Trans Mountain’s continuing compliance with its existing obligations provides security for EPTC’s conclusion that modifying the compliance measures in the order would not result in “serious risk of harm” as contemplated by s. 265 of CEPA.

Summary of Tribunal’s Findings on Measure # 3

[103] Given the mitigation measures that Trans Mountain is required to implement under other approvals and processes, including the additional measures outlined in the Revised Environmental Field Guide – Nesting Bird Risk Assessment, dated June 2021,⁴¹ combined with the reduced number of migratory birds likely to be nesting at the Site from July 27 to August 20, 2021, the Tribunal finds that its amendment of the Compliance Order by modifying the duration of Measures 2 and 3 to end as of the date of this decision will not result in a serious risk of harm as contemplated in s. 265 of CEPA.

Issue No. 4: Whether the Compliance Order should be cancelled as it applies to the named individuals

[104] In its requested relief to the Tribunal, Trans Mountain requests that the Compliance Order be amended to remove the three named individuals, leaving only Trans Mountain.

[105] ECCC argues that the individuals were properly named under s. 11.21(2)(a) of the MBCA, which provides that a compliance order may be issued to any person who

⁴¹ Exhibit D to Britt Affidavit

(a) owns or has the charge, management or control of theproperty on which the substance is located **(b)** causes or contributes to the alleged contravention; or **(c)** is likely to cause or contribute to the alleged contravention.

[106] Officer Mirembe testified the three individuals he named in the Compliance Order were on Site, identified themselves as working for Trans Mountain and confirmed they had control of the property when he asked them this question during the inspection⁴².

[107] Trans Mountain argues that the named individuals are Trans Mountain contractors and not directors or officers of the company, and did not have charge, management or control of the Site.⁴³ It did not make any specific arguments about the interpretation of s.11.21(2) of the MBCA.

Jurisdiction to remove a named individual

[108] ECCC argues that the Tribunal does not have jurisdiction to remove individuals who are properly named in an environmental compliance order. It argues that the Tribunal's power under s. 263(b) of CEPA involves amending or suspending "a term or condition of the order", and that the persons subject to the order are not a term or condition.

[109] Trans Mountain argues that a removal of the named individuals is in fact an amendment of the Compliance Order, which the Tribunal has jurisdiction to do under CEPA s. 263(b). It also argues that the Game Officer could have just as easily issued a separate compliance order for each of the recipients, in which case the Tribunal could have simply cancelled the orders directed toward the individuals as it clearly has the power to do under CEPA s. 263(a).

Analysis and Findings on Issue No. 4

[110] The Tribunal finds that s. 11.21(2) of the MBCA is clear and does not require an individual to be a director or officer of the company to be properly named. It is sufficient that the individual has the "charge, management or control" of the property or are causing or contributing to the alleged contravention. The Tribunal finds that it was reasonable for Officer Mirembe to include the three individuals in the Compliance Order. The Tribunal notes, for example, that the Field Guide which outlines nesting bird mitigation measures to be implemented on the work site "applies to Contractors"⁴⁴ and thus concludes that the individuals could be a person causing or contributing to the alleged contravention, in accordance with s. 11.21(2).

⁴² Transcript of Mirembe Cross examination, July 5, 2021, p.272.

⁴³ Britt Affidavit para. 53.

⁴⁴ Britt Affidavit, Exhibit D, section 2.0 "Scope".

[111] The Tribunal finds that it has the power to cancel an environmental compliance order under s. 263(a), and this power extends to cancelling a compliance order as it applies to any particular named individual. The Tribunal would clearly have the jurisdiction to cancel the Compliance Order as against an individual who had been improperly named. The Compliance Order in this case is in fact an amalgam of four compliance orders, addressing four separate recipients as it does, with all of the same compliance measures.

[112] No evidence was adduced to suggest that the removal of the three named individuals would increase any risk of harm to the environment or plant or animal life. The three named individuals are consultants, paid by Trans Mountain to assist with this Project. As confirmed by ECCC witness Mr. Fort, Trans Mountain has been cooperative with ECCC and is taking full responsibility for complying with the Compliance Order.

[113] Similarly, it was not suggested that the inclusion of these three individuals on the Compliance Order would result in any increased protection to the environment, plant or animal life. The evidence before the Tribunal is that the three named individuals, as consultants, have no power to cause Trans Mountain to either comply with the Compliance Order or not to comply; they have no power to stop Trans Mountain work on the site as ordered in the Compliance Order, or to restart that work⁴⁵.

[114] On the other hand, it was argued that the three named individuals are put at personal legal jeopardy despite having no control over whether Trans Mountain complies with the Compliance Order. MBCA s. 13(1)(a) provides that a failure to comply with a Compliance Order may result in a prosecution. Thus, by remaining on the Compliance Order, the three individuals are at legal risk of personal prosecution should ECCC consider the compliance measures to have been insufficiently complied with. The Tribunal therefore finds that it is reasonable in the circumstances to cancel the Compliance Order as it applies to the three named individuals.

[115] As noted above, the Tribunal's power to cancel or amend a compliance order is constrained by s. 265 of CEPA, where to do so would cause serious risk of injury to plant or animal life. In this case, based on the finding that there would be no increased risk to the environment if the named individuals were removed from the Compliance Order, the Tribunal finds that s. 265 is not engaged.

Conclusion and Order

[116] For all of the reasons listed above, the Tribunal finds that Compliance Order No. 9530-2021-03-25-6490 was properly issued, but amends a term of the Compliance Order under s. 263(b) of CEPA by reducing the duration of Measures 2 and 3 such that they

⁴⁵ Britt Affidavit.

end as of the date of this decision. The Tribunal also cancels the Compliance Order as it applies to the three named individuals.

Review Granted

Compliance Order Amended

“Heather Gibbs”

HEATHER GIBBS
CHIEF REVIEW OFFICER

“Leslie Belloc-Pinder”

LESLIE BELLOC-PINDER
REVIEW OFFICER

“Paul Muldoon”

PAUL MULDOON
REVIEW OFFICER

Relevant Legislation

Migratory Birds Regulations (C.R.C., c.1035)

6 Subject to subsection 5(9), no person shall

(a) disturb, destroy or take a nest, egg, nest shelter, eider duck shelter or duck box of a migratory bird, or

(b) have in his possession a live migratory bird, or a carcass, skin, nest or egg of a migratory bird

except under authority of a permit therefor.

Migratory Birds Convention Act, 1994 (S.C. 1994, c. 22)

4 The purpose of this Act is to implement the Convention by protecting and conserving migratory birds — as populations and individual birds — and their nests.

Compliance order

11.21 (1) Whenever, during the course of an inspection or a search, a game officer has reasonable grounds to believe that any provision of this Act or the regulations has been contravened by a person that is continuing the commission of the offence, or that any of those provisions are likely to be contravened, the game officer may issue a compliance order directing any person described in subsection (2) to take any of the measures referred to in subsection (3) that are reasonable in the circumstances and consistent with the protection and conservation of migratory birds and their nests and with public safety in order to cease or refrain from committing the alleged contravention.

(2) Subsection (1) applies to any person who

(a) owns or has the charge, management or control of the substance to which the alleged contravention relates or the property on which the substance is located;

(b) causes or contributes to the alleged contravention; or

(c) is likely to cause or contribute to the alleged contravention.

(3) The order may specify that the person to whom the order is directed take one or more of the following measures:

(a) refrain from doing anything in contravention of this Act or the regulations, or do anything to comply with this Act or the regulations;

(b) stop or shut down any activity, work, undertaking or thing for a specified period;

(c) cease the operation of any activity or any part of a work, undertaking or thing until the game officer is satisfied that the activity, work, undertaking or thing will be operated in accordance with this Act and the regulations;

(d) move any conveyance to another location including, in the case of a vessel, moving the vessel into port or, in the case of an aircraft, landing the aircraft;

(e) unload or reload the contents of any conveyance; and

(f) take any other measure that the game officer considers necessary to facilitate compliance with the order or to protect or restore migratory birds or their nests, including

(i) maintaining records on any relevant matter,

(ii) reporting periodically to the game officer, and

(iii) submitting to the game officer any information, proposal or plan specified by the game officer that sets out any action to be taken by the person with respect to the subject matter of the order.

11.24 (1) A person to whom an order is directed shall, immediately on receipt of the order or a copy of it, or on being directed by a game officer in an order given orally under subsection 11.22(1), comply with the order.

11.27 (1) Any person to whom an order is directed may, by notice in writing given to the Chief Review Officer within 30 days after the day on which the person receives a copy of the written order or after the oral order is given, make a request to the Chief Review Officer for a review of the order.

Review

11.3 Sections 257 to 271 of the *Canadian Environmental Protection Act, 1999* apply, with any modifications that the circumstances require, to a review requested of any order.

Offence — persons

13 (1) Every person commits an offence who

- (a) contravenes section 5, subsection 5.1(1) or (2), paragraph 5.2(a), (c) or (d), subsection 5.3(1), 8.1(6), or 11.24(1);
- (b) knowingly contravenes paragraph 5.2(b);
- (c) contravenes any provision of the regulations designated by regulations made under paragraph 12(1)(l);
- (d) contravenes an order made under subsection 8.1(1) or (2); or
- (e) contravenes an order made by a court under this Act.

(2) Every individual who commits an offence under subsection (1) is liable,

(a) on conviction on indictment,

(i) for a first offence, to a fine of not less than \$15,000 and not more than \$1,000,000 or to imprisonment for a term of not more than three years, or to both, and

(ii) for a second or subsequent offence, to a fine of not less than \$30,000 and not more than \$2,000,000 or to imprisonment for a term of not more than three years, or to both; or

(b) on summary conviction,

(i) for a first offence, to a fine of not less than \$5,000 and not more than \$300,000 or to imprisonment for a term of not more than six months, or to both, and

(ii) for a second or subsequent offence, to a fine of not less than \$10,000 and not more than \$600,000 or to imprisonment for a term of not more than six months, or to both.

(3) Every person, other than an individual or a corporation referred to in subsection (4), that commits an offence under subsection (1) is liable,

....

Canadian Environmental Protection Act, 1999 (S.C. 1999, c.33)

Powers of review officer

263 The review officer, after reviewing the order and after giving all persons who are subject to the order, and the Minister, reasonable notice orally or in writing of a hearing and allowing a reasonable opportunity in the circumstances for those persons and the Minister to make oral representations, may

- (a) confirm or cancel the order;

(b) amend or suspend a term or condition of the order, or add a term or condition to, or delete a term or condition from, the order; or

(c) extend the duration of the order for a period of not more than 180 days less the number of days that have passed since the day on which the order was received by the person who is subject to the order, not counting the days during which the order was suspended under subsection 258(3).

Limitations on exercise of review officer's powers

265 A review officer shall not exercise any of the powers referred to in section 263 if doing so would result in

(a) impairment or serious risk of impairment of the quality of the environment for any use that can be made of it;

(b) injury or damage or serious risk of injury or damage to any property or to any plant or animal life; or

(c) danger to the health or safety of any person.

Decision

266 The review officer or the panel, as the case may be, shall, within 15 days after the completion of the review of an order, render a decision, with written reasons, and provide all persons to whom the order was directed and the Minister with a copy of the decision and the reasons.